A Tribute to E.P. Thompson, Chronicler of the Dispossessed

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The death of E.P. Thompson last year has provided an occasion for scholars from many corners of the intellectual universe to reflect on his work. Thompson's voluminous body of work includes major books in such diverse fields as eighteenth- and nineteenth-century English labor history,\(^1\) criminal law in the early eighteenth century,\(^2\) the life and work of the poet William Blake,\(^3\) the life and work of the architect and utopian radical reformer, William Morris,\(^4\) and the twentieth-century anti-nuclear movement.\(^5\) Thus it is only fitting that scholars of labor, literature, art history, and politics should pay tribute to his extraordinary contribution. It is also fitting, although somewhat less obvious, for legal scholars to reflect on Thompson's contribution to legal history and legal theory.

E.P. Thompson was not a legal historian of a conventional sort. While much of his historical writings are about law, he rarely discussed the origin or meaning of particular legal rules as such. Rather, he portrayed particular legal rules as the context against which individual actions are taken and historical events occur. Thompson's historical writings give us a richly textured picture of what law meant in everyday life in eighteenth century England. He showed how law both constrained actions and at the same time became one of the main battlefields on which social conflict was enacted. His writings thus provide a wealth of historical and anthropological data from which we can draw insights about the role of law in society more generally.

In 1976, Thompson was asked to identify the common threads that ran through his work, to explain what connected his interest in William Morris, the Black Act of 1723, *The Making of the English Working Class*, William Blake, and the anti-nuclear movement. He responded that all of his work attempts to understand value systems—the role values play in individual actions and in history, the origins and content of those values, and what happens when competing value systems come into conflict. He said that he writes about "moral ideology," about "the invisible rules that govern

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behavior quite as powerfully as military force, the terror of the gallows, or economic domination." He went on to say that he is "examining the dialectic of interaction, the dialectic between 'economics' and 'values'. This preoccupation has run through all my work, historical and political." Because in the common law tradition, values are revealed in the law, and because the law is itself an arena in which expositors of differing values contend, much of Thompson's work is concerned with the law.

At the end of Whigs and Hunters, Thompson wrote that he sees himself as trying to carve out a middle ground between two schools of thought. "[T]he old middle ground of historiography is crumbling on both sides. I stand on a very narrow ledge, watching the tides come up." On one side of the ledge is the Whig view that history is a March of Progress and, consequently, law is a March of Rationality. On the other side is the mechanistic Marxist view that treats law as superstructure, as merely reflective of the interests of the ruling class and always oppressive of the poor and working classes. Thompson said he wanted to demonstrate that law plays a greater role in history than the Marxist view would allow. He wanted to locate the law as a place where values are expressed and as a terrain where differing values contend. To be sure, he saw law as often oppressing the socially weak, but he also saw the law as embodying our greatest aspirations for justice, and therefore serving an inspirational and emancipatory role in history. Law is something more than simply a weapon used by the rulers against the ruled; it is also the context in which everyday life occurs and the terrain on which the lower classes attempt to articulate and implement their values, their vision of the good.

This is the narrow ledge that Thompson aspired to occupy. Here I want to explore the questions: What does this ledge look like? Does Thompson succeed in maintaining his perch, or does he slide off? I examine three essays of Thompson's, each of which deals with an aspect of the same historical experience—the experience of commoners in the eighteenth century who were losing their customary forms of livelihood as the fields and forests were being enclosed and their use-rights were being extinguished. Perhaps no historian has documented more vividly than Thompson the history of English enclosures and their impact on the lower classes. So to these essays I turn.

In his essay, "The Crime of Anonymity"—an essay that is not explicitly about law—Thompson described how certain social groups resisted repressive laws in the eighteenth century, and how their discontent found expres-

7. Id.
8. WHIGS AND HUNTERS, supra note 2, at 260.
9. Id. at 264-65.
sion despite laws designed to silence it.\textsuperscript{10} In the essay, Thompson reported on his examination of approximately three hundred letters, written in the eighteenth century, that contained anonymous threats against members of the upper classes and against public officials. These were threats that the recipient would be killed, or his home and family burned, if he did not comply with a stated demand. Some of the letters were polite in tone, and even poetic in their language, yet their threats were fierce. For example:

This, with my Service to you, and I desire you’l, of all Love, lay me 30 pounds at the Bottom of the Post next to Henry Hudsons . . . a Friday night by Eight of the Clock, or if you do not, I’ll burn your House to Ashes God dam your Blood; and God dam you Sir, if you watch, or declare this Secret to any Body dam my Blood if Death shall not be your Portion.\textsuperscript{11}

Or, in a letter directed to a Master Shipwright:

Mr Allen:
Blackguard—for Gentlemen I cannot call you it have wrote to lett You know without You are beter to the Shipwrights and all the Yard in genurl You will be very soon Nock’t out of the Book of Life . . . You are like the rich Man wich refused to give Lazarus the Crums which fell from his tabel. . . .\textsuperscript{12}

Thompson found these letters in the \textit{London Gazette}, an official house organ of the monarchy, the eighteenth-century equivalent of the \textit{Federal Register}. The anonymous letters were published in the \textit{Gazette} by the recipients of the threats because publication was a technical requirement if the recipient wanted to obtain the Crown’s assistance in ferreting out the author’s identity. Under the procedural requisites of the day, publication of the letter was accompanied with a notice that any person producing evidence of the letter’s author would receive an official pardon from the Secretary of State as well as a monetary reward.

Thompson separated the letters into two types—those involving simple blackmail and those involving some expression of a social grievance. Focusing on the social grievance letters, Thompson found that approximately a third involved complaints about the price of bread or food, or monopolization practices of food distributors. Many of these letters also complained about low agricultural wages. Another large number concerned industrial protests over industrial wages or the use of machines. Others complained

\begin{itemize}
\item \textsuperscript{10} E. P. Thompson, \textit{The Crime of Anonymity}, in \textit{Albion’s Fatal Tree} 255 (Douglas Hay et al. eds., 1976).
\item \textsuperscript{11} \textit{Id.} at 264.
\item \textsuperscript{12} \textit{Id.} at 274.
\end{itemize}
of the poor laws, enclosures, or matters of local politics. Thompson exam-
ined three types of letters in detail—industrial protests, complaints related
to food riots, and agrarian complaints about enclosures. With the help of
other historical sources, Thompson developed a picture of who the letter
writers were and to whom the letters were directed. Some were directed
toward particular targets like employers or public officials. Others were
intended to be read widely, like handbills. Indeed, he reported that food
riots and industrial disturbances were routinely accompanied by the post-
ing of an anonymous letter of grievances.\(^{13}\)

Thompson thus depicts anonymous letter-writing as a form of social
protest by workers, farmers, and the poor in the latter half of the eigh-
teenth century. He paints a picture in which the sentiments, goals, and
passions of protest are expressed in the participants’ own words. As
Thompson wrote, the letters are “the testimony of men driven to fury by
the humiliations of the poor law, low wages, the abuse of charities . . . the
only surviving articulate testaments of millions of the supposedly inartic-
ulate.”\(^{14}\)

Furthermore, Thompson found that the letters, although penned by
individuals, were not always—perhaps not even primarily—individual acts
of protest. The relationship between the posting of threatening letters and
the occurrence of food riots and industrial disturbances suggests that these
incidents were often a form of collective action—an incipient form of trade
unionism. Similarly, the letters often demanded such collective improve-
ments as public subsidies for corn in times of dearth, or a general levelling
of wealth. Thompson fortified the link between anonymous threatening
letters and collective action by noting that the practice of anonymous
letter-writing practically disappeared after 1830, at the time of the develop-
ment of the Radical and Chartist printing press.\(^{15}\)

Thompson did not merely excavate these buried shards of preindustrial
life. He also placed them in the context of the legal and economic lives of
the individuals involved. Thus Thompson tells us that to send anonymous
threatening letters was, in the eighteenth century, a serious crime. Certain
types of anonymous threats were capital offenses under the Black Act;
others were occasions for long sentences of transportation or hard labor.
Given the draconian sanctions, he asks, why were these letters written?

Thompson addressed this question with a detailed inquiry into who
wrote the letters and under what circumstances. He discovered that the
anonymous letters were the work of a newly impoverished peasant and
working class, commoners who had only recently lost their customary
livelihoods of grazing on common fields and were exercising common

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13. Id. at 272-79.
14. Id. at 275.
15. Id. at 282.
rights to gather fuel, wood, and game in the forest. The disappearance of their means for producing their own subsistence came at a time of decreasing wages in the industrializing sector and of rising market prices for food. At the same time, the harsh poor laws and settlement laws, and the ever-present terror of debtors' prison, made destitution a frightening prospect. Driven by fear, necessity, bad luck, and the law, the underclass of disenfranchised peasants and yet-to-be franchised workers penned anonymous threats as a form of collective action. Although such actions may seem a pitifully meek form of protest to us today, Thompson showed how anonymous letter-writing was one of the few forms of collective action available to the underclass at that time.

What do we learn from Thompson's archeological excavation into the words and minds of the eighteenth-century English underclass? Thompson concluded that the eighteenth century was not a time of social consensus and bonding across social classes as Whig historians portrayed it to be. Rather, it was a time of social conflict, inarticulately expressed but occasionally erupting into food riots, Ludditism, and other forms of social protest. Those early decades of industrialism were not an uninterrupted March of Progress—they were an era of contested shifts in social structure, shifts in which the law played a multifaceted and powerful role. The law tried to keep the poor, already disenfranchised by enclosures and the loss of customary rights, from speaking. Yet as powerful as the law was, Thompson showed that it did not prevent people from seeing their commonality in times of hardship, or from articulating a shared vision for improving their conditions.

In Whigs and Hunters, published in 1976, Thompson wrote about law more explicitly. He examined one law in great detail—the Black Act of 1723. In this study, as in “The Crime of Anonymity,” Thompson reconstructed the day-to-day life of commoners in late seventeenth- and early eighteenth-century England and described the effect that enclosures and the loss of customary rights had on them.

As Thompson tells us, the Black Act of 1723 was an extraordinary statute because by its passage, Parliament in one stroke completely revised the criminal law of England. The Black Act created more than fifty new capital offenses, made whole communities liable for monetary damages caused by any of the defined offenses, and nullified many customary procedural protections for the accused. This sweeping statute was passed unanimously, in four weeks in May, without any serious discussion or debate. As Thompson wrote, the passage of the Black Act, which corresponded with Walpole's ascendancy to power, "signalled the onset of the flood-tide of eighteenth century retributive justice."16

16. Whigs and Hunters, supra note 2, at 23.
Thompson asked, how could this comprehensive and brutal law have come into being? Was there some overwhelming emergency that made such harsh measures seem necessary? What occasioned this Act? How was it applied? In his words, "[w]hy was it so easy for the legislators of 1723 to write out this statute in blood?"\textsuperscript{17}

Thompson set out to answer these questions by a detailed investigation of forest life and culture of eighteenth-century England, focusing on two forests—Windsor and Sherwood. He described the ancient forest laws that restricted and regulated commoners' rights to cut timber, cut peats, hunt, and fish. In the seventeenth century, he relates, enforcement of those laws had become lax. However, the early years of the eighteenth century saw renewed enforcement of the forest laws, and, consequently, innumerable conflicts arose over such issues as the rights to take timber, kindling, and other wood for household use; the right to use forest clearings for grazing; the right to take peat for fuel; and the right to fish in the forest streams and to hunt the forest wildlife. Perhaps the greatest conflicts in the forest occurred over the deer.

Deer were holders of great privilege in the English legal system. The aristocracy had a passion for deer hunting that they indulged by enclosing large pieces of the forest for their private deer parks. In addition, the monarchy proclaimed numerous forest laws to facilitate their royal sport. For example, dwellers in the forest purlies were not permitted to hunt on the sabbath, nor during 'fence-time', nor more than three times a week, nor with persons other than household servants. A forest dweller could not hunt beyond the extent of his own land, nor unless his land was worth 40 shillings a year, nor within forty days before or after the King's hunting, nor might his dog follow the deer into the forest. Furthermore, those living in the forest proper were not permitted to kill deer on any pretense or to interfere with the deer's feeding grounds by felling timber or cutting peat. There were also restrictions on erecting fences around cottage gardens to keep the deer from eating crops: Fences could not be so high that the deer could not pass through on their way to their customary feeding grounds.\textsuperscript{18}

Clearly there were ample reasons for the commoners of the forests to resent the deer. In addition, over time the forests became the home to local gentry who also resented the forest laws, both because they wanted to hunt deer for meat, and because they wanted to keep the deer out of their gardens. For a long period of time, the various forest dwellers enjoyed a \textit{modus vivendi} with the gamekeepers, in which forest laws were either enforced with small fines or not enforced at all.

But about 1716 the gamekeepers—the enforcers of forest law—attempted to reassert their forest authority. The forest courts were revived

\textsuperscript{17} \textit{Id.} at 24.  
\textsuperscript{18} \textit{Id.} at 30-31.
and the gamekeepers began to enforce forest law strictly. Numerous conflicts ensued. Around 1719 there arose the phenomena of “Blacking.” Blacking involved roving gangs of foresters, who operated at night, faces blackened in disguise, mounted and armed. These groups of “Blacks” killed deer, cut fish-heads, and removed peats and turfs. When deer-poachers were caught and fined by the gamekeepers, the Blacks would descend on the keepers’ lodgings at night and take the fines back by force or intimidation. For a few years, they waged a small-scale guerilla war with the gamekeepers.

At times the Blacks went beyond the immediate issues of deer or fish to larger issues of social justice. For example, Thompson wrote about the leader of one of these groups, known as King John of Hampshire Forest, who together with a band of Blacks re-enacted the Robin Hood tradition. They visited local gentry who had reneged on obligations to pay their debts to local tradesmen, and with threats of force, “convinced” the deadbeat gentlemen to pay up.

Who were the Blacks and where did they come from? Thompson discovered that the Blacks were mostly rural laborers, trying to protect their hunting, timber, grazing, and fishing rights. Their actions constituted resistance to the newly emerging, privatized forest regime.

Blacking arose in response to the attempted reactivation of a relaxed forest authority. This provoked resentment among foresters generally, whether small gentry (outside the charmed circle of Court favours), yeomen, artisans or labourers. The resort of deer-poachers to more highly organized force may be seen as retributive in character and concerned less with venison as such than with the deer as symbols (and as agents) of an authority which threatened their economy, their crops and their customary agrarian rights. These Blacks . . . are armed foresters, enforcing the definition of rights to which the ‘country people’ had become habituated, and also . . . resisting the private emparkments which encroached upon their tillage, their firing and their grazing.19

_Whigs and Hunters_ gives a richly detailed picture of several groups of Blacks and of their complex efforts to outmaneuver the forest authorities. Thompson tried to estimate the numbers of the Blacks and found that their numbers were small—one or two hundred at most. Small, too, was the actual violence they inflicted. Even in the year of greatest “crisis,” 1723-24, there were two keepers killed, several injured, and no gentlemen or magistrates harmed.20 And in response, about sixteen Blacks were hanged. What then, he asked, was the “emergency” that gave rise to the bloody Black Act?

19. _Id._ at 64.
20. _Id._ at 190.
Thompson answered this question by showing that the existence of the Blacks created alarm in a place far removed from the forest: London's political circles. There the Blacks were seen as part of a Jacobite conspiracy to overthrow Hanoverian rule and assassinate the King. The Blacks were portrayed as insurrectionaries—revolutionaries pretending to be deer thieves but who were actually fomenting guerrilla war amongst the peasants. The fear of conspiracy among Walpole and his faction was fed by exaggerated tales of horror about organized violent resistance in the forests. These factors converged to create the climate for the enactment of the harsh, punitive Black Act.

In his account of the origins of the Black Act, Thompson came close to slipping off his "narrow ledge" into a mechanistic Marxism. His two hundred-odd page discussion of the origins of the Act argues that the Act was enacted by the upper classes in order to repress social conflict that had erupted in the forests when the forest-dwellers lost their customary use-rights in the timber, peat, and other resources of the forest. And he showed that in practice, the Act was a club for the wealthy and the aristocrats to beat down the lower orders, an aid in establishing their social control.

But is this merely a story of the powerful disenfranchising the powerless and using the legal system to repress all forms of protest? Thompson said no. True, he admitted, the Black Act was the triumph of government, aristocracy, and Walpole over the insurgent foresters. But it was also something more. As Thompson argued, the Act not only replaced fines and whipping-posts with the gallows, it also changed the definition of crime itself.

What was now to be punished was not an offence between men (a breach of fealty or deference . . .) but an offence against property. Since property was a thing, it became possible to define offences as crimes against things, rather than as injuries to men. This enabled the law to assume, with its robes, the postures of impartiality: it was neutral as between every degree of man, and defended only the inviolability of the ownership of things.21

Thompson went on to say that while this law was, throughout the eighteenth century, an instrument for rulers "to impose new definitions of property to their even greater advantage, as in the extinction by law of indefinite agrarian use-rights and in the furtherance of enclosure," the law also set up legal forms that mediated these class relations and at times inhibited the actions of the rulers. That is, as law became more imper-

21. Id. at 207.
sonal, more divorced from the direct relations of loyalty and feudal obligation, and more universal in its reach, it brought power within constitutional controls. Thompson wrote:

The rhetoric and the rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behavior of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions . . . .

. . . I think that this study has shown that for many of England's governing elite the rules of law were a nuisance, to be manipulated and bent in what ways they could . . . . But I do not conclude from this that the rule of law itself was humbug. On the contrary, the inhibitions upon power imposed by law seem to me a legacy as substantial as any handed down from the struggles of the seventeenth century to the eighteenth . . . .

More than this, the notion of the regulation and reconciliation of conflicts through the rule of law—and the elaboration of rules and procedures which, on occasion, make some approximate approach toward the ideal—seems to me a cultural achievement of universal significance.22

*Whigs and Hunters* thus ends with a description of law as a potential tool for the lower classes to use against injustice and arbitrary exercises of power. It also ends with an appreciation of law's inspirational role as the expression of collective ideals. However, in *Whigs and Hunters* Thompson did not engage in a textual analysis of the Black Act, nor identify its laudatory features. Rather, his conclusion, which celebrates the Act's impersonality and universality, seems to be an afterthought, almost a *non sequitur*, given the detailed history that came before.

Almost twenty years later, in an essay entitled "Custom Law and Common Right" that appeared in the collection *Customs in Common*, Thompson revisited the issue of enclosures and the loss of common rights. This time he focused explicitly on the legal means by which these processes occurred and provided a detailed analysis of legal texts.

"Custom Law and Common Right" traces the history of private property as it developed in eighteenth-century England.23 Thompson recounted numerous disputes about enclosures of grazing lands; and about fishing rights; timber rights; the right to exploit quarries, sand-pits and peat; the right to restrict rabbit warrants; and of course, the ever-bothersome deer. And he showed how what we call "private property" is a concept that developed piece by piece, twig by twig, one peat at a time.

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22. *Id.* at 265.
The essay counterposes the developing individualistic notion of property as the right to exclude all others, to the previous customary notion of property as use-rights to a commons. Thompson gave countless examples of use-rights and showed how they functioned to permit ordinary people to share the various common resources of their communities.

While Thompson used the notion of custom as the embodiment of a use-right-centered notion of property, he went to great lengths to disavow any idea that custom is a known, fixed set of rules. He argued that custom is not an established fact on which all agree. Rather, custom is a terrain, somewhere between law and social practice, in which arguments about conflicting entitlements are made. Custom is the place where social practices and norms meet. In any complex society, the definition and meaning of custom is highly contested. Thompson wrote:

Agrarian custom was never fact. It was ambience. It may be best understood with the aid of Bourdieu’s concept of ‘habitus’—a lived environment comprised of practices, inherited expectations, rules which both determined limits to usages and disclosed possibilities, norms, and sanctions both of law and neighborhood pressures. The profile of common right usages will vary from parish to parish according to innumerable variables: the economy of crop and stock, the extent of common and waste, demographic pressures, [and so forth.] Within this habitus all parties strove to maximize their own advantages. Each encroached upon the usages of the others.\(^2^4\)

In this setting, Thompson concluded, "[d]isputes over common right . . . were not exceptional. They were normal."\(^2^5\)

Thompson’s essay recounts disputes over custom and common right, and shows how such disputes were gradually resolved against the assertion of communal rights and in favor of individuated entitlements. He described numerous disputes that found their ways into the law courts. As the seventeenth century wore on, and as the common law courts heard more and more disputes over commons and customary rights, the courts developed doctrines that ultimately deprived commoners of those rights. While the results were not uniform, nor the logic always consistent, the courts developed the view that to uphold a custom, the custom must be reasonable, it must be linked to a recognizable property interest, and that the custom itself be of long-standing and continuous existence. Courts justified these requirements by saying that if customary rights to commons were recognized on a lesser showing, such rights would get in the way of "improvements."\(^2^6\) Thus, concluded Thompson, the call for improvements,

\(^2^4\) Id. at 102 (footnotes omitted).
\(^2^5\) Id. at 104.
\(^2^6\) Id. at 130-38.
for progress, justified expropriating the poor.\textsuperscript{27}

Thompson showed that the legal logic that said commons should yield so as to encourage “improvements” was a logic that “translated the usages of the poor into the property-rights of the landowners.”\textsuperscript{28} However, Thompson did not claim that courts adopted this view for the purpose of expropriating the poor. Indeed, he showed how much of the litigated cases concerned disputes between two landholders. Rather, he argued that the common law judges had become, by the eighteenth century, so imbued with the Lockean view of exclusive property in land that they could not help but extinguish customary rights that interfered.

Thompson also documented the substantial popular resistance to the enclosures and loss of customary rights.\textsuperscript{29} He described numerous instances in which there were riots, fences destroyed, surveyors mobbed, records destroyed. And he showed the hardship that enclosures wrought. He described the many ways that people’s livelihood depended upon the existence of common fields for grazing of animals and the existence of common wastelands for obtaining household necessaries. As lands were enclosed, Thompson tells us, many peasants were reduced to day laborers or forced to emigrate.\textsuperscript{30} Thompson quoted the nineteenth century poet, John Clare, who lamented the loss of the unenclosed moor of his youth:

\begin{quote}
Unbounded freedom ruled the wandering scene
Nor fence of ownership crept in between
To hide the prospect of the following eye
Its only bondage was the circling sky . . .

Fence now meets fence in owners little bounds
Of field and meadow large as garden grounds
In little parcels little minds to please
With men and flocks imprisoned ill at ease.\textsuperscript{31}
\end{quote}

Despite the poetic lament, Thompson warned against sentimentalizing the poor or viewing them as possessing some “generous and universalistic communist spirit.”\textsuperscript{32} The customary rights they sought to retain were not utopian. They were detailed and particular rights of usages that regulated coterminous user-rights to local resources. They expressed a consciousness based on sharing rather than on exclusion, one that harmonized and regulated competing claims to use communal resources. Theirs was a

\begin{footnotes}
\item[27] Id. at 138.
\item[28] Id. at 163.
\item[29] Id. at 114-26.
\item[30] Id. at 177-78.
\item[31] Id. at 179-80 (footnotes omitted) (quoting John Clare, “The Mores”).
\item[32] Id. at 179.
\end{footnotes}
sensibility grounded in localities, and it was parochial. Common right gave localities the right to exclude strangers. The sensibility of custom and common right assumed that people lived together in stable communities—it expressed a way of life as well as a relation between people. As Thompson said in his conclusion, “[e]nclosure, in taking the commons away from the poor, made them strangers in their own land.”

Viewing this process from the vantage point of the 1990's, we might still ask whether the enclosures and the rise of private property in land were part of the March of Progress, despite the transitional hardship and the poetic laments. After all, many contemporary economists have described and theorized about the “tragedy of the commons.” These economists claim that when resources are held in common without private ownership, they will be over-exploited and inefficiently utilized because no one has an interest in conserving them or allocating them to their most optimal uses. Thompson addressed and rejected this argument. He wrote:

> Despite its commonsense air, what [the tragedy-of-the-commons argument] overlooks is that the commoners themselves were not without common-sense. Over time and over space the users of commons have developed a rich variety of institutions and community sanctions which have effected restraints and stints upon use.\(^{34}\)

Thompson devoted much of his ninety-page essay to showing what this “common-sense” was all about.

What does Thompson's essay tell us about the role of law in the demise of the commons? Again, does Thompson slip off his ledge? Does he present a story of the ruling classes developing legal doctrines that disenfranchise the poor, such as the “improvement” rationale for denying common rights? As with *Whigs and Hunters*, one could read “Custom Law and Common Right” in that light. However, one could also read it differently.

In “Custom Law and Common Right,” Thompson illustrated what he means by law as the battleground on which competing views of right, competing sensibilities and ideals, contend. In the essay, law is not the subject of the story; rather it is the window through which the story unfolds. The story itself is about the existence of different values, different notions of “right,” different moral sensibilities reflective of different ways of life. Implicitly the story is also about how the values expressed in our legal rules of property are neither immutable nor necessarily optimal. Thompson said of those who resisted enclosures:

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33. *Id.* at 184.
34. *Id.* at 107 (footnote omitted).
London and its environs would have no parks today if commoners had not asserted their rights, and as the nineteenth century drew on rights of recreation became more important than rights of pasture . . . . We owe to these premature "Greens" such urban lungs as we have.35

So, at the end of the day, has Thompson successfully created a ledge where he, and others in his footsteps, can view law and its role in history? Perhaps, and perhaps not. His conclusion at the end of Whigs and Hunters that we should appreciate—indeed celebrate—the achievement of law, the growth of impersonal, universal rules that constrain arbitrary power, sounds like another version of the Whiggish March of Rationality. And his argument in "Custom Law and Common Right" that common law courts eliminated the commons in order to foster "improvements" sounds like an argument that the inexorable force of capitalism was responsible for expropriating the poor in favor of the owners of capital. Thus, Thompson seems to have fallen off his ledge on both sides. However, the ledge is a narrow one, perhaps so narrow that it is impossible to avoid an occasional tip from side to side. That is, rather than being a ledge-sitter, perhaps Thompson is more like a tight-rope walker, leaning first to the right and then to the left to keep his balance, as he walks through the centuries of the history of the English underclasses. And on his journey, he shares with us his panoramic view of the lives of ordinary people, people whose ordinary, everyday life activities of working, carousing, loving, agitating, and despairing have shaped our common history. From this perspective, Thompson has given us a view of legal history more rich in its detail and more sweeping in its insights than most legal history of more conventional approaches. We must respect his willingness to take such a precarious approach and be grateful for the enormous contribution to our understanding of law, history, and society that his efforts have made.

35. Id. at 125-26 (footnote omitted).