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“Rational Recreation” and the Law: The Transformation of Popular Urban Leisure in Victorian England

Rachel Vorspan*

Popular urban recreation underwent a radical transformation in nineteenth-century England. Rowdy and brutal pre-industrial leisure activities in the city streets gave way after the 1850s to more “rational”, disciplined, morally respectable, and physically segregated pastimes. This article investigates the role of the courts in this complex development.

Through a variety of coercive and facilitative strategies, the judiciary performed a critical function in moulding the major institutions and practices of urban leisure. Acutely sensitive to the relative position of various recreations on the spectrum of Victorian respectability, judges applied the criminal law to eradicate disfavoured street activities such as prize fights and football; used public administrative and private nuisance law to enhance the “rational” features of quasi-respectable establishments such as music halls; and creatively adapted customary law to foster “desirable” leisure pursuits such as amateur athleticism.

The article concludes that the judiciary complemented its assiduous efforts to cleanse the thoroughfares of undesirable activities by establishing specified urban sites for “morally appropriate” popular sports and exercise. In marked contrast to their treatment of popular rights in the political and economic spheres—such as claims by political protestors to demonstrate or trade unionists to picket—judges in the recreational context willingly vindicated communal “rights to recreation” and allocated private property for acceptable popular uses. The courts thus played an important role in demarcating nineteenth-century English cultural life into a series of physically discrete and morally ordered spaces.

En Angleterre, les loisirs populaires urbains ont connu une transformation radicale au XIX^e siècle. Au cours de la deuxième moitié du XIX^e siècle, les loisirs et divertissements de rue de l'époque préindustrielle, souvent brutaux et peu raffinés, furent remplacés par des passe-temps plus «rationnels», disciplinés, moralement respectables et organisés en secteurs d'activité. Le présent article enquête sur le rôle qu'ont joué les tribunaux dans ce processus complexe.

Par le biais de mesures coercitives et incitatives, la magistrature joua un rôle décisif en orientant et façonnant les principales institutions et pratiques des passe-temps urbains. Les juges, fort conscients de la position relative qu'occupaient certains passe-temps dans la gamme d'activités jugées respectables à l'époque victorienne, appliquèrent le droit pénal de manière coercitive pour éliminer les jeux de rue en défaveur tels que le football. Ceux-ci employèrent également le droit public administratif et le droit privé de *nuisance* pour mettre en valeur les qualités «rationnelles» des établissements quasi respectables tels que les music-halls, et employèrent le droit coutumier de façon créative pour encourager des passe-temps «souhaitables» tels que l'athlétisme amateur.

L'article conclut que la magistrature, pour soutenir ses efforts assidus d'éradication des activités non-désirées, désigna des secteurs urbains spécifiques pour l'exercice de sports et d'activités physiques populaires jugés «morale-ment appropriés». En contradiction avec leur prise de position sur les droits des opposants politiques et des syndiqués, les juges, dans le contexte récréatif, firent valoir le «droit aux loisirs» des communautés et allouèrent des propriétés privées pour des usages populaires jugés acceptables. C'est de cette façon que les tribunaux ont joué un rôle important dans la délimitation de la vie culturelle du XIX^e siècle en Angleterre en une série d'espaces discrets et moralement ordonnés.

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Introduction

Since the 1970s the history of English recreation has gained increasing prominence and respectability as a subject of academic inquiry.¹ Most scholarly attention has focused on the nineteenth century, as social historians have explored a variety of popular recreations including fairs,² sports,³ public houses,⁴ music halls,⁵ theatres,⁶

¹ See e.g. P. Bailey, *Leisure and Class in Victorian England: Rational Recreation and the Contest for Control, 1830-1885* (London: Routledge & Kegan Paul, 1978) [hereinafter *Rational Recreation*]; H. Cunningham, *Leisure in the Industrial Revolution, c. 1780-c. 1880* (London: Croom Helm, 1980) [hereinafter *Leisure in the Industrial Revolution*]; J. Lowerson & J. Myerscough, *Time to Spare in Victorian England* (Hassocks, U.K.: Harvester Press, 1977); R.W. Malcolmson, *Popular Recreations in English Society, 1700-1850* (Cambridge: Cambridge University Press, 1973); H.E. Meller, *Leisure and the Changing City, 1870-1914* (London: Routledge & Paul, 1976); J.A.R. Pimlott, *Recreations* (London: Studio Vista, 1968) [hereinafter *Recreations*]; M.A. Smith, S. Parker, & C.S. Smith, eds., *Leisure and Society in Britain* (London: Allen Lane, 1973); R.D. Storch, ed., *Popular Culture and Custom in Nineteenth-Century England* (London: Croom Helm, 1982) [hereinafter *Popular Culture and Custom*]; J.K. Walton & J. Walvin, eds., *Leisure in Britain, 1780-1939* (Manchester: Manchester University Press, 1983); J. Walvin, *Leisure and Society, 1830-1950* (London: Longman, 1978) [hereinafter *Leisure and Society*]; E. Yeo & S. Yeo, eds., *Popular Culture and Class Conflict, 1590-1914: Explorations in the History of Labour and Leisure* (Hassocks, U.K.: Harvester Press, 1981); B. Harrison, "Religion and Recreation in Nineteenth-Century England" (1967) 38 *Past & Present* 98; J. Myerscough, "The Recent History of the Use of Leisure Time" in I. Appleton, ed., *Leisure Research and Policy* (Edinburgh: Scottish Academic Press, 1974) 3.

² See e.g. H. Cunningham, "The Metropolitan Fairs: a Case Study in the Social Control of Leisure" in A.P. Donajgrodzki, ed., *Social Control in Nineteenth-Century Britain* (London: Croom Helm, 1977) 163 [hereinafter "Metropolitan Fairs"]; A. Howkins, "The Taming of Whitsun: The Changing Face of a Nineteenth-Century Rural Holiday" in Yeo & Yeo, *supra* note 1, 187; D.A. Reid, "Interpreting the Festival Calendar: Wakes and Fairs as Carnivals" in *Popular Culture and Custom*, *supra* note 1, 125 [hereinafter "Interpreting the Festival Calendar"]; J.K. Walton & R. Poole, "The Lancashire Wakes in the Nineteenth Century" in *Popular Culture and Custom*, *supra* note 1, 100.

³ See e.g. F.P. Magoun, *History of Football From the Beginnings to 1871* (Stuttgart: Bochum-Langendreer, 1938); M. Marples, *A History of Football* (London: Secker & Warburg, 1954); T. Mason, *Association Football and English Society, 1863-1915* (Brighton: Harvester Press, 1980); W. Vamplew, *The Turf: A Social and Economic History of Horse Racing* (London: Allen Lane, 1976); J. Walvin, *The People's Game: A Social History of British Football* (London: Penguin, 1975) [hereinafter *People's Game*]; P.M. Young, *A History of British Football* (London: Stanley Paul, 1968); A. Delves, "Popular Recreation and Social Conflict in Derby, 1800-1850" in Yeo & Yeo, *supra* note 1, 89; W.F. Mandle, "Games People Played: Cricket and Football in England and Victoria in the Late Nineteenth Century" (1974) 15 *Hist. Stud.* 511; M. Shearman, "History" in *Football* (London: Longmans, Green 1899) 1.

⁴ See e.g. P. Clark, *The English Alehouse: A Social History, 1200-1830* (London: Longman, 1983); B. Harrison, *Drink and the Victorians: The Temperance Question in England, 1815-1872* (London: Faber & Faber, 1971) [hereinafter *Drink and the Victorians*]; M. Girouard, *Victorian Pubs* (London: Studio Vista, 1975); B. Spiller, *Victorian Public Houses* (Newton Abbott, U.K.: Davis & Charles, 1972); B. Harrison, "Pubs" in H.J. Dyos & M. Wolff, eds., *The Victorian City: Images and Realities*, vol. 1 (London: Routledge & Kegan Paul, 1973) 161 [hereinafter "Pubs"].

cinemas,⁷ and holiday excursions.⁸ These investigations have produced a consensus that popular leisure pursuits and their accompanying cultural values underwent a radical transformation during the nineteenth century. Pre-industrial sports and recreations notable for their rowdiness, brutality, and disorganization—for example, street games, animal combat, and local festivals—gave way after the 1850s to more disciplined and “morally respectable” pastimes such as seaside holidays and spectator sports.

In considering the reshaping of urban popular leisure, historians have debated the relative causal weight of such factors as the requirements of a new industrial labour discipline, the disappearance of open spaces in urban areas, and the dissemination of an evangelical middle-class ethos that regarded traditional working-class culture as socially subversive and morally offensive.⁹ Surprisingly, however, the voluminous academic literature has virtually ignored the role of the courts in recreational developments. In fact, nineteenth-century judicial decisions, serving as agents as well as mirrors of social change, directly influenced the transformation of leisure—at some points accelerating the process, at other points controlling and channeling its direction, and at still others obstructing it to preserve private property rights and older cultural values.

This essay investigates the relationship between popular recreation and the courts in the rapidly urbanizing and industrializing society of Victorian England. It argues that judicial decisions promoted the objective of “rational recreation”, the contemporary term for pastimes that were respectable and morally “improving”.¹⁰ More specifi-

⁵ See e.g. R. Mander & J. Mitchenson, *British Music Hall* (London: Studio Vista, 1965); G.J. Mellor, *The Northern Music Hall: A Century of Popular Entertainment* (Newcastle: Graham, 1970); H. Scott, *The Early Doors: Origins of the Music Hall* (London: Nicholson & Watson, 1946); M. Vicinus, *The Industrial Muse* (London: Croom Helm, 1974); P. Bailey, “Custom, Capital and Culture in the Victorian Music Hall” in *Popular Culture and Custom*, *supra* note 1, 180 [hereinafter “Custom, Capital and Culture”]; P. Summerfield, “The Effingham Arms and the Empire: Deliberate Selection in the Evolution of Music Hall in London” in Yeo & Yeo, *supra* note 1, 209.

⁶ See e.g. D. Bradby, L. James & B. Sharratt, eds., *Performance and Politics in Popular Drama: Aspects of Popular Entertainment in Theatre, Film and Television, 1800-1976* (Cambridge: Cambridge University Press, 1980); D. Howard, *London Theatres and Music Halls, 1850-1950* (London: Library Association, 1970); K. Richards & P. Thomson, eds., *Essays on Nineteenth Century British Theatre* (London: Methuen, 1971); M.R. Booth, “The Metropolis on Stage” in Dyos & Wolff, *supra* note 4, 211.

⁷ See e.g. A. Field, *Picture Palace: A Social History of the Cinema* (London: Gentry, 1974); Bradby, James & Sharratt, *ibid*.

⁸ See e.g. J.A.R. Pimlott, *The Englishman's Holiday: A Social History* (London: Faber & Faber, 1947); J.K. Walton, *The Blackpool Landlady: A Social History* (Manchester: Manchester University Press, 1978) [hereinafter *Blackpool Landlady*]; J.K. Walton, “The Demand for Working-Class Seaside Holidays in Victorian England” (1981) 34 *Econ. Hist. Rev.* 249 [hereinafter “Seaside Holidays”]; J.K. Walton, “Municipal Government and the Holiday Industry in Blackpool, 1876-1914” in Walton & Walvin, *supra* note 1, 160 [hereinafter “Municipal Government”].

⁹ See *infra* notes 25 & 26 and accompanying text.

¹⁰ See e.g. *Rational Recreation*, *supra* note 1 at 35; G.F.A. Best, *Mid-Victorian Britain, 1851-1875* (New York: Schocken, 1971); Lowerson & Myerscough, *supra* note 1 at 16-17.

cally, it examines the array of approaches that the courts employed to direct and mold the nineteenth-century leisure revolution. In the spheres of public administrative and criminal law, the courts worked to “rationalize” recreation through two postures, one restrictive and the other facilitative. In their restrictive mode, judges rigidly though discriminatingly enforced statutes and regulations governing commercial establishments such as pubs and music halls; further, they broadly sanctioned police efforts to eradicate outdoor amusements such as fairs and sports from the city streets. In their facilitative posture, judges acted expansively and inventively to establish alternative urban spaces for morally appropriate urban recreations. Complementing their suppression of pre-industrial pastimes in city thoroughfares, judges ensured that municipalities utilized land designated for popular leisure for its intended purpose and creatively invoked common law doctrines of “customary rights” to carve out special urban sites for recreational use.

In the area of private law, the courts exhibited yet a third approach that can be characterized as “managerial”. Civil nuisance suits pitting urban inhabitants against neighbouring commercial leisure enterprises became increasingly common in the Victorian period. As a general matter, the courts supported householders over recreational businesses; judicial decisions were not, as they may have been in other contexts, blatantly pro-entrepreneurial.¹¹ However, judges favoured residents only to a point. Frequently they established strict rules on liability without ordering correspondingly stringent relief, in effect pressuring the parties to reach private accommodations that would ameliorate the nuisance while allowing the recreational enterprise to continue in a more “rational” form. That is, they facilitated and structured out-of-court compromises between traditional property rights and commercial development.

More broadly, this article also suggests that judges were acutely sensitive to the relative position of various recreations on an informal but nevertheless well-established spectrum of Victorian respectability. They were obviously hostile to the traditionally unsavoury activities of pub drinking, horse racing, and blood sports; they were ambivalent toward music halls and professional team sports; and they were highly sympathetic to the legitimate theatre and non-commercial popular athleticism. Legal decisions reflected this moral hierarchy in a surprisingly nuanced fashion. Judges coercively applied the criminal law to suppress disfavoured recreations, pursued a flexible middle course toward quasi-respectable establishments to enhance their more “rational” features, and inventively employed statutory and customary law to foster “desirable” leisure pursuits.

¹¹ For example, Joel Brenner has argued that in the area of industrial pollution, courts consciously favoured exploitative over conservationist uses of land and emasculated nuisance law as a potential curb on environmental pollution (see J.F. Brenner, “Nuisance Law and the Industrial Revolution” (1974) 3 *J. Leg. Stud.* 403 at 413-14). John McLaren, however, has qualified this picture by pointing out that the courts reacted unevenly to industrialization and that institutional and social factors were more important than substantive rules in preventing nuisance law from containing environmental damage (see J.P.S. McLaren, “Nuisance Law and the Industrial Revolution—Some Lessons from Social History” (1983) 3 *Oxford J. Leg. Stud.* 155 at 190, 220).

This inquiry into urban recreation and the courts consists of six parts. Part I traces the radical transformation of popular leisure in nineteenth-century England. Part II examines the critical role the courts played in eliminating pre-industrial games and sports from urban streets, while Part III uncovers their complementary and largely unrecognized efforts to establish alternative municipal sites for “deserving” popular recreations. Part IV explores the judicial function in regulating indoor commercial entertainments such as pubs, music halls, theatres, and cinemas, especially with regard to local licensing schemes. Turning to private law, Part V analyzes the emergence of a managerial judicial approach that segregated liability from relief to encourage private settlements between competing interests. Finally, the Conclusion offers some broader reflections on the relationship between urban recreation and the courts in Victorian England.¹²

I. The Transformation of Popular Recreation in Nineteenth-Century England

In pre-industrial English society, there was no sharp demarcation between “work” and “leisure”. Community occasions such as harvesting often centred on labour, while popular festivals conformed to the agrarian calendar.¹³ Traditional leisure pursuits included fairs, “wakes”,¹⁴ street games, and blood sports, all temporally and spatially undisciplined and associated with drinking, violence, and gambling.¹⁵ In urban areas

¹² This essay is based primarily on printed primary sources such as case reports, legal treatises, periodicals, memoirs, and parliamentary reports and debates. For the general social history of recreation, it relies on secondary sources. Obviously, detailed empirical studies—involving research into police records, magistrates’ decisions, local government documents, and other manuscript materials—would be necessary to flesh out more specifically the ways in which the law affected recreational change in specific localities and periods. Regarding legal decisions specifically, reported cases obviously do not convey the full extent of litigation, as most decisions were not reported, especially those rendered in magistrates’ courts. Moreover, the mere fear of legal action had a significant impact on social behaviour and undoubtedly constrained many individuals without leaving written evidence of its effect. Reported decisions are, nonetheless, a useful supplement and corrective to the non-legal sources—newspapers, books, pamphlets, and memoirs—upon which traditional historians of popular recreation have largely relied.

¹³ See e.g. Lowerson & Myerscough, *supra* note 1 at 8; Malcomson, *supra* note 1 at 15 (noting that at times work and recreation were so closely related as to be “almost indistinguishable”); M. Judd, “The Oddest Combination of Town and Country”: Popular Culture and the London Fairs, 1800-1860” in Walton & Walvin, *supra* note 1, 10 at 15; “Interpreting the Festival Calendar”, *supra* note 2 at 126-28; K. Thomas, “Work and Leisure” (1964) 29 *Past & Present* 50 at 51 (pre-industrial work and non-work were “inextricably confused”); E.P. Thompson, “Patrician Society, Plebeian Culture” (1974) 7 *J. Soc. Hist.* 382 at 392.

¹⁴ Wakes were annual feasts originating in the Middle Ages that commemorated the dedication of a parish church. By the early nineteenth century they had little religious significance and had become carnivalesque holidays involving bawdy sports and drinking on a massive scale. See e.g. Judd, *supra* note 13 at 12-13; “Interpreting the Festival Calendar”, *supra* note 2 at 126-27.

¹⁵ For a discussion of pre-industrial leisure patterns generally, see Thomas, *supra* note 13; Thompson, *supra* note 13; E.P. Thompson, “Time, Work-Discipline, and Industrial Capitalism” (1967) 38

these pastimes began to disappear in the early nineteenth century, and by the 1850s and 1860s a new range of “modern” and commercialized recreations unconnected with working life—seaside excursions, professional sports, amusement parks, and music halls—were emerging to replace them.¹⁶

The domestication and commercialization of leisure after mid-century resulted from a confluence of forces. First, traditional pastimes were increasingly incompatible with the work discipline appropriate to an industrializing economy. Unpredictable absenteeism, including the intermittent observance of “Saint Monday”, disrupted factory organization and impeded productivity.¹⁷ Regularized holidays became the norm and were even expanded as employers discovered that leisure—especially such “rational” recreations as seaside excursions¹⁸—could promote industrial efficiency.¹⁹ Second, a middle-class evangelical culture of sobriety, morality, and self-improvement reinforced the new industrial labour patterns to discourage traditional entertainments in favour of more respectable and productive pursuits.²⁰ Third, the growing scarcity of

Past & Present 56. On the brutality of early recreations, see J. Lawson, *Letters to the Young on Progress in Pudsey During the Last Sixty Years* (Stanningley: J.W. Birdsall, 1887) at 57-58.

¹⁶ See e.g. *Rational Recreation*, *supra* note 1 at 56-104; Lowerson & Myerscough, *supra* note 1 at 1; Judd, *supra* note 13 at 12-13.

¹⁷ See e.g. Lowerson & Myerscough, *supra* note 1 at 10; Malcolmson, *supra* note 1 at 99; *Leisure and Society*, *supra* note 1 at 5; *People's Game*, *supra* note 3 at 56 (the new forms of leisure “were as disciplined, regulated and even as timetabled as the industrial society which spawned them”); D.A. Reid, “The Decline of Saint Monday, 1766-1876” (1976) 71 *Past & Present* 76.

¹⁸ See e.g. *Leisure and Society*, *supra* note 1 at 28-29, 69-82; “Seaside Holidays”, *supra* note 8. By mid-century day railway trips to the seaside were affordable by all but the poorest labourers (see Best, *supra* note 10 at 201). Contemporaries credited the seaside holiday with a decline in drunkenness and violence (see *ibid.* at 257), and some employers even took their employees on free excursions to the seaside to prevent them from spending their leisure time in drinking (see Myerscough, *supra* note 1 at 13).

¹⁹ See e.g. Lowerson & Myerscough, *supra* note 1 at 3 (in contrast to intermittent holy days, free time became rationalized into a structured timetable of regular holidays); *Recreations*, *supra* note 1 at 39-40. The Saturday half holiday became widespread in the 1870s (see Marples, *supra* note 3 at 164-65). The first Bank Holiday was established by statute in 1871, a watershed event because it marked the transition from religious holidays to state-authorized secular holidays (see *People's Game*, *supra* note 3 at 55. See also e.g. *Englishman's Holiday*, *supra* note 8 at 144-45; “Seaside Holidays”, *supra* note 8 at 255 (the total closure of a mill at a regular holiday was preferable to constant disruption throughout the summer)). As Alfred Marshall wrote in 1890, leisure and rest were “among the necessities for efficiency” because people’s “increased energy, intelligence and force of character would enable them to do as much as before in less time” (A. Marshall, *Principles of Economics*, 9th ed. by C.W. Guillebaud (London: Macmillan, 1961) vol. 1 at 694).

²⁰ See e.g. *Rational Recreation*, *supra* note 1 at 17-18; Malcolmson, *supra* note 1 at 100-01; *Recreations*, *supra* note 1 at 40. Some historians have cautioned, however, that although leisure patterns undeniably changed in the direction of being more constrained and controlled, new forms of entertainment such as music halls were not particularly “improving”. See e.g. Best, *supra* note 10 at 211-12; Lowerson & Myerscough, *supra* note 1 at 22; G. Stedman Jones, “Working-Class Culture and Working-Class Politics in London, 1870-1900: Notes on the Remaking of a Working Class” (1974) 7 *J. Soc. Hist.* 460 at 476-77; Walton & Poole, *supra* note 2 at 103.

urban land threatened games played over unlimited space, encouraging more constrained and structured amusements.²¹ Fourth, national and local authorities, associating undisciplined public recreation with disorder and crime, increasingly regulated popular entertainments as a means of exercising "social control" over the population.²² In particular, the "new" police forces instituted close surveillance of working-class neighbourhoods to enforce more rigorous standards of acceptable public behaviour.²³ Finally, new forms of commercial capitalism and a burgeoning consumerism fostered the emergence, in the last quarter of the century, of large commercial enterprises dedicated to providing safe and relatively respectable entertainment for the masses.²⁴

²¹ See Myerscough, *supra* note 1 at 11-12. During the first half of the nineteenth century, Britain became the world's first urbanized industrial society. In 1801, 20% of the population lived in cities and towns with 10,000 or more inhabitants; the percentage of urban residents reached 38% in 1851 and 77% in 1901 (E.E. Lampard, "The Urbanizing World" in Dyos & Wolff, *supra* note 4, 3 at 4, 10). The population density in towns placed severe pressure on spatially indiscriminate traditional recreations (see *infra* note 28 and accompanying text).

²² See R.D. Storch, "The Problem of Working-class Leisure. Some Roots of Middle-class Moral Reform in the Industrial North: 1825-50" in Donajgrodzki, *supra* note 2, 138 at 138-39 [hereinafter "Problem of Working-Class Leisure"] (describing the authorities' fear of the potential for chaos and destruction posed by industrial workers outside the disciplined environment of the factory); R. Storch, "The Policeman as Domestic Missionary: Urban Discipline and Popular Culture in Northern England, 1850-1880" (1976) 9 J. Soc. Hist. 481 [hereinafter "Domestic Missionary"] (arguing that the obverse of middle-class philanthropic reform was the policeman's truncheon). Criticizing the "social control" accounts for portraying workers as overly passive, some scholars have insisted that the process of "rationalization" was due less to middle-class reformers or official state controls than to working-class considerations of enlightened self-interest. See e.g. Best, *supra* note 10 at 211 (many working men agreed that leisure should be devoted to self-improvement, not self-indulgence); *Leisure and Society*, *supra* note 1 at 5 (although the new industrialists perfected the concept of work discipline, generations of industrial workers perpetuated it); S. J. Davies, "Classes and Police in Manchester 1829-1880" in A.J. Kidd & K.W. Roberts, eds., *City, Class and Culture: Studies of Social Policy and Cultural Production in Victorian Manchester* (Manchester: Manchester University Press, 1985) 26 at 39 (the increased orderliness of nineteenth-century urban society "grew from autonomous pressures and developments within working class communities"); G. Stedman Jones, "Class Expression Versus Social Control? A Critique of Recent Trends in the Social History of 'Leisure'" (1977) 4 Hist. Workshop 162 at 169 (workers themselves were divided on whether to defend traditional forms of recreation); F.M.L. Thompson, "Social Control in Victorian Britain" (1981) 34 Econ. Hist. Rev. 189 at 207 [hereinafter "Social Control"] (working-class values were developed "by the workers for the workers"). While acknowledging that the lower classes to some extent made their own history, Storch thought the point could be overemphasized: "History can rarely be made to any person's or group's measure. If it can be so made, it is usually more to the measure of ruling classes and elites than to anyone else's ... [because of] sheer inequalities of power" (R.D. Storch, "Introduction: Persistence and Change in Nineteenth-century Popular Culture" in *Popular Culture and Custom*, *supra* note 1, 1 at 12-13 [hereinafter "Introduction"]).

²³ "Domestic Missionary", *ibid.* at 487 (the police directly monitored key institutions of daily life in working-class neighborhoods). See Davies, *ibid.* at 31 (the governing classes sought a more preventative form of policing that would reform working-class conduct by a policy of surveillance).

²⁴ See e.g. *Leisure in the Industrial Revolution*, *supra* note 1 at 141 (the world of commercialized leisure provided its own controls); *Leisure and Society*, *supra* note 1 at 62 (a central feature of the

Though historians are in agreement about the basic outlines of this recreational revolution, and its multi-faceted nature,²⁵ they diverge in their assessments of different explanatory factors. Historians have variously emphasized, for example, industrialists, middle-class philanthropic reformers, and commercial entrepreneurs as the most significant agents of change.²⁶ Judges, however, have been almost uniformly neglected, even though they too played a critical role in the transformative process. Perhaps the defining characteristic of their response to traditional urban leisure was a wholly undisguised animosity toward collective activity in the public streets. The judiciary viewed disreputable group entertainments in urban thoroughfares as the antithesis to “rational recreation”, and eradicating recreational street crowds became one of its highest priorities.

II. Judicial Suppression of Traditional Recreation: Clearing the Streets through the Criminal Law

A major contribution of the courts to recreational change in the nineteenth century was their unwavering support for official attempts to clear the streets of pre-industrial pursuits. As urbanization progressed, open spaces diminished and working-

transformation of English recreations after the 1870s was their dependence on new forms of consumer goods and services); P. Joyce, *Work, Society and Politics: The Culture of the Factory in Later Victorian England* (New Brunswick: Rutgers University Press, 1980) at 338 (the major cause of the transformation was new commercial influences); Thompson, “Social Control”, *supra* note 22 at 195, 200, 204 (the growth of an entertainment industry and increased working-class consumption were more significant than the efforts of missionary crusaders).

²⁵ See e.g. *Rational Recreation*, *supra* note 1 at 174 (the improvement in popular recreations came from numerous factors including the tightening of workplace discipline that accompanied the subdivision of labour and the spread of scientific management; the emergence of agencies of social control in education and policing; more effective local government; improved transportation; the expansion of working-class purchasing power; and the availability of inexpensive consumer goods); Lowerson & Myerscough, *supra* note 1 at 1 (the leisure revolution of the nineteenth century involved a growth in free time, new ways to spend leisure time, and changes in recreational spending habits); Malcolmson, *supra* note 1 at 89-117, 170-71 (traditional recreation was based on a social system that was agrarian, parochial, and corporate and thus incompatible with a society that was urban, contractual, individualistic, and industrialized); Thompson, “Social Control”, *supra* note 22 at 195-96 (changes in social habits were due to the discipline, punctuality, and regularity of factory work; the influence of employers; the efforts of police forces; housing and civic improvements; the poor law; and the independent evolution of working-class cultures).

²⁶ For accounts that emphasize the importance of the early industrialists, see e.g. *Leisure and Society*, *supra* note 1 at 5; Thomas, *supra* note 13 at 60-61. For studies that stress the role of middle-class reformers and philanthropic organizations, see e.g. “Metropolitan Fairs”, *supra* note 2 at 89; J. Rule, “Methodism, Popular Beliefs and Village Culture in Cornwall, 1800-50” in *Popular Culture and Custom*, *supra* note 1, 48 at 49. Yet other scholars have underscored the regulatory efforts of police and local officials. See e.g. S. Cohen & A. Scull, eds., *Social Control and the State: Historical and Comparative Essays* (Oxford: Martin Robertson, 1983); “Domestic Missionary”, *supra* note 23 at 487; “Introduction”, *supra* note 22 at 14-16. As noted, other historians have focused on the commercialization of mass entertainment (see *supra* note 24).

class homes became increasingly unsalutary; the populace therefore resorted to the streets as the only remaining outdoor venue for popular sports and games.²⁷ The political and judicial authorities responded with vigorous efforts to forcibly transfer popular recreation from the public thoroughfares to specially designated and regulated urban spaces.

A. Official Perceptions: The Threat of Recreational Street Crowds

The authorities were preoccupied with curbing street recreation for a variety of reasons. First, and most obviously, they saw a need to regulate the use of public space, an amenity that was rapidly disappearing under the pressure of urbanization.²⁸ Second, they regarded rowdy and undisciplined street games as immoral and, relatedly, as excessively “public.”²⁹ Third, the large and unruly crowds drawn to pre-industrial amusements were viewed as a definite societal threat. Although by the 1850s working-class movements no longer posed an actual danger of revolution, episodes of outdoor protest persisted,³⁰ and the governing classes feared that even a crowd assembled for recreational purposes might suddenly dissolve into a menacing political mob. In addition, the middle and upper classes viewed street crowds—especially those assembled to watch prize fights and animal contests—as unavoidably associated with gambling and violence.³¹ Collective street activity thus raised severe apprehension among the Victorian governing classes about criminality, social instability, and dangers to personal safety.

²⁷ *Rational Recreation*, *supra* note 1 at 15 (as footpaths, public gardens, and common land were swallowed up, “the street alone was left as the new commons of the industrial poor”). See J.L. Hammond & B. Hammond, *The Bleak Age* (West Drayton: Penguin, 1947) at 75-90; Delves, *supra* note 3 at 100.

²⁸ See e.g. Malcolmson, *supra* note 1 at 109-10; Meller, *supra* note 1 at 109-10; *Leisure and Society*, *supra* note 1 at 3.

²⁹ “Introduction”, *supra* note 22 at 14 (in the nineteenth century there was “a palpable narrowing of the limits of what would be tolerated in public”). This was a time when the middle classes were retreating into private family amusements (see L. Davidoff, *The Best Circles: Women and Society in Victorian England* (Totowa, N.J.: Rowman & Littlefield, 1973) at 22-23 (after the 1840s the middle and upper classes placed new importance on privacy for family and social life); Lowerson & Myerscough, *supra* note 1 at 56 (“carriage folk” stayed respectably “behind the walls and hedges of home”, an option not available to the poor given their housing conditions); Malcolmson, *supra* note 1 at 103 (“Public assemblies for diversion were particularly suspect, for it was in those settings that the temptations were most intense, the chances of contamination most likely, the sensual indulgences most extreme.”); *Leisure and Society*, *supra* note 1 at 11 (many upper-class recreations were based at home)).

³⁰ See e.g. D.C. Richter, *Riotous Victorians* (Athens: Ohio University Press, 1981); R. Vorspan, “‘Freedom of Assembly’ and the Right to Passage in Modern English Legal History” (1997) 34 San Diego L. Rev. 921 at 940, n.66 and sources cited therein [hereinafter “Right to Passage”].

³¹ See e.g. Malcolmson, *supra* note 1 at 103-04; *Leisure and Society*, *supra* note 1 at 26; *People’s Game*, *supra* note 3 at 52.

The anxiety and disgust inspired by street crowds were important catalysts for the creation of “new” municipal police forces after the 1830s. As one historian has suggested, the governing classes considered the police to be “domestic missionaries” who would discipline urban life by dispersing or arresting people who gathered in the thoroughfares.³² The courts lent vigorous support to police action, especially when the targeted street activity involved street sports, itinerant musical entertainment, or popular festivals.

B. The Legal Suppression of Street Sports

In the battle against pre-industrial street recreations, the authorities first directed their efforts against blood sports: cockfighting, bullbaiting, and other forms of animal combat. These pursuits were already slipping out of favour in the late eighteenth century, a development owing as much to the rowdiness of the spectators as the sports’ inherent brutality.³³ By the 1840s blood sports had been largely eradicated by statute,³⁴ and the courts turned their attention to more resistant street sports—prize fights and soccer.

Prize fighting was considered especially objectionable because it invariably involved betting and corruption and attracted large and volatile crowds.³⁵ In addition, it was closely connected with drinking; boxing matches, in fact, were often organized by publican ex-fighters.³⁶ Abolition of the prize ring was a necessity, a contemporary insisted, “if for no other reason than the outrageous language and blasphemy, which were twenty thousand times worse than I ever heard in a London crowd—even an execution crowd.”³⁷

In suppressing prize fighting, the authorities’ primary instrument was the criminal common law, especially the offence of assault. Judges took a consistently hard line on

³² See Delves, *supra* note 3 at 98; R.D. Storch, “The Plague of the Blue Locusts: Police Reform and Popular Resistance in Northern England, 1840-57” (1975) 20 *Int’l Rev. Soc. Hist.* 61 at 80; “Domestic Missionary”, *supra* note 22 at 482. Henry Mayhew described the costermongers’ hatred of the “moving on” system as “intense”. A costermonger once asked him, “Can you wonder at it, sir ... that I hate the police? They drive us about, we must move on, we can’t stand here, and we can’t pitch there” (H. Mayhew, *London Labour and the London Poor*, vol. 1 (London: Frank Cass, 1967) at 20).

³³ See *Leisure and Society*, *supra* note 1 at 9, 26 (in the late eighteenth century a series of local acts suppressed blood sports, considered especially objectionable because of the nature of the crowds they attracted).

³⁴ *Cruelty to Animals Act, 1835* (U.K.), 5 & 6 Will. 4, c. 59, as rep. and repl. by *Cruelty to Animals Act, 1849* (U.K.), 12 & 13 Vict., c. 92; *Metropolitan Police Act, 1839* (U.K.), 2 & 3 Vict., c. 47. See *Protection of Animals Act, 1911* (U.K.), 11 & 12 Geo. V, c. 14; Lowerson & Myerscough, *supra* note 1 at 115-16; Malcolmson, *supra* note 1 at 119; “Domestic Missionary”, *supra* note 22 at 483.

³⁵ See Vamplew, *supra* note 3 at 86-87 (gambling and corruption were prevalent at prize fights); Malcolmson, *supra* note 1 at 145-46 (large crowds posed a threat to public order).

³⁶ See e.g. F. Gale, *Sports and Recreations in Town and Country* (London: Swan, Sonnenschein, 1888) at 17 [hereinafter *Sports and Recreations*]; Girouard, *supra* note 4 at 14.

³⁷ *Sports and Recreations*, *ibid.* at 16.

outdoor fighting, refusing to recognize any defence of consent. In 1825, for example, when a thousand persons gathered to witness a fight in London, Mr. Justice Boroughs announced in the Court of King's Bench that "all these fights are illegal, and no consent can make them legal, and all the country being present would not make them less an offence."³⁸ Such fights were inconvenient in rural areas, the judge observed, but in London they were extremely serious because "the quantity of crime that these fights lead to is immense."³⁹

Determined to eradicate prize fights, the courts readily extended liability beyond the combatants themselves, first to organizers and eventually even to spectators. In *R. v. Perkins*⁴⁰ the court sustained the conviction of persons who had collected betting money and helped to keep order at a match. When the foreman of the jury expressed doubt that such persons could be guilty of assault, the judge firmly corrected him. If their actions encouraged people "to see these men strike each other," he pronounced, they were guilty of the crime: "There is no distinction between those who concur in the act and those who fight."⁴¹ Liability was further expanded in 1841 when the Crown prosecuted a bystander for refusing to leave his horses to aid a constable in breaking up a fight.⁴² In summing up, Baron Alderson directed the jury that "all prize-fights are illegal" and that every man was bound "to set a good example to others by doing his duty in preserving the public peace."⁴³

Most striking, in the late nineteenth century the Queen's Bench Divisional Court came close to holding that spectators at a prize fight were guilty of a crime by virtue of their mere presence. In 1882 the Crown criminally indicted three labourers who had chanced upon a fight near the Ascot Road while walking home after the Ascot races; there was no evidence that the men had been involved in any betting. Although in *R. v. Coney*⁴⁴ a majority of the judges were unwilling to carry liability to such an extreme, they did hold that mere presence at a fight, though not sufficient *ipso facto* to render a person guilty of aiding and abetting, did afford evidence that a jury could consider on such a prosecution. Moreover, the entire court definitively reaffirmed that

³⁸ *R. v. Billingham* (1825), 2 C. & P. 234, 172 E.R. 106 [hereinafter *Billingham* cited to C. & P.]. Similarly, in *R. v. Lewis* (1844), 1 C. & K. 419, 174 E.R. 874, Mr. Justice Coleridge held that if two parties fought they were both liable for assault, regardless of who struck the first blow. The following year *R. v. Hunt* (1845), 1 Cox C.C. 177, confirmed that prize fighters could be indicted for assault, though it rejected charges of riot and affray in the instant case because there had been no resistance to lawful authority or fighting on a public highway. For pre-nineteenth century cases on prize fighting, see *Matthew v. Ollerton* (1693), 4 Mod. 226, 90 E.R. 438, and *Boulter v. Clarke* (1747), Bull N.P. 16 (both holding that one could not consent to be beaten).

³⁹ *Billingham*, *ibid.* at 235.

⁴⁰ (1831), 4 C. & P. 537, 172 E.R. 814 [cited to E.R.].

⁴¹ *Ibid.* at 815.

⁴² *R. v. Brown* (1841), 1 C. & P. 314. None of the 400 spectators was willing to assist the constable, and the fight continued. When the constable finally managed to arrest several persons, they were rescued by the crowd (*ibid.* at 317).

⁴³ *Ibid.* at 318. Not surprisingly, the jury convicted the defendant.

⁴⁴ (1882), 8 Q.B.D. 534.

prize fighting was illegal and that the consent of a combatant was not a defence to an assault charge. The novelty of the case, however, was that three judges went so far as to insist that the defendants had committed a crime based solely on their presence in the crowd. Lord Coleridge observed that spectators alone made a prize fight possible because “no two men, having no cause of personal quarrel, would meet together in solitude to knock one another about for an hour or two.”⁴⁵ It was obvious, he declared, that “[t]he brutalizing effects of prize-fights are chiefly due to the crowd who resort to them.”⁴⁶

The increasingly severe treatment of street fighting contrasted with the courts’ more lenient approach to indoor boxing. In *R. v. Young*⁴⁷ a boxer was put on trial for manslaughter when, during an indoor sparring match, his opponent fell against a ring post and died. The prosecution argued that the latitude given to “manly diversions among friends” did not extend to public matches for a purse that drew together “idle, disorderly people.”⁴⁸ Baron Bramwell agreed with this analysis but found it inapposite as there was nothing unlawful in sparring for athletic purposes in a private room. Similarly, in *R. v. Orton*⁴⁹ the judge directed the jury that a mere exhibition of skill in a sparring match was not illegal. If the parties met “intending to fight till one gave in,” however, it was an unlawful prize fight whether the combatants wore protective gloves or not.⁵⁰

By thus employing the criminal law, the courts successfully abolished the street prize fight; the sport itself, however, did not entirely disappear. Amateur boxing continued into the late nineteenth century and actually increased in popularity. As an enthusiast of the sport observed in 1888, “there has arisen from the ashes of the old Ring a love of boxing, which has produced a large school of amateurs, who perhaps are quite equal to a great number of the good men of the past.”⁵¹ The authorities did not treat boxing “demonstrations” in private clubs as unlawful, and the replacement of bare-fists with gloves and the development of the Queensbury rules made the sport more socially acceptable.⁵² The rationalization of boxing by moving it to regulated indoor clubs did not, however, wholly obviate the authorities’ concern with street

⁴⁵ *Ibid.* at 569.

⁴⁶ *Ibid.* See also *ibid.* at 548, Mathew J. (members of the crowd “by their presence lend themselves to the purpose of the combatants”). The dissent relied extensively on *R. v. Murphy* (1833), 6 C. & P. 103, 172 E.R. 1164, where Littledale J. had said that if the defendant was “present at this fight, encouraging it by his presence, he is guilty, though he took no active part in it” (*ibid.* at 1165). The majority in *Coney* reinterpreted this language and disapproved its reasoning.

⁴⁷ (1866), 10 Cox C.C. 371.

⁴⁸ *Ibid.* at 373.

⁴⁹ (1878), 39 L.T. 293.

⁵⁰ *Ibid.* at 294. Upon appeal, the conviction was affirmed.

⁵¹ *Sports and Recreations*, *supra* note 36 at 27. See also *ibid.* at 22-23. He regretted the fact that the police pried into every contest to determine whether it was in fact a prize fight (*ibid.* at 27-28).

⁵² Boxing reached its low point in the 1860s and 1870 and then began to improve; it attained its high point in the 1890s, when a new era of legal clubs began (see Girouard, *supra* note 4 at 14; *Leisure and Society*, *supra* note 1 at 27).

crowds. The courts continued to scrutinize boxing establishments to ensure that the matches did not cause a nuisance by attracting crowds to the neighbouring streets.⁵³

The ancient game of street football prompted equally harsh treatment from the judges. The traditional sport, dating from the Middle Ages, was extremely disorganized and rowdy; it drew large numbers of players—frequently more than a thousand—and caused substantial personal and property damage.⁵⁴ Major matches occurred on festivals and holidays, particularly on Shrove Tuesday, a customary holiday for apprentices in many parts of the country. Derby's annual game provided a typical example of pre-industrial soccer.⁵⁵ A contemporary described how at noon on Shrove Tuesday and Ash Wednesday, a town official “threw up” the ball in the marketplace “into the midst of an assembly of many thousand people, so closely wedged together, as scarcely to admit of locomotion.”⁵⁶ The tossing up of the ball was a signal for play to surge randomly through streets, rivers, and gardens toward goals situated at opposite ends of the town:

The moment the ball was thrown, the “war cries” of the rival parishes began, and thousands of arms were uplifted in the hope of catching it during its descent. The opposing parties endeavoured by every possible means, and by the exertion of their utmost strength, to carry the ball in the direction of their respective goals, and by this means the town was traversed and retraversed many times in the course of the day.⁵⁷

The contests endured for at least six hours and inevitably precipitated brawling, drunkenness, and petty vandalism, leading terrified shopowners to close their stores and board their windows.⁵⁸ “If this is what they call football,” inquired a Frenchman who watched a Derby football match in 1829, “what do they call fighting?”⁵⁹

In other cities football constituted not merely an annual occasion but a daily nuisance, as suggested by this letter in a Preston newspaper:

⁵³ See *infra* notes 400-08 and accompanying text.

⁵⁴ See e.g. T.F. Thiselton-Dyer, *British Popular Customs, Present and Past* (London: George Bell & Sons, 1876) at 70, 73-75, 88-91; *People's Game*, *supra* note 3 at 6; Delves, *supra* note 3 at 89-90.

⁵⁵ Other cities particularly known for their tradition of street football included Alnwick, Chester-le-Street, Sedgefield, Ashbourne, Nuneaton, Twickenham, Teddington, Bushey Park, Dorking, Richmond, East Mousley, Kingston-upon-Thames, Hampton Wick, and Thames Ditton (see Malcomson, *supra* note 1 at 36; Mason, *supra* note 3 at 9). In Inverness an annual match took place between married and unmarried women, and at Perthshire married men played against bachelors (Thiselton-Dyer, *ibid.* at 90).

⁵⁶ Thiselton-Dyer, *ibid.* at 75.

⁵⁷ *Ibid.* at 74-75.

⁵⁸ See Delves, *supra* note 3 at 106-07; Malcomson, *supra* note 1 at 141-42; Marples, *supra* note 3 at 98-100; Shearman, *supra* note 3 at 25-26.

⁵⁹ Quoted in *People's Game*, *supra* note 3 at 179. A local historian writing in 1790 said of the Derby games, “I have seen this coarse sport carried to the barbarous height of an election-contest” (quoted in Magoun, *supra* note 3 at 113). It is small wonder that the Earl of Kent upbraided the knavish Oswald by calling him a “base football player” (W. Shakespeare, *The Tragedy of King Lear* (Boston: Ginn, 1940) Act I, Scene 4, ll. 86-87).

Sir—will you allow me, through the medium of the public press, to call the attention of our Chief Constable to a rapidly spreading nuisance in the shape of football. Almost in any street or open space, such as the crossing from the Orchard to Lord Street, may be seen daily groups of boys, and even young men, kicking at anything in the shape of a ball, regardless of passers-by, and especially dangerous to young children going to and from the different schools. The nuisance does not end here ... Surely the police would not be exceeding their duty in trying to put down all football playing in the public streets and parks.⁶⁰

In short, traditional football was unconstrained, improvised, and inclusive; as a contemporary observer remarked with disgust, “[t]he unrestrained people took possession of the streets.”⁶¹ To mid-Victorian eyes, the sport was obviously incompatible with the requirements of an efficient and orderly industrializing society.

Local officials could rely on a variety of legal mechanisms to suppress this objectionable activity. A particularly effective weapon was the national *Highways Act, 1835*,⁶² which imposed a criminal penalty on any person who obstructed the highway by playing at “Football or any other Game on any Part of the said Highways, to the Annoyance of any Passenger or Passengers”.⁶³ Magistrates and judges consistently supported police enforcement efforts. For example, in 1860 a major prosecution occurred at Ashbourne, where the population customarily played street football in thick nailed boots and padded clothing “prepared mostly as if for a deadly struggle.”⁶⁴ After a game involving several hundred participants, one George Woolley was convicted under the Act of obstructing the passage of two carts in the marketplace, an area that was technically a public highway.⁶⁵ Determined on resistance, Woolley refused to pay the fine, raised £200 by public subscription, and retained a prominent attorney to argue his appeal before the Court of Queen’s Bench. At the oral argument, Woolley’s counsel admitted that his client had played the game but objected to the failure of the prosecution to present any evidence of “annoyance to passengers”. Indeed, he pointed out, even the constable who had witnessed the obstruction had eagerly joined in the sport. “Well,” Lord Cockburn responded dismissively, “what of that?” Surely the defendant did not mean to contend “that the parties who were actually annoyed by the obstruction of the highway should be called to give evidence of the annoyance.”⁶⁶ In

⁶⁰ Quoted in Mason, *supra* note 3 at 82. In his recollections of early nineteenth-century Pudsey, Joseph Lawson described football in the following terms: “Downtowners playing up-towners; in wet weather, bad roads, and played through the village; breaking windows, striking bystanders, the ball driven into houses; and such ‘shinning,’ as they called kicking each other’s legs ... Of course, many received serious injuries” (Lawson, *supra* note 15 at 58).

⁶¹ Quoted in Delves, *supra* note 3 at 97.

⁶² (U.K.), 5 & 6 Will. IV, c. 50.

⁶³ *Ibid.*, s. 72. See Magoun, *supra* note 3 at 110; Malcolmson, *supra* note 1 at 141.

⁶⁴ Magoun, *supra* note 3 at 111. At Ashbourne, the number of players was unlimited: everyone living north of a bridge was assigned to one side, everyone on the south to the other. The goals were three miles apart, and scoring required a player to swim across a pond (*ibid.* at 110).

⁶⁵ *Woolley v. Corbishley* (1860), 34 J.P. 773.

⁶⁶ *Ibid.* at 774.

other words, in the case of street football the court would presume annoyance despite the existence of compelling evidence to the contrary.

That the inhabitants bitterly resented Lord Cockburn's decision was apparent from the satirical broadsheets that circulated shortly thereafter:

It becomes our painful duty to record the death of the Right Honourable Game Football, which melancholy event took place in the Court of Queen's Bench on Wednesday Nov. 14, 1860 ... For some months the patriotic Old Man had been suffering from injuries sustained in his native town, so far back as Shrovetide last year; he was at once removed (by appeal) to London, where he lingered in suspense till the law of death put its icy hand upon him, and claimed as another trophy to magisterial interference one who had long lived in the hearts of the people. His untimely end has cast a gloom over the place, where the amusement he afforded the inhabitants will not soon be forgotten.⁶⁷

Despite the game's seeming demise, in 1862 the ball was again "thrown up" in the market place. The police quickly made arrests, and residents agreed in future to play on fields outside the town.⁶⁸ Forcible suppression of the game by means of the Act also occurred in other cities and towns including Richmond, East Mousley, Hampton, Hampton Wick, and Kingston-upon-Thames.⁶⁹

In addition to relying on the national *Highways Act*, town authorities invoked analogous local acts and regulations that prohibited games in the streets. The *Metropolitan Police Act*, for example, declared it an offence to "play at any game to the annoyance of the inhabitants or passengers," and it authorized a constable to take any person committing such an offence into custody without warrant.⁷⁰ Similarly, in 1866 the Kingston town council issued a proclamation that inasmuch as a suitable recreation ground was now available, "the game of Football will not be permitted to be played on Shrove Tuesday in the public thoroughfares of the Borough, and the police have strict orders to carry this into effect."⁷¹ Although these particular prohibitions aroused little controversy, other cities relying on local acts or ordinances faced larger battles. Shortly before Shrove Tuesday in 1845, the mayor of Derby issued a public notice prohibiting the playing of street football. Anticipating popular resistance, he swore in several hundred inhabitants as special constables and, with the approval of the Home Secretary, summoned two troops of dragoons. Despite this display of force the game began as usual; in fact, it started simultaneously in several different places as a mark of popular defiance. Subsequently, the townspeople stoned the mayor, the

⁶⁷ Quoted in Marples, *supra* note 3 at 103.

⁶⁸ See *ibid.* at 104. After this arrangement was negotiated, the game continued undisturbed into the twentieth century. In 1938 the Duke of Windsor "threw up" the ball on the Shaw Croft in the outskirts of the town (see Magoun, *supra* note 3 at 112).

⁶⁹ See *Rational Recreation*, *supra* note 1 at 21; Malcolmson, *supra* note 1 at 141; Mason, *supra* note 4 at 10; Delves, *supra* note 3 at 91.

⁷⁰ *Supra* note 34, s. 54(17).

⁷¹ See Magoun, *supra* note 3 at 123-24.

magistrates read the *Riot Act*, and police battled with players for the ball.⁷² The footballers were criminally prosecuted, and the government argued that “in a town consisting of 40,000 inhabitants, one-third of whom were labouring population, persons must not assemble for such low and improper amusements at the present day in the public streets, whatever they might have done when football was originally practiced.”⁷³ Upon their conviction the players abandoned serious attempts to continue the tradition, though for three years the city took extensive precautions before each Shrove Tuesday.⁷⁴

Another weapon in the legal armoury was the common law crime of public nuisance. Members of the Barnes vestry, for example, petitioned the justices at Surrey Quarter Sessions to abolish street football on the ground that it constituted a nuisance.⁷⁵ Similarly, when the Mayor of Bolton declared in 1884 that the game was a major nuisance, the magistrates sentenced five boys to a fine or seven days’ hard labour for playing it.⁷⁶ Nuisance prosecutions for Shrove Tuesday football occurred in numerous locations into the early twentieth century in the face of sporadic but continuing popular opposition.⁷⁷

Eventually, however, authorities throughout England defeated the practice of “footballing” and asserted effective control over the streets.⁷⁸ Soccer did not vanish but, like boxing, evolved into a more domesticated, commercialized, and spatially contained form. Many street games migrated to municipal playing fields,⁷⁹ and in 1863 a group of public school enthusiasts organized the Football Association, which presided over the rapid transformation of the amateur sport into a substantial business involving organized teams and paid professional players.⁸⁰ Within twenty years soccer

⁷² See *ibid.* at 118; Malcolmson, *supra* note 1 at 140-44; Delves, *supra* note 3 at 91.

⁷³ Quoted in Malcolmson, *supra* note 1 at 144.

⁷⁴ See *ibid.* at 142.

⁷⁵ See *ibid.* at 140; Mason, *supra* note 3 at 100-01.

⁷⁶ See Mason, *ibid.* at 123, n.2.

⁷⁷ See *People’s Game*, *supra* note 3 at 14.

⁷⁸ *Ibid.* at 26 (“Street football in the old cities was one of the victims of effective law enforcement.”). See Marples, *supra* note 3 at 97-98, 107.

⁷⁹ See Lowerson & Myerscough, *supra* note 1 at 18; Malcolmson, *supra* note 1 at 142-43. For example, in 1866 Kingston provided an alternate recreation ground (Magoun, *supra* note 3 at 123-24).

⁸⁰ The Football Association had only ten constituent clubs in 1867 but grew to fifty by 1871 and to ten thousand in 1905. By the 1870s most clubs were working class, often linked to church or chapel (Marples, *supra* note 3 at 165-167. See also *People’s Game*, *supra* note 3 at 69-91; Young, *supra* note 3 at 89-139). On the professionalization and commercialization of the sport, see *Leisure and Society*, *supra* note 1 at 67-70; W.J. Oakley & G.O. Smith, “The Association Game” in *Football*, *supra* note 3, 85 at 85-93, 168-84. The Saturday half-day holiday, which became widespread in the 1870s, contributed to the growth of the sport by creating an enormous public seeking amusement on Saturday afternoons (see Marples, *supra* note 3 at 164-65).

became the English national game, commanding unwavering loyalty from the working classes of London and northern and midland towns.⁸¹

Thus rationalized and disciplined, soccer eventually secured middle-class approval; indeed, late Victorians came to view it as promoting the values of fair play, self-reliance, endurance, and even sobriety. "There can be ... no doubt that owing to the popularity of the game," a contemporary observer wrote in 1899, "public-houses have been largely denuded and have surrendered their *habitués* to the more healthy enjoyment of the football field."⁸² Football also benefited from the perceived threat to Britain's national security from the unification of Germany in 1870, which prompted widespread public concern with manliness, athletic achievement, and physical fitness.⁸³ Of course, the eradication of the street game, which owed much to judicial action, was an essential precondition to the emergence of soccer in its modern "rational" form.

The courts also played an important role in taming other types of games deemed unsuitable for urban thoroughfares. For example, the inhabitants of Stratton, Cornwall, tended to amuse themselves in the evenings with a "stag hunt", which involved chasing a person costumed as a stag through the city streets. On May Day 1863 the police arrested a participant for violating the *Highways Act* by engaging in a "game" to the annoyance of the public. Although the justices dismissed the information, the Court of Queen's Bench reversed on the ground that it "certainly appears to be a game such as might be the subject of a conviction under the statute."⁸⁴ Other cases held that skittle alleys (a form of bowling) and Cornish hurling (a form of hockey) also constituted street nuisances.⁸⁵

Similarly, the courts declared a variety of popular races to be unlawful uses of the streets. In 1863, for example, the owner of a road in Lilly sued some farmers in trespass for conducting a hurdles race on his property and exceeding their right of passage. The defendants responded that they had used the street properly because in a race the parties certainly "passed and repassed".⁸⁶ Baron Bramwell concluded, however, that "[it] could not be said, in common sense, or law, that a right of way involved

⁸¹ Thompson, "Social Control", *supra* note 22 at 201. See Best, *supra* note 10 at 209; *People's Game*, *supra* note 3 at 7, 76.

⁸² Oakley & Smith, *supra* note 80 at 173. See Mason, *supra* note 3 at 88, 224-27. The Chief Constable of Liverpool, Captain J.W. Nott Bower, testified to the Royal Commission on Liquor Licensing in 1898 that now "a great number of working men, the instant they get paid, rush off home as quickly as they can, get a wash and a change, leave their wages with their wives, and are off to see the football, and I think that has led to a great decrease in drunkenness" (quoted in Mason, *ibid.* at 175-76).

⁸³ See *Rational Recreation*, *supra* note 1 at 125-26; Mason, *ibid.* at 14; *Leisure and Society*, *supra* note 1 at 86. See also *infra* note 118 and accompanying text.

⁸⁴ *Pappin v. Maynard* (1863), 9 L.T. 327 at 327.

⁸⁵ See e.g. *Barham v. Hodges* (1876), Wkly Notes 234 (skittles); *Bock v. Schroeder*, (1894) 9 Cape Colony L.R. 106 (South Afr. East. Dist. Ct.) (skittles) [hereinafter *Bock*]; Marples, *supra* note 3 at 105 (Cornish hurling).

⁸⁶ *Sowerby v. Wadsworth* (1863), 3 F. & F. 734, 176 E.R. 336 (cited to F. & F.).

a right to race.⁸⁷ Even though the plaintiff had not suffered injury, the judge declared, he was entitled to nominal damages as a vindication of his legal right.⁸⁸ Another form of street racing was “pedestrianism” or “race running”, which consisted of eccentric contests between individuals who “raced” while wearing weighted clogs, picking up stones at regular intervals, or trundling barrows of bricks. Organized by publicans, the matches attracted crowds of thousands in the big cities, and judges applauded police and magisterial efforts to suppress them.⁸⁹ The courts even held that the act of passively watching a race from the street was illegal. In *The Earl of Coventry v. Willes*,⁹⁰ the court rejected the defendant’s claim of a legal right to stand on the highway to observe the races on Newmarket common. The defendant did not want a “right of way”, Mr Justice Blackburn pointed out, but rather a “right to stay” and witness the races.⁹¹

Thus, one by one the old street games disappeared or transformed themselves in the face of legal assault. If not wholly eliminated, they moved to municipal or commercial playing fields where they were subjected to stringent public regulation, especially regarding facilities for drinking and gambling.⁹² The domestication and con-

⁸⁷ *Ibid.* at 735.

⁸⁸ *Ibid.*

⁸⁹ See *Rational Recreation*, *supra* note 1 at 83, 132; Note, “Race Running Nuisance” (1876) 32 J.P. 432.

⁹⁰ (1863), 9 L.T. 384.

⁹¹ *Ibid.* at 385.

⁹² For example, the tightening up of the licensing laws in the 1870s, especially with regard to beer-houses, enabled the authorities to supervise more closely the operations of new urban commercial sporting grounds (see “Introduction”, *supra* note 22 at 15. See also *infra* note 255 and accompanying text). In addition, the courts assisted the police to control gambling in the new commercial sporting grounds through an expansive interpretation of the *Betting House Act, 1853* (U.K.), 16 & 17 Vict., c. 119. The statute aimed not at prohibiting betting on sports *per se* but at curbing the proliferation of fixed “betting houses”. It imposed a penalty on any person who knowingly and wilfully permitted “any house, room, office, or other place” to be used for the purpose of betting (*ibid.*, s. 1). In 1873, the owner of the Hyde Park Cricket Ground, a sports ground used for cricket, foot races and other games and sports, was convicted under the Act for allowing professional bookmakers to stand on chairs and stools and take bets during foot races (*Haigh v. Town Council of Sheffield* (1874), L.R. 10 Q.B. 102). A similar result was reached in *Eastwood v. Miller* (1874), 30 L.T. 716, where the court concluded that wagering at an outdoor facility for pigeon shooting and footraces was a “place” for betting as well as for sports. This provision was also applied to control betting at racetracks. See *Shaw v. Morley* (1868), 19 L.T. 15 (temporary wooden structure with desk at Doncaster race course found to be a “fixed place” for purposes of the Act); *Bows v. Fenwick* (1874), 30 L.T. 524 (bookie standing on a stool under an umbrella at the Chester racecourse constituted a “place” under the statute); *Galloway v. Maries* (1881), 45 L.T. 763 (bookie standing on small movable wooden box violated the Act); *Hawke v. Dunn* (1897), 76 L.T. 355 (bookmaker in race course enclosure who moved around and had no “fixed place” liable under the statute). Of all these cases, however, only *Shaw* and *Bows* survived *Powell v. Kempton Park Racecourse Company*, [1899] A.C. 143, in which the House of Lords liberalized judicial interpretation of the *Betting Houses Act* by insisting that the Act applied only to “betting places” that were “definitely localized”. A few months later, the Divisional Court nonetheless found a bamboo structure at a race track to be sufficiently “localized” (*Brown v. Patch* (1899), 80 L.T. 716).

tainment of these activities, not surprisingly, made them increasingly acceptable to the moral sensibilities of the Victorian governing classes.

C. *The Elimination of Street Entertainers and Festivals*

The law also extinguished other popular street pastimes, either abolishing them entirely or shunting them off to confined and regulated spaces where they continued in more “rational” and disciplined forms. This process occurred in the case of both itinerant street entertainers and the fairs and festivals that periodically enveloped town centres.

Street entertainers, particularly organ-grinders and ballad singers, were ubiquitous in Victorian England. Contemporaries frequently complained about the appalling sound of street music. “Unless it pours with rain,” Charles Dickens lamented in 1847, “I cannot write half an hour without the most excruciating organs, fiddles, bells or glee-singers.”⁹³ The police took the matter in hand either by “moving on” entertainers who attracted crowds or by arresting them for common law nuisance and statutory violations.⁹⁴ A major impetus to dispersing street performers came with the *Metropolitan Police Act, 1839*, which provided that any householder could require a street musician to depart from the neighbourhood owing to the illness of a resident “or for other reasonable cause.”⁹⁵ To broaden enforcement even further, *Bass’s Act, 1864* specified that a householder could request an entertainer to depart based merely on the “interruption of the ordinary occupations or pursuits of any inmate of such house.”⁹⁶ Despite some problems with enforcement—middle-class complainants were reluctant to accompany an organ grinder to the police station for fear of becoming the subject of a facetious paragraph in a police report—contemporaries nonetheless found the Act to provide “a fair remedy equivalent to the necessity.”⁹⁷

Perhaps predictably, the courts demonstrated greater leniency toward religious musicians than toward common street singers. For example, in 1886 the borough of Croyden promulgated a bylaw prohibiting people from playing any musical instrument in the streets on Sunday. When the police arrested a person for playing sacred hymns, the defendant challenged the bylaw on the ground that it was *ultra vires* an enabling act that only authorized regulations for “the prevention and suppression of

⁹¹ Quoted in *Leisure and Society*, *supra* note 1 at 103. In support of legislation to curb street singers, Thackeray, Carlyle, and Tennyson offered statements that interruptions by street music made it impossible for them to carry out their professions in London. See Meller, *supra* note 1 at 209; Mayhew, *supra* note 32 at vol. 3, 44-220; Note, “Street Music Nuisance” (1871) 15 Solic. J. & Rep. 227 at 228 [hereinafter “Street Music Nuisance”].

⁹⁴ See *e.g. R. v. Hagan* (1837), 8 C. & P. 167, 173 E.R. 445 (constable tried to move on a bagpiper who collected a large crowd while playing music in a public thoroughfare). On use of the “moving on” system against street entertainers, see Mayhew, *supra* note 32 at vol. 3, 158, 177.

⁹⁵ *Supra* note 34, s. 57.

⁹⁶ (U.K.), 27 & 28 Vict., c. 55, s. 1.

⁹⁷ “Street Music Nuisance”, *supra* note 93 at 228.

nuisances”.⁹⁸ In *Johnson v. Mayor*⁹⁹ the Divisional Court agreed, striking down the bylaw because “there might be cases where the inhabitants of a street might desire to have music of a sacred character played on a Sunday, and where such music would not occasion any annoyance.”¹⁰⁰ *Munro v. Watson*,¹⁰¹ where a member of the Salvation Army breached a bylaw by engaging in hymn singing without first obtaining a licence from the mayor, reached the same result. The court found the bylaw even more objectionable than the one at issue in *Johnson* because it empowered the mayor both to legalize a nuisance and to suppress something “perfectly innocent”.¹⁰² A further flaw in the bylaw, the court continued, was that it removed discretion from the justices, obliging them to inflict a fine “however musical the sound produced may be.”¹⁰³ These cases demonstrated the judiciary’s keen sensitivity to shadings of morality and respectability: the campaign to sweep musical entertainment off the streets stopped short of infringing on *bona fide* religious singing.

Popular fairs and festivals also came under increasing legal attack in the latter half of the nineteenth century. In the early Victorian period the ancient festivals literally stood their ground, periodically occupying the centre of many towns for several days each year. During these annual festivals, as one historian has written, “the labouring poor took over the streets,”¹⁰⁴ and the governing classes viewed them as a major inconvenience to local residents. Fairs were just an “annual nuisance”, the *Birmingham Post* observed in 1872, and a town councillor agreed that it was no “trifling matter” to stop up the street for three days.¹⁰⁵ In addition, the pervasive drinking and abrasive entertainments offered at fairs—particularly blood sports—conspicuously assaulted middle-class sensibilities in major urban thoroughfares.¹⁰⁶ Beyond constituting an an-

⁹⁸ The bylaw was promulgated pursuant to the *Municipal Corporations Act, 1882* (U.K.), 45 & 46 Vict. c. 50, s. 23(1), which empowered local authorities to enact regulations for the “good rule and government of the borough, and for prevention and suppression of nuisances not already punishable in a summary manner.”

⁹⁹ (1886), 16 Q.B.D. 708 [hereinafter *Johnson*].

¹⁰⁰ *Ibid.* at 709.

¹⁰¹ (1887), 57 L.T. 366 [hereinafter *Munro*].

¹⁰² *Ibid.* at 367. At the end of the century, however, the courts adopted a more deferential attitude to bylaws promulgated by popularly elected bodies, upholding prohibitions on street music even as applied to hymn singing (see *Kruse v. Johnson*, [1898] 2 Q.B. 91 [hereinafter *Kruse*] (upholding a bylaw prohibiting the playing of musical instruments in any public place after being asked by a resident or constable to desist)).

¹⁰³ *Munro*, *supra* note 101 at 367. Mr. Justice Cave noted that there was no difficulty in drawing up a bylaw to prevent nuisances, but here the town council had gone too far and extended its bylaw to all kinds of noises, whether nuisances or not (*ibid.*).

¹⁰⁴ See “Interpreting the Festival Calendar”, *supra* note 2 at 128.

¹⁰⁵ See *ibid.* at 141, 143.

¹⁰⁶ See *ibid.* at 142; Judd, *supra* note 13 at 102; J. Hart, “Religion and Social Control in the mid-Nineteenth Century” in Donajgradzki, *supra* note 2, 108 at 128 (fairs were thought to foster vice and to be “seasons of imminent peril to the moral and spiritual interests of the young of both sexes”). A sixteenth-century statute remaining in effect until 1874 permitted anyone to brew beer and sell it at

noyance, fairs were also perceived as events that could explode without warning into violence or civil disorder.¹⁰⁷

The combination of moral effrontery and physical encroachment guaranteed a death sentence for the fairs. Responding to the urging of its Methodist members, the City of London strangled Bartholomew Fair in the 1840s by shortening it, changing its location, and raising fees for its stalls.¹⁰⁸ Subsequent legislation, particularly the *Fairs Act, 1871*, authorized the Home Secretary to abolish any fair where such action “would be for the convenience and advantage of the public.”¹⁰⁹ Many fairs in England and Wales, the preamble to the Act declared, “are unnecessary, are the cause of grievous immorality, and are very injurious to the inhabitants of the towns in which such fairs are held.”¹¹⁰

As occurred in the case of street sports, fairs did not entirely disappear but metamorphosed into new “rational” enterprises that were segregated, regulated, and commercialized. After mid-century the modern fairground or “pleasure ground” appeared, assembled by “showmen” who offered mechanized rides and live entertainment at licensed sites.¹¹¹ Municipalities exercised control over these new enterprises by requiring organizers to obtain a permit, and courts construed the enabling statutes broadly to assure local bodies ample licensing authority. In *Collins v. Cooper*,¹¹² for example, the court considered a Wanstall bylaw that imposed a penalty on anyone who organized a “market or fair” without obtaining a licence from the city. Patrick Collins, the owner of swing boats, roundabouts, shooting galleries, wild beast shows, a ghost exhibition, and various mechanical contrivances, was convicted under the bylaw in 1892 for setting up his amusements without permission. There was no evidence of merchandise sales, however, and Collins argued on appeal that a “fair” must necessarily be a place where “sales” took place. Insisting that the legislation was intended to give the city control over more than mere “market rights”,¹¹³ the senior judge concluded that the word “fair” applied equally to a show or exhibition. The conviction stood as an important precedent on the regulatory rights of municipalities over amusement parks.

A bylaw was again construed in favour of municipal regulation of showmen in *Nash v. Manning*,¹¹⁴ a case involving a local bylaw for Thorfield Green that prohibited parking on the heath without official written permission and payment of a prescribed

fair time without a licence, leading to “an orgy of drunkenness and disorder at every fair” (S. & B. Webb, *The History of Liquor Licensing* (Hamden, Conn.: Archon Books, 1963) at 106, n.1).

¹⁰⁷ See Vamplew, *supra* note 3 at 138; “Metropolitan Fairs”, *supra* note 2 at 180; “Problem of Working-Class Leisure”, *supra* note 22 at 144.

¹⁰⁸ See *Rational Recreation*, *supra* note 1 at 20.

¹⁰⁹ (U.K.), 34 & 35 Vict., c. 12, s. 3. See “Metropolitan Fairs”, *supra* note 2 at 163. Nearly 300 outdoor fairs were abolished between 1871 and 1898 (see Judd, *supra* note 13 at 118).

¹¹⁰ *Fairs Act, 1871*, *ibid.*, Preamble. See *Metropolitan Fairs Act, 1868* (U.K.), 31 & 32 Vict., c. 106.

¹¹¹ See Judd, *supra* note 13 at 26-27; Thompson, “Social Control”, *supra* note 22 at 200.

¹¹² (1893), 17 Cox C.C. 647.

¹¹³ *Ibid.* at 655.

¹¹⁴ (1894), 5 J.P. 718.

fee. The defendant's "van" was actually a vehicle used as a pleasure swing. Although the magistrates ruled that the bylaw was invalid because the mere parking of a van on the heath was not a nuisance,¹¹⁵ the Divisional Court thought an unlimited right to bring vehicles onto the land would doubtless produce "nuisances and disorder".¹¹⁶ Through such decisions the judiciary validated municipal regulation and helped "rationalize" the modern incarnation of the traditional fair. By the end of the century showmen had evolved into respectable and often wealthy entrepreneurs of leisure, while the fair itself—as other customary recreations—had become commercialized and relatively respectable once it was banished from the streets.¹¹⁷

III. Judicial Creation of Alternative Recreational Space

The courts not only consistently supported municipal officials in their struggle to regain possession of the streets; they played an equally important, if more unexpected, role in developing substitute areas for popular recreation. As a corollary to eliminating undesirable games and entertainment from public thoroughfares, judges affirmatively and inventively employed a variety of legal mechanisms to provide alternative urban spaces for "rational" physical activities.

A. Urban Physical Fitness and Cultural Change

Beginning in the 1840s and accelerating after mid-century, contemporary observers voiced concern that the scarcity of open space in the new towns and the corresponding lack of opportunities for physical exercise were adversely affecting the urban population. Exercise and sports, they believed, were necessary to maintain a citizenry physically fit for industrial and military purposes. This new interest in physical fitness reflected evolving views about the effects of ill health on the working classes. Disease would demoralize city dwellers, reformers argued, making them easy prey for political agitators and interfering with industrial productivity. In addition, by the 1870s public health was viewed as a matter of urgent national security, as fears developed that a sick population would be incapable of performing military service.¹¹⁸

¹¹⁵ The magistrates found no evidence that the vehicle was a nuisance, had interfered with the inhabitants' enjoyment of the heath, or had obstructed any right of passage (*ibid.*).

¹¹⁶ *Ibid.* at 719. See also U.K., H.C., "Select Committee on Theatres and Places of Entertainment, Report and Minutes of Evidence", No. 240 in *Sessional Papers*, vol. 18 (1892) iii (describing successful police prosecution of novelty showman in London) [hereinafter "1892 S.C. on Theatres"]; *Walker v. Murphy*, [1915] 1 Ch. 71 (C.A.) (Newcastle could not open an amusement park to the detriment of an ancient right to pasture cows on the moor).

¹¹⁷ "Metropolitan Fairs", *supra* note 2 at 163-64, 179-80 (through legal controls and shared values among showmen, fairgoers, and the authorities, fairs became tolerated and safe).

¹¹⁸ See *Rational Recreation*, *supra* note 1 at 125-26; D. Fraser, *Power and Authority in the Victorian City* (New York: St. Martin's, 1979) at 167 (in the Victorian period "municipal reform came to define its purpose in public health"); E.P. Hennock, *Fit and Proper Persons* (Montreal: McGill-Queens University Press, 1973) at 115 (urban public health was becoming a subject of urgent interest); Myer-

An obvious way to improve public health was to establish open spaces and opportunities for physical exercise in urban areas. As the Select Committee on the Health of Towns reported, the maintenance of open spaces was essential to the health and comfort of the poorer classes.¹¹⁹ Frederick Gale, a contemporary authority on sports, similarly bemoaned the situation of urban workers “who from overwork and constant late hours in cities and large towns, degenerated into effeminate Englishmen.”¹²⁰ The spread of athletics, he promised, would soon transform them into “fine, manly young fellows of pluck and sinew.”¹²¹

The governing classes believed that urban walks and sporting grounds would serve moral purposes as well as promote public health. As the House of Commons Select Committee on Public Walks observed in 1833, such facilities would wean the humbler classes “from low and debasing pleasures.”¹²² Writing to the Committee, the public health expert J.P. Kay complained that “[t]he operative population of Manchester enjoys little or no leisure during the week,” and on Sunday sank into “abject sloth” or “reckless sensuality”. Healthful exercise in the open air was obviously pref-

scough, *supra* note 1 at 13; Mason, *supra* note 3 at 224-27. The Crown appointed a Royal Sanitary Commission in 1864, and in the four years following its 1871 report Parliament enacted seven important health measures (see Hennock, *ibid.* at 115).

¹¹⁹ U.K., H.C., “Report from the Select Committee on the Health of Towns”, No. 384 in *Sessional Papers*, vol. 11 (1840) at xx [hereinafter “S.C. on Health of Towns”]. A number of witnesses testified to the beneficial nature of public walks and games (see *ibid.* Questions 595-97, 1238-46, 2497-98, 2779, 3423). Witnesses before the 1844 Select Committee on Inclosure similarly testified that there “ought to be the greatest possible care taken to provide adequate ground for the recreation of the inhabitants of towns” (U.K., H.C., “Report from the Select Committee on Commons’ Inclosure”, No. 583 in *Sessional Papers*, vol. 5 (1844) at Q. 586 (testimony of Tithe Commissioner). See *ibid.* at Qs. 121-22, 559, 3497-99, 4267, 4277, 4918). Another official report in 1845 noted that the enclosure of public space had excluded people from their former places of exercise and recreation and prevented necessary ventilation. It recommended that local bodies be empowered to raise the funds necessary to provide public walks (U.K., H.C., “Second Report of the Commissioners for Inquiring Into the State of Large Towns and Populous Districts”, No. 602 in *Sessional Papers*, vol. 18 (1845) at 68). The connection between unenclosed space and public health derived partly from a medical mistake; the Victorians believed that air pollution transmitted deadly diseases and that preserving open areas—a city’s “lungs”—was the only preventive measure (see Meller, *supra* note 1 at 110).

¹²⁰ F. Gale, *Modern English Sports* (London: S. Low, 1885) at xviii [hereinafter *Modern English Sports*]. He also stated elsewhere that “surely every opportunity should be given to children of the poor to become active and manly” (see *Sports and Recreations*, *supra* note 36 at 29).

¹²¹ *Modern English Sports*, *supra* note 120.

¹²² U.K., H.C., “Select Committee on Public Walks, Report and Minutes of Evidence”, No. 448 in *Sessional Papers*, vol. 15 (1883) at 8. The Committee reported that during the previous half century, many open spaces in towns had been enclosed “and little or no provision has been made for Public Walks or Open Spaces, fitted to afford means of exercise or amusement to the middle or humbler classes” (*ibid.* at 3). As a result, the only escape from the narrow courts and alleys was the drinking shops. Public walks would allow a man to walk about with his family among neighbors of different ranks, which would improve the cleanliness, neatness, and personal appearance of the working classes (*ibid.* at 9).

erable to such “gross and degrading pursuits.”¹²³ In the same vein, the eminent health reformer Dr. Edwin Chadwick insisted that parks and sporting areas were important “not less for the pleasure they afford in themselves, than for their rivalry to pleasures that are expensive, demoralizing, and injurious to the health.”¹²⁴ He pointed to the conclusion of a Birmingham sanitary committee that the absence of public walks and parks drove working people to “frequent the ale-houses and skittle-alleys for amusement.”¹²⁵

The conviction that open urban spaces would promote “rational recreation” and provide a counter-attraction to less “deserving” amusements persisted and indeed intensified as the century advanced. Clerics in particular embraced a cult of athleticism that seized on recreation and sports as a way of combating urban degeneracy.¹²⁶ As the Bishop of Manchester declared in 1890, healthy outdoor exercise would prevent youths from seeking disagreeable substitutes such as “playing pitch and toss in dark lanes” or gathering at street corners to “hurl scurrilous language at passers-by.”¹²⁷ In 1899 the Royal Commission on Liquor Licensing reported: “The passion for games and athletics—such as football and bicycling—which has been so remarkably stimulated during the past quarter of a century, has served as a powerful rival to ‘boozing,’ which was at one time almost the only excitement open to working men.”¹²⁸ Parks and playgrounds thus increasingly gained recognition as important amenities of city life, and by century’s end amateur sports came to occupy the highest position on the spectrum of recreational respectability.

As momentum developed to secure open spaces for urban leisure activities, Parliament responded with a series of increasingly ambitious legislative enactments. The

¹²³ *Ibid.* at Q. 876.

¹²⁴ E. Chadwick, *Report on the Sanitary Condition of the Labouring Population of Great Britain*, ed. by M.W. Flinn (Edinburgh: Edinburgh University Press, 1965) at 336.

¹²⁵ *Ibid.* at 335. He further quoted the committee to the effect that the “want of some place of recreation for the mechanic is an evil ... to which many of their bad habits may be traced” (*ibid.*). See “S.C. on Health of Towns”, *supra* note 119 at Q. 3423 (metropolitan builder testifying that the lack of “airy places” drove people into public-houses, “where they corrupt each other, because they have no place in which to take exercise”).

¹²⁶ As one historian has noted, the clergy suspected “all indoor recreations except those which took place in the home,” and sought in their place “healthful invigorating manly amusements, especially ones which could take place out of doors” (Hart, *supra* note 106 at 129. See Lowerson & Myerscough, *supra* note 1 at 120-22; *People’s Game*, *supra* note 3 at 56; *Leisure and Society*, *supra* note 1 at 86-87).

¹²⁷ Quoted in Mason, *supra* note 3 at 88.

¹²⁸ U.K., Royal Commission on Liquor Licensing Laws, “Final Report of Her Majesty’s Commissioners Appointed to Inquire into the Operation and Administration of the Laws Relating to Sale of Intoxicating Liquors”, C. 9379 in *Sessional Papers*, vol. 35 (1899) at 2 [hereinafter “R.C. on Liquor Licensing”]. See E. Selley, *The English Public House As It Is* (London: Longmans, Green, 1927) at 138 (lauding open air sports—football, cricket, tennis, bowling greens—as a counter-attraction to the pubs).

first major statute, the *Inclosure Act, 1845*,¹²⁹ lamented the loss of public space caused by previous enclosure acts and prohibited the enclosure of any surviving green. The Act also empowered a new regulatory body, the Inclosure Commission, to require as a condition of enclosure the appropriation of an allotment to the parish “for the purposes of exercise and recreation for the inhabitants of the neighbourhood.”¹³⁰ Subsequent statutes—the *Commons Act, 1876* and the *Commons Act, 1899*,¹³¹ the *Public Health Act, 1875* and *Public Health Acts Amendment Act, 1890*,¹³² and the *Open Spaces Act, 1906*¹³³—went even further in mandating places of exercise and recreation for local inhabitants. The *Commons Act, 1876*, for example, required the Inclosure Commissioners to secure for residents “a privilege of playing games or of enjoying other species of recreation,”¹³⁴ and it expressly declared any encroachment on a green to be a public nuisance.¹³⁵ With regard to London specifically, Parliament authorized the formal recognition of recreational spaces in a series of *Metropolitan Commons Acts* enacted between 1866 and 1878.¹³⁶

Municipalities did not immediately exploit their new powers to establish recreational sites; the high capital cost of land and the mid-Victorian ethos of strict economy initially inhibited local initiative. However, private landowners—admittedly influenced not only by civic ideals but also by the prospect of raising the value of their adjoining property—often donated land for public parks, and private philanthropy

¹²⁹ (U.K.), 8 & 9 Vict., c. 118, s. 15.

¹³⁰ *Ibid.* s. 30. Such an allotment would end rights of common exercisable over the green. See B. Harris, *An Outline of the Law Relating to Common Land and Public Access to the Countryside* (London: Sweet & Maxwell, 1967) at 132-33; R. Hunter, *The Preservation of Open Spaces, and of Footpaths, and Other Rights of Way* (London: Eyre & Spottiswoode, 1896) at 184-85; Malcolmson, *supra* note 1 at 108; J. Williams, *Rights of Common and Other Prescriptive Rights* (London: H. Sweet, 1877) at 252-53.

¹³¹ *Commons Act, 1876* (U.K.), 39 & 40 Vict., c. 56; *Commons Act, 1899* (U.K.), 62 & 63 Vict., c. 30.

¹³² *Public Health Act, 1875* (U.K.), 38 & 39 Vict., c. 55; *Public Health Acts Amendment Act, 1890* (U.K.), 53 & 54 Vict., c. 59. The *Public Health Acts* gave local authorities broad powers to use or acquire land for public gardens, recreation grounds, and public walks (see Harris, *supra* note 130 at 134).

¹³³ (U.K.) 6 Edw. VII, c. 25. It gave local authorities the power of controlling open spaces either through bylaws or direct acquisition. One of its principal effects was to facilitate access to the land for recreation (see Harris, *supra* note 130 at 134).

¹³⁴ *Supra* note 131, s. 7. See Williams, *supra* note 130 at 257. The Act did not prohibit inclosure as such but required Parliament to consider whether it would benefit the neighborhood as well as those with legal interests in the land (see Hunter, *supra* note 130 at 237-38).

¹³⁵ *Supra* note 131, s. 29.

¹³⁶ *Metropolitan Commons Act, 1866* (U.K.), 29 & 30 Vict., c. 122, as am. by *Metropolitan Commons Amendment Act, 1869*, 32 & 33 Vict., c. 107, and *Metropolitan Commons Act, 1878*, 41 & 42 Vict., c. 71 (collectively known as the *Metropolitan Commons Acts*). See Hunter, *supra* note 130 at 230-31. All statutes relating to common recreational land authorized the local authority to make by-laws regulating use of the property (Harris, *supra* note 130 at 138).

remained important throughout the century.¹³⁷ Moreover, by the 1880s even urban ratepayers had become willing to purchase and maintain recreational grounds,¹³⁸ and the courts proved instrumental in dictating the permissible bounds of local governmental action.

B. Judicial Response: Supervision and Creativity

To compensate for the loss of the streets as a popular playground, courts channeled and nourished the efforts of municipalities to provide alternative leisure spaces. They interpreted statutes and deeds to force local authorities to maintain recreational property for its designated purpose, while vesting in municipal officials broad administrative discretion to regulate public use of parks and playing fields. In addition, and perhaps most notably, judges applied the customary law to enforce popular rights to recreation in what had become densely inhabited urban areas.

1. Judicial Constraints on Municipal Uses of Recreational Land

Regardless of the legal instrument that created a public recreational site—an enclosure act, local improvement act, or private grant to a municipality—the courts rigorously preserved the location for leisure purposes and reined in local councils that sought to use the property for other public objectives. In *A.G. v. Mayor of Southampton*,¹³⁹ for example, the court held that Southampton had improperly interpreted a statute to authorize use of recreational land for a cattle fair. According to an 1844 local

¹³⁷ See Best, *supra* note 10 at 63-64; *Recreations*, *supra* note 1 at 39 (the first public park was established under private auspices at Derby in 1840); "Municipal Government", *supra* note 8 at 162; *Rational Recreation*, *supra* note 1 at 38-39; Delves, *supra* note 3 at 100. The Duke of Norfolk presented Sheffield with its first public park in 1847; other benefactors donated parks in Bradford in 1850 and Halifax in 1857 (see *Leisure in the Industrial Revolution*, *supra* note 1 at 151). A number of voluntary organizations worked to preserve municipal open spaces. The Commons Preservation Society, Britain's oldest national amenity society, was founded in 1865; in 1899 it merged with the National Footpaths Society to form the Commons, Open Spaces and Footpaths Preservation Society (see P. Clayden & J. Trevelyan, *Rights of Way: A Guide to Law and Practice* (London: Open Spaces Society, 1983) at 3-4). Other private organizations included the People's Garden Company, founded in London in 1870 (see *Rational Recreation*, *supra* note 1 at 137), and the London Playing Fields Association organized in 1891 (see Mason, *supra* note 3 at 87).

¹³⁸ Best, *supra* note 10 at 63-64; Malcomson, *supra* note 1 at 110; Meller, *supra* note 1 at 109-17; G. Newman, "The Health of the People" in H.J. Laski *et al.*, eds., *A Century of Municipal Progress, 1835-1935* (London: G. Allen & Unwin, 1935) 153; "Municipal Government", *supra* note 8 at 162. Birmingham in 1886 had only ten open spaces comprising 222 acres; by 1913 it had sixty-three open spaces covering 1,298 acres (see Mason, *supra* note 3 at 87). A member of the Birmingham municipal council wrote in 1901: "[W]e can give our town dwellers fewer temptations to irrational excitement, and more opportunities for beneficial enjoyment than they have at present. We can, if we will, let light and air into our towns; we can, if we will, make the most and not the least of the sunshine" (quoted in Meller, *supra* note 1 at 119).

¹³⁹ (1859), 1 L.T. 155, 63 E.R. 957 [hereinafter *Southampton* cited to L.T.].

act, four acres of marsh known as the "Cricket Ground" were to "forever thereafter be subject to such rights of common and of recreation ... as have heretofore been exercised and enjoyed thereon."¹⁴⁰ However, another clause empowered municipal officials to move a traditional cattle-fair to whatever parts of the waste "as they shall think fit."¹⁴¹ When the city moved the cattle fair to the cricket ground, a resident objected. Quoting Chaucer and Tennyson to support its claim that a fair was indeed a form of "recreation", the city argued that it had broad discretion with respect to the use of municipal space. Vice Chancellor Bacon rejected this contention, concluding that it was "quite plain" that the designated land could not be used even temporarily for a non-recreational purpose.¹⁴² Commenting on this case a half-century later, the court in *Down v. A.G.*¹⁴³ noted its "unquestioned correctness" and agreed that a "trust for recreation generally implies that the land must be open for that use every day."¹⁴⁴

Similarly, the Court of Chancery interpreted a statute to prohibit the municipal corporation of Blackpool from using its seaside promenade for motor races to raise money and publicize the city's off-season tourist attractions.¹⁴⁵ A local act passed in 1865 authorized the corporation to maintain a parade to be used "exclusively for purposes of recreation by persons on foot."¹⁴⁶ Construing another piece of legislation enacted thirty years later as incorporating this clause by implication, the Vice Chancellor concluded that the city would abuse this provision by using the promenade even for horses, let alone motor races.¹⁴⁷ In a battle over statutory interpretation, the court again leaned toward a strict interpretation that furthered non-commercial athletic uses over profitable activities, even when conducted by a municipal authority.¹⁴⁸

¹⁴⁰ *Ibid.* at 156.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.* at 157. The city had complained that it would be fettered in the exercise of its powers by a small section of the inhabitants; the court found that it was fettered only "by Act of Parliament" (*ibid.*). Although he was willing to grant a permanent injunction, the judge regretted that the dispute had arisen and hoped that the litigation would be "brought to a close by some arrangement" (*ibid.* at 158). As the private nuisance cases also demonstrated, the courts were reluctant to use coercive judicial powers unless necessary (see Part V, below).

¹⁴³ [1905] 2 C.L.R. 639 (H.C. Austral.) [hereinafter *Down*].

¹⁴⁴ *Ibid.* at 660.

¹⁴⁵ *A.G. v. Blackpool Corp.* (1907), 71 J.P. 478.

¹⁴⁶ *Ibid.* at 479.

¹⁴⁷ *Ibid.* at 480.

¹⁴⁸ The same interpretative approach was evident in *Down*, *supra* note 143, where the residents of Brisbane sued the city for allowing use of its cricket ground for horse and pony racing. A grant from the Crown conveyed the land to trustees "as a reserve for cricket and other athletic sports and for no other purposes whatsoever" (*ibid.* at 640). The court declared that the races substantially interfered with the use of the ground for the specific purposes of the trust. A "reserve for cricket and athletic sports" did not mean "a reserve for other sports" (*ibid.* at 655). The court reached this decision despite the fact that race meetings brought the trustees a rental sum that comprised their most important source of revenue (*ibid.* at 666).

The same determination to force municipalities to use recreational sites for their designated leisure purposes shaped the courts' approach to construing private deeds. *Stourcliffe Estates Company v. Corporation of Bournemouth*¹⁴⁹ upheld a private covenant preventing Bournemouth from erecting buildings on park land, even though the city was authorized precisely to take this action under its other public powers. In 1904 Bournemouth purchased land for recreational use pursuant to the *Public Health Act, 1875*, and the seller insisted upon a covenant prohibiting any building on the property. The covenant conflicted, however, with Bournemouth's authority under its *Improvement Act* to erect "buildings and conveniences" in any public park, garden, or recreation ground. In 1909 the city proposed to erect lavatories and urinals on part of the property, and a neighbouring estate invoked the conveyance to enjoin the construction. Finding for the plaintiff, the court held that the restrictive covenant did not improperly limit the city from exercising powers vested in it for the public benefit. Lord Parker observed that it would be difficult for a municipality to acquire land for parks without such an enforceable covenant because a landowner often sought to inhibit development to protect his remaining property.¹⁵⁰ On appeal, the Court of Appeal found it a "startling" proposition that a city could ignore restrictive covenants attached to property, and it agreed with Lord Parker that nullifying such a covenant would effectively preclude contracts with private landowners.¹⁵¹ Thus, to facilitate the purchase of recreational land—and incidentally to benefit neighbouring landowners—the Court of Appeal gave priority to a private contractual provision over a municipal corporation's general statutory powers.

In contrast, courts allowed towns some latitude in using recreational property when a municipal project, while not strictly in conformity with a grant, nonetheless furthered the goal of "rational recreation". In 1844 the Treasury awarded the municipal corporation of Sunderland a monetary grant to purchase property on condition that the site would be "legally and permanently saved as a place of recreation for the people."¹⁵² Accordingly, when the city eventually acquired the land in 1853, it agreed to use it only for public walks or pleasure grounds. Ten years later the Home Secretary sanctioned Sunderland's purchase of ten adjoining acres on the same condition. The city determined to use a small portion of the new lot to build a museum, public library, art school, conservatory, and several public office buildings. Three residents of Sunderland immediately sued to restrain the corporation from erecting buildings "not needed for or incidental to the maintenance of the said parks as public walks or pleasure-grounds."¹⁵³ The corporation responded that it had discretion to act for the public benefit and that the proposed buildings were not inconsistent with the purposes of a park.¹⁵⁴

¹⁴⁹ [1910] 2 Ch. 12 (C.A.).

¹⁵⁰ *Ibid.* at 15.

¹⁵¹ *Ibid.* at 18.

¹⁵² *A.G. v. Corp. of Sunderland*, [1876] 2 Ch. 634 at 635 (C.A.).

¹⁵³ *Ibid.* at 636.

¹⁵⁴ *Ibid.* at 637.

Not surprisingly, both Vice Chancellor Bacon and the Court of Appeal ruled that constructing a town hall and public office buildings would be plainly unlawful. The park had been appropriated as a "place of recreation", and the corporation had no more authority to use the land for a town hall than for a shop.¹⁵⁵ Somewhat unexpectedly, however, both courts found that the buildings intended to house a conservatory and library would be permissible. Indeed, Lord James in the Court of Appeal observed that a conservatory was a construction that "you would expect as a matter of course to find in first-rate pleasure-grounds," and a library was conducive to public walks because it was a place "into which people may turn if the weather becomes unfavourable."¹⁵⁶ The case thus illustrated judicial willingness to strain the contractual language—in this case, to construe "public walks" to mean buildings—to serve the broader approved purposes of "rational recreation".¹⁵⁷

Revealingly, the rigorous scrutiny that courts applied to the proposed use of recreational land for non-recreational purposes did not extend to the projected use of non-recreational land for leisure pursuits. The Court of Chancery, for example, allowed the Teddington council to use land designated for "the reception and disposal of sewage" for a public pleasure ground, promenade, and artificial lake.¹⁵⁸ Lord Romer acknowledged that the defendants were prohibited from employing the land for any purpose inconsistent with sewage, but he nonetheless thought that they could legitimately use it temporarily but indefinitely as a recreational ground.¹⁵⁹ The plaintiffs had plausibly contended that some of the planned improvements—notably the construction of a lake and bathing area—would permanently interfere with future use of the property for sewage purposes. The court, however, magnanimously concluded that it would accept the defendants at their word.¹⁶⁰

In addressing municipal uses of land, therefore, the courts firmly limited the discretion of urban authorities to utilize recreational property for purposes other than public walks and games, allowing broader uses only exceptionally and in the service

¹⁵⁵ *Ibid.*, at 641, James L.J.

¹⁵⁶ *Ibid.* at 641-42. The other Court of Appeal judges agreed that a museum, library, and conservatory would improve the grounds in their character of public walks and pleasure-grounds (*ibid.* at 642-43).

¹⁵⁷ This approach was also evident in *A.G. v. Bradford Corp.* (1911), 75 J.P. 553, where the court permitted Bradford to relieve traffic congestion in a busy road by adding five thousand square yards of nearby park property to the road to widen it. The court was careful to note that the proposed work would increase the "enjoyment of the park" (*ibid.* at 557).

¹⁵⁸ *A.G. v. Teddington Urban District Council*, [1898] 1 Ch. 66 [hereinafter *Teddington*].

¹⁵⁹ *Ibid.* at 70. In contrast, in *A.G. v. Hanwell Urban District Council*, [1900] 2 Ch. 377, the Court of Appeal refused to allow the municipal council to use land designated for sewage, which all parties agreed could never be used for such a purpose because of the elevation of the land, from erecting a permanent hospital on the site.

¹⁶⁰ *Teddington*, *supra* note 158 at 71-72. The court (at 70) distinguished *A.G. v. Southampton*, *supra* note 139, the cattle fair case, on the ground that there the terms of the trust had prevented the land from being used even temporarily for anything but recreation.

of rational self-improvement.¹⁶¹ Conversely, as will be shown below, they conferred on municipalities substantial flexibility to regulate the conduct on leisure sites of individual users. In both respects the courts staunchly planted themselves in favour of a policy of maximizing recreational opportunities for the general urban population.

2. Judicial Validation of Local Use Regulations

While the courts interpreted statutes and covenants restrictively to restrain municipalities from using leisure space for other purposes, they energetically supported the efforts of local bodies to limit individual citizens in their use of public recreational land. Indeed, they validated local regulatory schemes striking in their comprehensiveness and specificity. In London, for example, the Metropolitan Board of Works promulgated rules for municipal parks and commons that were meticulous in their detail, prohibiting such activities as playing cards, removing sand, drying clothes, skimming ice from a lake, climbing fences, catching birds, throwing stones, cursing, and quarreling.¹⁶² The regulations also declared football, cricket, and other games to be unlawful except at places set apart by the Board for such purposes, while preventing spectators from interfering with persons lawfully playing games at their sanctioned locations.¹⁶³ The *Parks Regulation Act, 1872*¹⁶⁴ authorized similar rules governing public conduct in the royal parks and gave the keepers the power to arrest violators without warrant. Banned activities included practising gymnastics, playing games or music, delivering a public address, walking on shrubbery, plucking a leaf,

¹⁶¹ Although the court ensured that municipalities used recreational space for that purpose only, they were careful not to allow public bodies to establish recreational grounds by riding roughshod over the rights of private owners. In *Tulk v. Metropolitan Board of Works* (1868), L.R. 3 Q.B. 682, the Metropolitan Board of Works took possession of Leicester Square, then in a dilapidated state, pursuant to the *Act for the Protection of Garden or Ornamental Grounds in Cities and Boroughs, 1843*, 26 Vict., c. 13, ss. 1-2. The Act provided that the Board of Works could take charge of any neglected garden or ornamental ground set apart “otherwise than by the revocable permission of the owner” for the use or enjoyment of the inhabitants. The plaintiff brought an action in trespass against the Board. The Exchequer Chamber, affirming a judgment of Queen’s Bench, held that the garden had not been used by the inhabitants of the square otherwise than by the “revocable permission of the owner”. Reviewing the applicable conveyances and contracts going back to 1786, the court concluded that although the owner was required to keep the square as an ornamental garden, “there exists not the slightest legal right of any kind or sort in any inhabitant of this square in the way of entering to use or enjoy the square garden” (*Tulk, ibid.* at 685). The square was the property of one or two individuals subject to a covenant to keep it as an ornamental garden, and the Board could not throw it open to the inhabitants of the square or even the whole public. Baron Bramwell cautioned the plaintiff, however, that he was not entitled to build on the land (*ibid.* at 688).

¹⁶² See U.K., H.C., “Public Meetings in Metropolitan Open Spaces: Correspondence from October 1878 to March 1888 between the Secretary of State for the Home Department and the Metropolitan Board of Works relating to the Right of Public Meeting in certain Open Spaces subject to the jurisdiction of the Board”, No. 126 in *Sessional Papers* (1888) at 3-7 [hereinafter “Public Meetings in Metropolitan Open Spaces”].

¹⁶³ See *ibid.* at 5.

¹⁶⁴ (U.K.), 35 & 36 Vict., c. 15.

using profane language, “worrying” an animal, or annoying any other person enjoying the park.¹⁶⁵ No challenge to such comprehensive regulatory schemes was ever judicially sustained. Lord Alverstone reflected the courts’ generally pro-regulatory stance in recreational cases when he observed in *Musgrave v. Kennison*¹⁶⁶ that he would conclude only reluctantly that an unpopular regulation was *ultra vires* the powers of a municipality.¹⁶⁷

The courts were especially scrupulous in supporting local restrictions on the sale of products or services in recreational areas, considering commercial activity to be an interference with “true” recreation. For example, in 1879 William Hambly, a photographer, was prosecuted for breaching a bylaw for a Camberwell recreation ground that prohibited the presence of any “carriage, caravan, cart, wagon, or any other wheeled vehicle, except perambulators.”¹⁶⁸ Hambly had obtained a licence to sell photographs on week days, but he exceeded his permission by setting up his photographic apparatus—a hand-drawn wooden cupboard on two wheels—on a Sunday. The magistrates had no problem treating his apparatus as a “wheeled vehicle” under the act.¹⁶⁹ In another case challenging a commercial regulation, the court in *Gray v. Sylvester*¹⁷⁰ approved the application to a newspaper vendor of a local bylaw proscribing unlicensed selling on the seaside. Relying on the hymn-singing cases, *Johnson and Munro*,¹⁷¹ the defendant argued that the regulation was overly broad in prohibiting what was not necessarily a nuisance. The Divisional Court, however, determined that *Munro and Johnson* were inapposite because the instant case involved recreation at the seashore. It was not unreasonable, the court declared, “that persons on the foreshore or esplanade should be freed from the importunities of hawkers and other vendors of goods.”¹⁷² The judges, in other words, readily upheld ordinances that eradicated hawkers or vendors—in contrast to hymn singers—who cluttered public spaces.

Not all sales of printed materials, however, were necessarily unlawful. Exercising its statutory powers, the London County Council (“LCC”) enacted a bylaw that prohibited selling in parks, gardens, and open spaces without the Council’s written consent. It then passed a general resolution terminating all existing permissions and refusing to issue any new ones. Pursuant to this blanket policy, the Council rejected an

¹⁶⁵ *Ibid.*, s. 5 & First Schedule.

¹⁶⁶ (1905), 92 L.T. 865 at 868.

¹⁶⁷ *Ibid.* The case considered a 1904 regulation under the *Parks Regulation Act, 1872*, *supra* note 164, s. 9, which prohibited a car propelled by mechanical means from proceeding faster than ten miles per hour. In 1905 Kennison drove his motor car in Green Park at an excessive speed. Lord Alverstone did not even bother to hear the government’s argument.

¹⁶⁸ *R. v. Hambly* (1879), 42 J.P. 495.

¹⁶⁹ *Ibid.* at 495.

¹⁷⁰ (1897), 61 J.P. 807 [hereinafter *Gray*].

¹⁷¹ See *supra* notes 99-103 and accompanying text.

¹⁷² *Gray*, *supra* note 170 at 807. See also *Williams v. Weston-super-Mare Urban District Council* (1908), 72 J.P. 54 (upholding local bylaw prohibiting stalls on the beach); *Moorman v. Tordoff* (1908), 72 J.P. 142 (invalidating local bylaw designating a particular part of the seashore for selling).

application from the National League for the Blind to sell pamphlets during meetings at Finsbury Park and Parliament Hill. The Divisional Court found for the organization, reasoning that the Council had discretion similar to that of the liquor licensing justices, who were required to hear each application on its individual merits.¹⁷³ Acknowledging that an appropriate process would not ultimately benefit the League, as the Council would likely deny its request, Mr. Justice Avory nonetheless supported the society's legal right to have its application individually reviewed.¹⁷⁴ In functional terms, however, this procedural victory for the League did not infringe materially on the LCC's power to regulate public space. More significantly, even this temporary procedural setback for the Council came only in a case where the defendant was a highly sympathetic charity pursuing an undeniably "moral" objective.

In considering other types of bylaws, the courts equally promoted their vision of recreational "rationality" through strict and sometimes contorted readings of regulatory requirements. In 1880 Edward Michell brought two birds that he owned, a falcon and a tame pigeon, to Wimbledon Common. He threw the birds into the air and followed the falcon's unsuccessful pursuit of the pigeon for over half a mile. The town council prosecuted him for violating a bylaw providing that no person could "shoot or chase game or other birds or animals upon any part of the commons."¹⁷⁵ A metropolitan police court magistrate dismissed the case on the ground that the bylaw obviously did not apply to tame birds brought to the common by their owners. Mr. Justice Field disagreed, remarking that the object of the bylaw was to create an ornamental ground free from any nuisance. Reflecting the judiciary's solicitude for preserving recreational space, he warned against the ominous slippery slope: "[I]f this were not within the mischief, the common might be turned to uses never contemplated."¹⁷⁶ The magistrates, he concluded, had failed to interpret the applicable bylaw with sufficient rigour.¹⁷⁷

¹⁷³ *R. v. London County Council*, [1918] 1 K.B. 68 at 73.

¹⁷⁴ *Ibid.* at 74. Mr. Justice Sankey agreed that the "right to be heard is one of those public safeguards which we should always struggle to preserve" (*ibid.* at 75).

¹⁷⁵ *Harper v. Michell* (1880), 44 J.P. 378 at 378.

¹⁷⁶ *Ibid.* Mr. Justice Manisty's view as well was that even chasing a tame pigeon was chasing a "bird".

¹⁷⁷ The courts were, however, also solicitous of adjoining landowners, not allowing even "rational" activity to encroach unreasonably on the property rights of reputable neighbors. In *Clifton v. Viscount Bury* (1887), 4 T.L.R. 8, another case involving Wimbledon Common, the Divisional Court restricted the Volunteer Corps from conducting rifle practice so as to annoy Viscount Bury, a former Major General of the Army. The Viscount sued the 12th Middlesex Volunteer Corps and its officers for raining bullets on his field during shooting drills. The Corps' defence was that the *Putney and Wimbledon Commons Act, 1871* authorized it to use certain parts of the common for rifle shooting practice. Mr. Justice Hawkins countered that the Act conferred no power over any other land, and "[n]obody could suggest seriously that the line of fire over Newlands Farm formed a part of the common" (*ibid.* at 9). Although the plaintiff had not suffered and was unlikely to suffer much damage, the defendants' use of the range "constituted a series of trespasses of an actionable character, unjustified by any statutory enactment or otherwise" (*ibid.*). The judge did not prohibit such a salutary activity,

Perhaps the most serious and controversial limitations imposed by local governments on individual conduct in recreational areas related to public speech. Here, too, the courts consistently upheld municipal restrictions, treating sermons or speeches as inconsistent with "legitimate" recreation. *Bailey v. Williamson*,¹⁷⁸ for example, involved a Hyde Park regulation that banned public addresses except within forty yards of a particular notice board and with two days' advance written notice.¹⁷⁹ To test the validity of the regulation, Bailey delivered a speech without notice 106 yards from the notice board. Chief Justice Cockburn impatiently dismissed Bailey's claim that the rule violated his constitutional rights, which he characterized as a "very startling" assertion.¹⁸⁰ The parks were royal property, he proclaimed, and the public enjoyed them only by the "gracious concession" of the Crown.¹⁸¹

The appellant's counsel seemed to be under the idea which has been put forward lately, that persons were by law entitled to do what they liked in the parks,

however, but enjoined future use of the range "in such manner as to cause bullets fired along it to traverse the land of the plaintiff" (*ibid.*). The court thus "rationalized" the practice in a manner that would not unduly interfere with the comfort of a reputable adjoining property owner. See *Torquay Local Board v. Bridle* (1882), 47 J.P. 183 [hereinafter *Torquay*].

¹⁷⁸ (1873), L.R. 8 Q.B. 118 [hereinafter *Bailey*].

¹⁷⁹ The *Parks Regulation Act, 1872*, *supra* note 164, First Schedule, s. 8, approved a provision that "[n]o person shall deliver, or invite any person to deliver, any public address in a park except in accordance with the rules of the park." It invited the Ranger of the park or the Commissioners of Works to make appropriate rules for each park (*ibid.*, s. 19). Even prior to this enactment, the police had frequently issued orders banning the holding of meetings in the royal parks. See *e.g.* U.K., H.C., "Police Order, Meetings in the Parks", No. 272 in *Sessional Papers* (1862) at 1-2 (meetings banned because they were "inconsistent with the purposes for which the parks are thrown open to and used by the public"); U.K., H.C., "Police Orders, Meeting in Hyde Park", No. 49 in *Sessional Papers* (1866) at 1 (meetings declared illegal because "inconsistent with the purposes for which the Park is thrown open to and used by the public").

¹⁸⁰ *Bailey*, *supra* note 178 at 125.

¹⁸¹ *Ibid.* Mr. Justice Blackburn agreed with this analysis. Conceding that the parks had long been devoted to the purpose of public recreation and that any minister of the Crown who revoked public enjoyment of the parks would be ill advised, he insisted that nonetheless no court of law could "say that he could not do it" (*ibid.* at 126). It was of course always the position of the administration that parks were subject to regulation at royal will. As Sir George Grey stated to the House of Commons in 1864, parks were the property of the Crown, and meetings were "utterly inconsistent with the objects for which the parks had been dedicated to the use of the public" (U.K., H.C., *Parliamentary Debates*, 3d ser., vol. 175, at col. 775 (27 May 1864)). See *ibid.* at col. 367 (12 May 1864) (meetings interfered "with the object for which the Parks were designed—namely, the enjoyment and recreation of all classes of people"). Similarly, the Earl of Derby declared in 1866 that the Crown had the undoubted right to prevent the parks from being diverted "to objects which may interfere with the enjoyment and recreation of the people" (U.K., H.L., *Parliamentary Debates*, 3d ser., vol. 184, at col. 1371 (24 July 1866)). Prime Minister Walpole agreed that assemblages "certainly would interfere with the recreation of quiet and orderly people, for whom the parks, the property of the Crown, are open" (*ibid.* at col. 1074 (19 July 1866)). See S. Walpole, *The History of Twenty-Five Years*, vol. 2 (London: Longmans, Green, 1904) at 170-71 (the parks of London were "consecrated to the amusements of the people", and to the upper classes "it seemed intolerable that the children of toil should invade their special domain for the purpose of proclaiming their own faith in democratic principles").

to make speeches or anything of the kind. I am aware of no legal principle and no authority, and I am quite confident that there is no enactment which says anything of the sort.¹⁸²

The judge observed that the statute was directed at the “modern inconvenience” of using the metropolitan parks “for other purposes than those of recreation and exercise.”¹⁸³

A few years later, a similar issue arose regarding not a royal park but a metropolitan common dedicated to recreation pursuant to the *Metropolitan Commons Supplemental Act, 1877*. The Metropolitan Board of Works issued a bylaw for Clapham Common prohibiting any speech, lecture, or sermon unless previously approved by the Board in writing. In 1880 a metropolitan police magistrate convicted John De Morgan for infringing the bylaw by delivering a speech on the common without permission.¹⁸⁴ The defendant claimed on appeal that the regulation was *ultra vires* the statute for contravening the public’s traditional right to hold meetings on the common. Acknowledging that public meetings had taken place on the site in the past, the court treated the practice as nothing more than “an excused or licensed trespass”.¹⁸⁵ There was no right to free speech “known to the law”, and if the defendant’s argument were correct, “any number of public meetings might be held at the same time in various parts of the common” to the exclusion of “that portion of the public who desired to use it for the purpose of recreation.”¹⁸⁶

Its policy judicially validated in *De Morgan*, the Metropolitan Board of Works continued throughout the 1880s to restrict public speaking in London parks and commons on the ground that it would interfere with the recreation of the people.¹⁸⁷ The Board encountered some resistance, however, from William Harcourt, the Liberal Home Secretary, who conceded that there was no legal impediment to such regulation but nevertheless thought it impolitic. In 1881 Harcourt wrote to the Commissioner of the Board that public meetings were “productive of no evil and their prohibition tend[ed] to provoke irritation and disturbance.”¹⁸⁸ His was an isolated view, however,

¹⁸² Bailey, *supra* note 178 at 129.

¹⁸³ *Ibid.* at 122. The *Parks Regulation Act* was passed to “secure the public from molestation and annoyance while enjoying such parks, gardens, and possessions” (*ibid.* at 126-27).

¹⁸⁴ *De Morgan v. Metro. Bd. of Works* (1880), 5 Q.B.D. 155.

¹⁸⁵ *Ibid.* at 157.

¹⁸⁶ *Ibid.* at 158. He added that the parliamentary scheme was to secure in perpetuity a place of public recreation. Riding, boating, cricketing, bathing, and the like were subject to reasonable restrictions, and it was “equally necessary that the holding of public meetings on the common should be also put under regulation” (*ibid.*).

¹⁸⁷ “Public Meetings in Metropolitan Open Spaces”, *supra* note 162 at 39.

¹⁸⁸ He advised the Board to grant a “reasonable liberty in this matter”, stating that he never contemplated that bylaws would be employed to prohibit peaceful and orderly meetings (*ibid.* at 22). On Harcourt’s efforts to relax prohibitions on public speaking in the royal parks, see A.G. Gardiner, *The Life of Sir William Harcourt*, vol. 1 (London: Constable, 1923) at 236-39. Harcourt was equally tolerant of popular fairs and other entertainments, which contrasted with the generally restrictive views of other cabinet ministers, civil servants, and judges (see “Metropolitan Fairs”, *supra* note 2 at 178-79).

and the Board, unequivocally supported by the magistrates, continued to enforce restrictions on political assemblies. For example, in August 1883 a police magistrate, openly doubting that Harcourt had “heard the whole story”, proceeded to convict three persons for unlawfully holding a meeting in violation of the bylaws for Southwark Park. The magistrate considered it “no recreation to listen to sermons in the open air, nor was it to the public advantage, or conducive to enjoyment and health of the people, that half-a-dozen persons should thrust themselves on thousands who went to the park for recreative purposes.”¹⁸⁹ Relations between Harcourt and the Board remained tense, with the Board insisting that Parliament had vested it with control over the commons precisely that “a stop might be put to the preaching and declaiming ... and interfere[nce] with the quiet enjoyment of those who sought recreation.”¹⁹⁰ Eventually a compromise was reached whereby meetings were permitted with advance notice but without the need for Board approval in specified areas of London parks and commons. Had the Board of Works hewed to its original line, however, the courts would unquestionably have supported even absolute prohibitions on free speech in recreational areas.¹⁹¹

In only two reported instances did the courts overturn local regulations governing public use of recreational sites. In the first, a neighbour was fined under a bylaw for allowing his fowls to wander into a recreation ground, and the court concluded that the regulation unfairly punished adjacent property owners.¹⁹² In the second, the court rejected municipal rules controlling the operation of a golf club as discriminatory

¹⁸⁹ See “Public Meetings in Metropolitan Open Spaces”, *supra* note 162 at 26.

¹⁹⁰ *Ibid.* at 34.

¹⁹¹ There was also no legal right to deliver an address on—or even have access to—the beach. See *Blundell v. Catterall* (1821), 5 B. & Ad. 553, 106 E.R. 286 [hereinafter *Blundell*] (no right to cross a beach to swim in the ocean); *Llandudno Urban District Council v. Woods*, [1899] 2 Ch. 705 (no right to preach a sermon on the beach); *Brighton Corp. v. Packham* (1908), 72 J.P. 318 (no right to deliver an address on the foreshore) [hereinafter *Packham*]; *Slee v. Meadows* (1911), 75 J.P. 246 (municipality may issue regulation prohibiting speeches on the beach). On the use of nuisance charges to suppress political speeches on the highway, see “Right to Passage”, *supra* note 30 at 962-90.

¹⁹² A local board, pursuant to its powers to regulate under the *Public Health Act, 1875*, *supra* note 132, s. 164, had issued a bylaw that “a person shall not cause or suffer any fowl, goose, or duck belonging to him, or in his charge, to enter or remain in the pleasure grounds” (*Torquay*, *supra* note 177). Six fowls wandered into the Upton Valley pleasure ground, which was entirely unfenced, and the owner was fined. The board argued that the bylaw was necessary to induce the owners of fowls to keep them within their own grounds; otherwise, the local authorities would need to hire someone to drive out the geese. The Divisional Court did not find this prospect troubling, Mr. Justice Stephen observing that “a very small boy, indeed, would quite suffice” (*ibid.* at 183). Lord Coleridge declared that the regulation was “a serious thing for people who have fowls near these gardens when the fowls wander” (*ibid.*). Inasmuch as there was no fence, he did not think that the owner should be criminally punished when his fowls passed across the boundary of his property without his having had anything to do with it. That this imposition on the landowner vexed the judges was made clear in *Gay v. Powell* (1884), 51 L.T. 92 at 93, where Mr. Justice Stephen again referred to *Torquay*, observing that the bylaw was “completely unreasonable” because a man was liable to be fined thirty pounds “on account of six fowls which had got through.”

against non-members.¹⁹³ These exceptions simply confirmed the courts' usual practice of validating local rules except in highly unusual circumstances where they sought to protect adjacent land owners or encourage participation in "rational" sports such as cricket and golf. While constraining cities from using recreational sites for other than leisure purposes, the judiciary generally conferred on municipalities expansive powers to regulate individual use of property in the service of "pure" recreation.

3. Judicial Ingenuity: Customary Rights in the Service of Modern Recreation

The courts influenced the course of recreational change not only by interpreting statutes and regulations but also by employing traditional common law doctrines to improve the physical amenities of urban life. Specifically, they supported citizens' efforts to reclaim particular urban locations for sports and exercise through trespass actions against landowners, whether private persons or public entities, that charged them with interfering with the inhabitants' "customary right to recreation". Judicial sympathy for such claims illustrated the manner in which flexible use of "ancient" common law doctrines could promote the "modern" and "rational" objective of urban amateur athleticism.

The first reported case dealing with customary recreational rights appeared in the seventeenth century, when the Court of King's Bench in *Abbot v. Weekly*¹⁹⁴ upheld the

¹⁹³ *Conservators of Mitcham Common v. Cox*, [1911] 2 K.B. 854. The case involved a regulatory scheme under the *Metropolitan Commons Acts, 1866*, *supra* note 136, whereby a golf club conveyed title over its property to the town of Mitcham in return for regulations providing that golf could not be played anywhere else on the common; that no one could play golf without a permit and accompanied by a caddie authorized by the club; and that only club members could play on a particular course on Saturdays. Two non-members tested the bylaws by playing on the reserved course without a permit or club-authorized caddie on a Saturday. A majority of the court sided with the defendants, holding that the conservators could not reserve part of the common to private associations or particular categories of people when the legislature contemplated "regulation and management" for the equal good of all (*ibid.* at 874). Moreover, the *Metropolitan Commons Acts* had been passed not to benefit Mitcham but the public at large: "[T]he dweller in Kensington has as much right to recreate himself there as the dweller in Mitcham" (*ibid.* at 876). Lord Scrutton loudly dissented, viewing the case as important because it would also govern cricket and football on metropolitan commons or parks. Parliament had conferred on the elected conservators the right to regulate use of the common for recreation and games, he declared, and *De Morgan* had established that public use must be restricted to allow any effective use at all. He did not agree that the defendants should have equality with the people whose money made the golf course possible (*ibid.* at 881-82, 887). Three years later, however, the court upheld rules permitting play only with a caddie while prohibiting nonmembers from requesting a caddie during certain hours. In the view of the court, such an exclusion was only "partial, discontinuous and temporary" (*Harris v. Harrison* (1914), 78 J.P. 398 at 399).

¹⁹⁴ (1665), 1 Lev. 176, 83 E.R. 357 [hereinafter *Abbot* cited to Lev.]. The landowner brought an action for trespass against an inhabitant for breaking into his close to dance on his field, and the court upheld the defendant based on a customary right. The plaintiff had argued that an enforceable easement must be useful and necessary, such as a right to cross land to reach a church, but the court held

"immemorial right" of the inhabitants to dance in a field. By the nineteenth century the basic legal principles governing the right to recreation were largely settled. It was not a "right of common"—that is, an economic right to the product of a field¹⁹⁵—but rather a customary right of enjoying "recreation and amusement, air and exercise, or the playing of all manner of lawful games and pastimes."¹⁹⁶ The customary right of recreation was grounded in "local" common law, the special common law of a particular place, rather than the "general" common law.¹⁹⁷ Such a right was proved by recreational usage "from time immemorial", conventionally dated from the accession of Richard I in 1189.¹⁹⁸

In addition to being of ancient lineage, a valid custom had to be reasonable, certain, and continuous.¹⁹⁹ The Court of King's Bench first construed the criterion of "reasonableness" in the seventeenth-century dancing case, when it concluded that the custom was reasonable because it was "necessary for inhabitants to have their recreation."²⁰⁰ "Certainty" meant that the custom inhered not in an amorphous public group but only in the inhabitants of a particular locality. In *Fitch v. Rawling*,²⁰¹ for example, the court held that a custom for people to play cricket on a field in Essex would not be good for the world at large but only for the inhabitants of the village and their guests. "Continuous" use required that persons claiming the right had never acquiesced in its

that it was sufficiently necessary for the inhabitants to "have their recreation". See on this point C.I. Elton, *A Treatise on Commons and Waste Lands* (London: Wildy & Sons, 1868) at 286.

¹⁹⁵ A right of common was a right to take some part of any natural product of the land of another. There were four principal rights of common: pasture, turbary, estovers, and piscary (see Elton, *ibid.* at 2, 13).

¹⁹⁶ *Hammerton v. Honey* (1876), 24 W.R. 603 at 603 [hereinafter *Honey*]. See *New Windsor Corp. v. Mellor*, [1975] Ch. 380 at 386 (C.A.) [hereinafter *Mellor*]; Elton, *supra* note 194 at 283 (a right of recreation was an easement of taking exercise and recreation over the waste).

¹⁹⁷ The general public had no right of recreation; the "general custom of the realm" did not recognize easements of recreation for the public at large over private property (see *Blundell*, *supra* note 191; Elton, *supra* note 194 at 289-91). The custom could inhere only in the inhabitants of a local area. The reason for this restriction was because otherwise "the owners of property would virtually be divested of all open and uninclosed lands over which people have been allowed to wander and ramble as they pleased" (*ibid.* at 291-92). See *Dyce v. Hay* (1852), 1 Macq. 305 at 309 [hereinafter *Dyce*] (a right on behalf of the public generally would be "entirely inconsistent with the right of property").

¹⁹⁸ *Honey*, *supra* note 196 at 603.

¹⁹⁹ The Exchequer Chamber summarized the applicable legal principles in *Tyson v. Smith* (1838), 9 A. & E. 406 at 421: "It is an acknowledged principle that, to give validity to a custom ... it must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption." See generally J.D. Lawson, *The Law of Usages and Customs* (St. Louis: F.H. Thomas, 1881).

²⁰⁰ *Abbot*, *supra* note 194 at 177. It was not reasonable, however, for horsemen to ride over arable land when the corn was growing (see *Bell v. Wardell* (1740), Willes 202 at 207, 125 E.R. 1131 [hereinafter *Bell*]). The opinion in *Bell* reprinted (at 205, n. 6) the earlier decision of *Millechamp v. Johnson*, Willes 205 [hereinafter *Millechamp*], where the court interpreted a custom to enjoy rural sports at all times of the year to mean legal and reasonable times. However, that limitation was later reversed (see *infra* note 212).

²⁰¹ (1795), 2 H. Bl. 394, 126 E.R. 614 [hereinafter *Fitch*]. See *Edwards v. Jenkins*, [1896] 1 Ch. 308 (a right of recreation cannot lie in the inhabitants of several adjoining parishes) [hereinafter *Edwards*].

substantial interruption or disturbance.²⁰² If these requirements were satisfied, any inhabitant could sue on behalf of others in the locality to enforce a customary right to recreation.²⁰³

Applying these rules expansively, a series of judicial decisions in the late nineteenth century validated the efforts of inhabitants to carve out secure recreational spaces in what had now become densely populated urban areas. The reinvigoration of these long-existing rules was due to a number of factors, most generally the widely perceived need to provide urban residents with areas for healthful exercise.²⁰⁴ More particularly, the Report of the Select Committee on Open Spaces in 1865 had criticized the courts for their crabbed interpretation of doctrines of customary rights. Noting that “[l]egal authorities appear most unwilling to admit any general public right to exercise and recreation ... unless limited to some certain defined body of persons,” it recommended legislation “to remedy what appears to us to be a somewhat narrow doctrine of the Courts, hardly in accordance with the general principles of the law having regard to the increased population of large towns in later times.”²⁰⁵ Ironically, the Report itself, urging the preservation of customary rights, stimulated landowners to extinguish them more speedily. Anticipating restrictive legislation, property owners immediately enclosed Bostal Heath and commons at Berkhamsted, Plumstead, and Tooting while also fencing off hundreds of acres of Epping Forest.²⁰⁶ Their aggressively proprietorial reaction doubtless reinforced the judicial inclination to respond affirmatively to residents’ claims.

While not formally altering the traditional doctrine that recreational rights inhered only in local inhabitants, the courts began to apply it more leniently to preserve recreational rights. In *Warrick v. Queen’s College, Oxford*,²⁰⁷ four residents of Plumstead sued the Provost and Scholars of Queens College, Oxford, for their enclosure of Plumstead Common, Bostal Heath, and Shoulder-of-Mutton Green with the intention of leasing the sites to the War Department.²⁰⁸ Lord Romilly, Master of the Rolls, found “distinct evidence that for a long time past the green has been used as a place of pastime by the inhabitants of the parish of Plumstead.”²⁰⁹ He then reserved the area in perpetuity to the local community. Magdalen College, Oxford, fared no better when

²⁰² *Honey*, *supra* note 196 at 603. People did not as a general rule “quietly acquiesce in the disturbance of their rights, and therefore when there has been long-continued interruption you naturally come to the conclusion that there never was any such law” (*ibid.* at 603-04).

²⁰³ See *Mellor*, *supra* note 196 at 387; *Wylde v. Silver*, [1963] Ch. 243 at 257.

²⁰⁴ See Part III.A, above.

²⁰⁵ U.K., H.C., “Second Report from the Select Committee on Open Spaces (Metropolis)”, No. 178 in *Sessional Papers*, vol. 8 (1865) at iv-v [hereinafter “S.C. on Open Spaces”].

²⁰⁶ See *Leisure in the Industrial Revolution*, *supra* note 1 at 152.

²⁰⁷ (1870), L.R. 10 Eq. 105.

²⁰⁸ These enclosures led to the formation of the Commons Preservation Society in 1865, a body that fought for the legal rights of commoners (see *Leisure in the Industrial Revolution*, *supra* note 1 at 152).

²⁰⁹ *Ibid.* at 129.

the inhabitants of Appes Quinton, Gloucestershire, challenged its inclosure of their green. The action of the college, the court held, was *ultra vires* the enclosure statutes as an unlawful effort to abolish the recreational rights of parish residents.²¹⁰

Other cases in the late nineteenth century demonstrated the courts' willingness to relieve recreational claimants of the burden of various procedural and evidentiary requirements. In *Mounsey v. Ismay*,²¹¹ for example, the citizens of Carlisle, claiming a custom of exercising horses every Ascension Day, destroyed barriers that the landowner had erected around a particular piece of land. The court not only agreed with the inhabitants that the custom was valid but also rejected any requirement that the particular day be "seasonable".²¹² The burden of proving "certainty" was eased in *Hall*,²¹³ where the inhabitants of Ashford Carbonell asserted a custom to dance around a maypole on a particular ground and to "otherwise enjoy any lawful and innocent recreation at any times in the year."²¹⁴ Baron Kelly, though expressing concern that the custom would seize from the landowner "the whole use and enjoyment of his property", nonetheless ruled that there was indeed such a customary right to hold maypole dances and engage in other recreations on the owner's land.²¹⁵ His fellow judge Baron Cleasby rejected the argument that the custom was too uncertain, observing that the inhabitants could not reasonably be expected "to be very precise as to the enjoyment which they were to have."²¹⁶ He joined his colleague in declining to interpret the precedents "in a direction to limit the rights and enjoyment of the public."²¹⁷ Regarding the requirement that plaintiffs had to prove special enjoyment by the local inhabitants over and above that of the general public, a contemporary treatise observed that "[v]ery slight evidence of this character will probably be sufficient to induce the Courts to find in favour of the right claimed."²¹⁸ In thus relaxing various formal requirements necessary to establish a customary claim, late nineteenth-century courts were obviously resolving any doubts about the scope of the right in favour of the claimants.

²¹⁰ Hunter, *supra* note 130 at 181.

²¹¹ (1863), 1 H. & C. 729, 158 E.R. 1077 [hereinafter *Mounsey* cited to H. & C.].

²¹² *Ibid.* at 735. The court noted that *Abbot* involved a custom to dance at all times "without qualification" and observed that *Bell*, which suggested that the right of recreation might be claimed only at seasonable times, had been misunderstood (*ibid.*). See *Hall v. Nottingham*, [1875] 1 Ex. D. 1 [hereinafter *Hall*]; Hunter, *supra* note 130 at 178 (noting that *Mounsey* "practically overruled" *Bell* and *Millechamp*). See also Elton, *supra* note 194 at 289 (noting that it was now settled that, contrary to *Millechamp*, a custom need not be confined in pleading to reasonable and legal times).

²¹³ *Hall*, *ibid.*

²¹⁴ *Ibid.* at 2.

²¹⁵ *Ibid.* at 3. He referred to the inconsistency between *Bell* on the one hand and *Abbot* and *Fitch* on the other, the latter cases holding that lawful games and pastimes might be played at all times even if they permanently interfered with the landowner's use of his property. He concluded that *Abbot* and *Fitch* were more authoritative.

²¹⁶ *Ibid.* at 4.

²¹⁷ *Ibid.*

²¹⁸ Hunter, *supra* note 130 at 181.

This expansive approach to the right of recreation was especially evident in *Honey*,²¹⁹ where Lord Jessel readily acknowledged that the concept of a customary right was fictitious. Custom, he candidly admitted, was “invented by judges for the purpose of giving a legal foundation or origin to long usage.”²²⁰ No one actually imagined that there had existed from time immemorial a common law of the particular place:

[T]he meaning and substance of the old law is merely this—that when you find long-continued usage which can have a legal origin, then, with the view of preserving to the people claiming them the quiet possession of the rights of property or rights of easement which they have so long enjoyed, you shall attribute these rights, if possible, to a legal origin so as to support them.²²¹

To prove continuous usage as an evidentiary matter, he advised, older people should testify that in their experience—usually at least half a century—the usage had persisted; in the absence of countervailing evidence, such testimony would be deemed sufficient to establish usage from time immemorial. Once a custom was established, moreover, it was tenacious. As Lord Jessel pointed out, it could not be terminated through disuse or abandonment but only by an express parliamentary enactment.²²²

In addition to lessening the procedural burdens to establish a customary claim, the courts held that rights of recreation enjoyed special legal privileges that did not attach to other popular rights such as rights of common. In 1872 the Ecclesiastical Commissioners, owners of a green in Southampton, arranged for a local vicar to use the site as a burial ground based on their statutory authority to grant property “free and absolutely discharged from all rights of common”. Opposing the plan, the inhabitants claimed a right to use the green “for enjoyment and exercise, amusement and recreation, and for all lawful village sports, games, and pastimes.”²²³ The Vice Chancellor held that the owner’s right to discharge the land of manorial rights did not include a power to dispense with rights of recreation. “To hold otherwise,” he declared, “would be to destroy by a side-wind public rights which were not in the contemplation of the Legislature.”²²⁴ Similarly, in *Ratcliffe v. Jowers*²²⁵ the court again elevated the customary right to recreation over a right of common. In 1884 the conservators of Barnes Common erected a fence along one side of the town green, which served as a cricket ground, to protect it from intruding animals. A tenant in a house abutting the green tore down the fence, complaining that it undermined her right to pasture on the whole

²¹⁹ *Honey*, *supra* note 196.

²²⁰ *Ibid.* at 604.

²²¹ *Ibid.*

²²² *Ibid.* See *Mellor*, *supra* note 196 at 387; *Forbes v. Ecclesiastical Commissioners* (1872), L.R. 15 Eq. 51 [hereinafter *Forbes*].

²²³ *Forbes*, *ibid.* at 51, 53.

²²⁴ *Ibid.* at 55.

²²⁵ (1891), 8 T.L.R. 6.

common, including the cricket ground.²²⁶ Rejecting her claim, Mr. Justice Chitty observed that the cricket ground was an ancient village green and that the commoners' right of pasture was "necessarily subject to the reasonable exercise of the rights of recreation and playing games."²²⁷ In his view, the conservators had legitimately determined that allowing cattle and horses to wander over the green would seriously interfere with the right of recreation.²²⁸

The courts continued to affirm customary rights of recreation through the end of the nineteenth century. In 1893 Mr. Justice Willes handed down *Virgo v. Harford*, which pronounced the residents of Walton justly entitled to use the village green "for recreation and for the playing of football, rounders, cricket, and all other lawful village sports, games, and pastimes."²²⁹ The decision recognized a right to recreation over sixty-five fine acres of land at the top of a hill.²³⁰ *Lancashire v. Hunt*,²³¹ decided the following year, involved a trespass suit brought by a landowner against an inhabitant of Stockbridge for unlawfully training horses and playing cricket and other games on his property. The defendant, a prominent local trainer of race horses, asserted that the residents of Stockbridge had a right of recreation over the area and by "special custom" a further right to train racehorses on it. Mr. Justice Wright upheld the recreation claim, declaring that "the inhabitants of Stockbridge had from a remote period of time enjoyed the right to use the down for the purpose of playing cricket and other games."²³²

He denied the claim of a special custom to train race horses, however, revealing not only the courts' solicitude for rights of recreation but also a corresponding inclination to disallow claims to pursue commercial activities. Just as the courts were quick to support municipal limitations on selling in parks and beaches, so were they reluctant to endorse use of a green for commercial objectives, especially those relating to the disreputable activity of horse racing.²³³ Although Stockbridge had been a racing centre for over a century, and witnesses had testified to the absence of any previous interference with trainers who used the down, the judge rejected the notion of a special custom. The defendant's assertion was "too wide",²³⁴ the judge declared, because

²²⁶ Her suit relied on the *Commons Act, 1876*, which, though permitting the conservators to set aside a portion of the common for cricket and other games and to enclose the ground to prevent cattle from straying on it, also contained clauses preventing existing common rights from being "injuriously affected" (*ibid.* at 6).

²²⁷ *Ibid.*

²²⁸ *Ibid.* at 7. He enjoined the defendant from removing the fence but also directed the conservators to allow the defendant "access for commonable beasts at suitable times and seasons" (*ibid.*). Such an order was meaningless in practice because the defendant had no commonable beasts on her tenement, and indeed no other person had objected to the fence (*ibid.*).

²²⁹ See Hunter, *supra* note 130 at 182.

²³⁰ See *ibid.*

²³¹ (1894), 10 T.L.R. 310 [hereinafter *Hunt*].

²³² *Ibid.* at 312.

²³³ See *infra* note 416 and accompanying text.

²³⁴ *Hunt, supra* note 231 at 312.

trainers not resident in the parish also used the down for this purpose. Although the court thus rejected the claim on a technical point, the result was that a landowner could not prevent a local inhabitant from riding a horse for recreation on the down but could preclude a professional trainer from using the same land to further business interests.²³⁵

In fact, cases where a claim of a customary right to recreation failed were connected either with the objectionable occupation of racing or with equally unacceptable attempts to hold public meetings. As in *Hunt*, the courts' stated reason for rejecting the right was usually that the alleged custom was enjoyed by a public larger than the local community. In *Sowerby v. Coleman*,²³⁶ for example, the inhabitants of a parish claimed the right to go on Coleman's land to exercise and train horses. The court dismissed the custom as improperly pleaded: the inhabitants of one parish seemed to be asserting a custom to use land in another locality. Had the plaintiffs specifically alleged that the land was used only by the inhabitants of one district, the judge suggested, he might have found the claim valid.²³⁷ Similarly, in *Earl of Coventry v. Wiles*,²³⁸ the defendant argued that there was an immemorial right for persons to stand on the Earl's road to view horse races on Newmarket common. Mr. Justice Blackburn found for the Earl, remarking that such a right could not lawfully be claimed by the public generally but only by inhabitants of a certain locality.²³⁹ Courts used the same rule to dismiss the notion of a customary right to free speech, pointing to the fact that a right to give speeches was not a limited right but was rather "an alleged right in the public as a whole".²⁴⁰ The judiciary's generally lenient posture toward procedural requirements suggests that the legalistic results in the racing and free speech cases

²³⁵ *Ibid.* The court expressly declined to decide the further question whether an inhabitant of the borough who was not a professional trainer of racehorses was entitled to train his own horse on the down.

²³⁶ (1867), L.R. 2 Ex. 96.

²³⁷ *Ibid.* at 100.

²³⁸ (1863), 9 L.T. 384.

²³⁹ *Ibid.* at 385. Another case involving a pleading error was *Edwards*, *supra* note 201, where the plaintiff brought a trespass action against four inhabitants of the town of Beddington for breaking into his land and destroying his fences. The defendants first appeared *pro se* and then, at the judge's insistence, employed counsel. Even their amended pleading, however, suffered from a fatal error. Their defence was "an ancient custom" enjoyed by the inhabitants of Beddington as well as the adjoining parishes of Carshalton and Mitcham "of recreation and of exercising and playing all lawful games, sports and pastimes upon the said piece of land" (*ibid.* at 308). The judge, though sympathetic, was in something of a bind. He believed that a custom could not lie in the inhabitants of many parishes, but further amendment of the defense—striking out the references to other parishes and limiting the claim to Beddington only—was now impossible, as the plaintiffs had already offered evidence of the larger custom (*ibid.* at 314). This decision, construing the requisite "district" to exclude even adjoining parishes, was much criticized both at the time and subsequently. See *e.g.* Hunter, *supra* note 130 at 180 n.*; Mellor, *supra* note 196 at 387, Lord Denning: the decision was incorrect and it was "obvious that the custom may virtually deprive the owner of the land of any benefit of it: because he cannot use it so as to hinder the villagers in their pastimes".

²⁴⁰ *Packham*, *supra* note 191 at 319.

might have been obviated by somewhat more artful pleading. More likely, however, the courts strictly enforced the rigorous pleading rules only in cases where they sought to discourage the custom for other reasons.

As a corollary to establishing both a “right to recreate” in certain places and the illegality of playing in the streets, the courts also clarified that there was no “right to wander” over space not specifically designated for a public purpose. That is, the effort to transfer recreation from the thoroughfares to particular confined sites—whether new locations created by statute or older places recognized by common law—was reinforced by a complementary rule that there was no public right to use any other property for recreational pursuits. The notable “Stonehenge” case, *A.G. v. Antrobus*,²⁴¹ definitively established this principle even with respect to a site long used for “rational” public recreation. In 1905 the Attorney General sued the owner of Stonehenge to remove fences around the monument that restricted access by pedestrians and vehicles. The government argued that Stonehenge had served as a public place from time immemorial for worship, pleasure, and instruction, and it urged the court to presume a customary legal right on behalf of the public to wander around the monument. Mr. Justice Farwell pronounced, however, that although Stonehenge was a national monument of great interest to the public, “*jus spatiandi*” or the right to wander was not known to English law.²⁴² The judge observed that it would be unfortunate if the courts, by presuming “novel and unheard of trusts or statutes from acts of kindly courtesy”, forced landowners to “close their gates in order to preserve their property.”²⁴³

While understandable from the perspective of landmark conservation, the broadly worded decision in *Antrobus* also drew on and strengthened the emerging rules on spatial segregation. By the turn of the century, the courts unequivocally supported claims that urban locations should be preserved for public exercise and sports but re-

²⁴¹ [1905] 2 Ch. 188 [hereinafter *Antrobus*].

²⁴² *Ibid.* at 198. The earlier precedents were conflicting. In *Schwinge v. Dowell* (1862), 2 Cir. Cas. 845 at 847, a jury found no custom or right of way over a forest green where people wandered “wherever they liked” rather than travelled over a defined path. Similarly, in *Robinson v. Cowpen Local Board* (1893), 63 L.J. Q.B. 235 at 237 (C.A.), Lord Justice Kay stated that he had “never heard of a claim to go over an open space in every direction.” A legal scholar, however, declared in 1868 that in addition to a right of recreation, there was “apparently the right of roaming about for exercise and amusement” (Elton, *supra* note 194 at 284 (relying on the Scottish case of *Dyce*, *supra* note 197 at 303, which observed that a “*servitus spatiandi* over open ground which has in some manner been devoted to public use, is also intelligible and known to the law”). Based on testimony by legal scholars, the Select Committee on Open Spaces in the Metropolis also thought that such a right might exist (see “S.C. on Open Spaces”, *supra* note 205 at iv). This question was definitively put to rest by *Antrobus*.

²⁴³ *Antrobus*, *supra* note 241 at 199. He stated that “the liberality with which landowners in this country have for years past allowed visitors free access to objects of interest on their property is amply sufficient to explain the access which has undoubtedly been allowed for many years to visitors to Stonehenge from all parts of the world” (*ibid.*). He also noted that the defendant was not acting capriciously but on expert advice to preserve a unique historical monument. If the stones were left open, he observed, heavy traffic would pose great risk to the monument (*ibid.* at 208-09).

jected any popular right to recreation either in the street or any other public place not specifically designated for this purpose. Recreation may have been both a right and a necessity, but the nineteenth-century courts confined its exercise to particular urban spaces subjected to thorough local regulation.

IV. Public Regulation of Indoor Commercial Entertainments: Judicial Enforcement along the Spectrum of Respectability

While the courts channeled the local authorities toward “rationality” in the form of maintaining open spaces for acceptable forms of popular recreation, they proceeded on a parallel track in the sphere of indoor mass entertainments. A series of statutes in the nineteenth century both imposed national controls on commercial recreational facilities and authorized municipalities to implement their own regulatory and licensing schemes. In the judicial interpretation of these statutes and regulations, three trends were discernible. First, the courts invariably upheld local licensing decisions, affirming the unfettered discretion of the magistrates to apply moral criteria in selecting licensees for leisure enterprises. Second, they enforced legislative and regulatory instruments within the context of a spectrum of respectability, treating institutions such as pubs relatively harshly—though even here tempering the often indiscriminate zeal of police and magistrates—while fostering within limits the development of more “rational” entertainments such as music halls, theatres, and cinemas. Finally, the overarching judicial concern with eliminating street crowds so evident in the courts’ approach to outdoor urban recreations was equally apparent in the area of indoor entertainments. The judges in fact concentrated less on regulating conduct occurring within the recreational establishments themselves than on controlling the facilities’ external public effects.

A. The Regulation of Traditional Leisure: Public Houses

The coercive weight of the law fell heavily on the public houses, a traditional locus of popular recreation that remained the paramount working-class leisure activity into the twentieth century.²⁴⁴ In 1861 there was one licensed pub for every 186 people in England,²⁴⁵ and by that date the clientele had become predominantly working class.²⁴⁶ The Victorian middle and upper classes disapproved of public houses for several reasons. First, pubs had long served as an important forum for working-class

²⁴⁴ See e.g. *Rational Recreation*, *supra* note 1 at 9-11; Girouard, *supra* note 4 at 14; *Drink and the Victorians*, *supra* note 4 at 46; T.G. Coffey, “Beer Street: Gin Lane” (1966) 27 Q.J. Stud. on Alcohol 669 at 679; Delves, *supra* note 3 at 98.

²⁴⁵ See Myerscough, *supra* note 1 at 13. This number compared with one pub for every 276 persons in 1891, one for every 398 persons in 1911, and one for every 668 in 1961 (*Drink and the Victorians*, *supra* note 4 at 313).

²⁴⁶ This situation contrasted with the social pattern that prevailed in 1800, when different social classes frequented the same establishment (see Clark, *supra* note 4 at 306-07; Girouard, *supra* note 4 at 12; “Pubs”, *supra* note 4 at 166; Lowerson & Myerscough, *supra* note 1 at 38).

radical political activity.²⁴⁷ Second, their existence conflicted with the intensifying moral emphasis on temperance and sobriety and, even worse, fostered consumption of alcohol in public; if the “respectable classes” now drank at all, they did so privately.²⁴⁸ Finally, though seemingly an “indoor” form of entertainment, pubs were in fact an unruly extension of a bustling street life. Their integral connection with the street was evidenced by sidewalk seats and tables, first-floor balconies, numerous street entrances, outdoor counters selling drinks for home consumption, and the presence of “potmen” carrying ale to customers in nearby premises or even in the road.²⁴⁹ As already noted, the Victorian governing classes were suspicious of outdoor popular gatherings of all types, and an institution for collective drinking that overflowed onto the streets automatically instilled aversion and distrust. Pubs therefore occupied one of the lowest points on the scale of respectability, and courts readily assisted local officials in implementing an expanding corpus of statutory controls.

Following episodic parliamentary forays into the area early in the century, including a misguided attempt in 1830 to reduce the consumption of gin by deregulating beer houses,²⁵⁰ an alarming increase in the statistics for drunkenness after mid-century²⁵¹ produced systemic reform in the years from 1869 to 1874. As the Royal

²⁴⁷ See e.g. *Leisure and Society*, *supra* note 1 at 35 (radical political meetings from the 1790s to the twentieth century took place in pubs); “Pubs”, *supra* note 4 at 178 (it was widely believed that pubs, where workers assembled in crowds, fostered revolutionary activity); S. & B. Webb, *supra* note 106 at 131 (beerhouses, exempt from magisterial control, were viewed as “the centres where rebellion was fomented”).

²⁴⁸ See Clark, *supra* note 4 at 307 (upper and middle-class customers preferred to drink in private clubs or at home); Davidoff, *supra* note 29 at 22-23 (private as opposed to public drinking was a sign of respectability); Girouard, *supra* note 4 at 12-13 (the middle classes abandoned the pubs because they lacked respectability); *Leisure and Society*, *supra* note 1 at 38 (upper-class drinking took place at home or in private clubs).

²⁴⁹ See “Pubs”, *supra* note 4 at 169; Girouard, *ibid.* at 11.

²⁵⁰ The major legislative enactment of the early nineteenth century was the *Alehouse Act, 1828*, which conferred on the justices an absolute discretion to grant licences. Licences were generally granted on condition that the licensed person did not adulterate his liquor; permit drunkenness or disorderly conduct, unlawful games, or the assembling of persons of bad character; and kept his house closed, except for the reception of travellers, during the hours of divine service on Sundays, Christmas Day, and Good Friday (*Alehouse Act, 1828* (U.K.), 9 Geo. IV, c. 61. See “R.C. on Liquor Licensing”, *supra* note 128 at 3). The *Beerhouse Act, 1830* (U.K.), 1 Will. IV, c. 64, allowed any householder to obtain an excise licence authorizing him to sell beer simply on payment of two guineas a year, without first obtaining a justices’ licence. Any dwelling could thus be turned into a beerhouse, and within a few months 24,342 new beer retailers appeared (see J.P. Lewis, *Freedom to Drink* (London: Institute of Economic Affairs, 1985) at 19-20; Girouard, *supra* note 4 at 34). By 1838 the number of beer sellers had risen to 45,717 (see C.C. Ross, *The Law of Licensing* (London: Sir Isaac Pitman, 1934) at 12).

²⁵¹ Between 1858 and 1876 the incidence of drunkenness more than doubled in England and Wales, especially after 1867 (see V.A.C. Gatrell & T.B. Hadden, “Criminal Statistics and their Interpretation”, in E.A. Wrigley, ed., *Nineteenth-Century Society: Essays in the Use of Quantitative Methods for the Study of Social Data* (Cambridge: Cambridge University Press, 1972) 336 at 370; J.S. Davis, “Prosecutions and Their Context” in D. Hay & F. Snyder, eds., *Policing and Prosecution in Britain 1750-1850* (Oxford: Clarendon Press, 1989) 397 at 421). Summary committals for drunkenness in

Commission on Liquor Licensing later noted, that period marked “the reversal and final abandonment of the free trade principle pursued for the preceding forty years.”²⁵² The new legislation—the *Wine and Beerhouse Act, 1869*²⁵³ and the *Licensing Act, 1872* and *Licensing Act, 1874*²⁵⁴—established rules governing both licensing procedures and the daily management of licensed premises. In general, the statutory scheme conferred discretion on local justices to license public houses while directly prohibiting on a national basis a variety of “public order” offences in pubs such as gambling, prostitution, and drunkenness. The new statutes spawned a remarkable amount of litigation. Indeed, the voluminous number of reported cases at the appellate

England and Wales rose from 75,859 in 1857 to 100,357 in 1867 to 205,567 in 1876, and then began to decline (see Wrigley, *ibid.* at 391; U.K., H.C., “Select Committee of the House of Lords, Third Report”, No. 418 in *Sessional Papers*, vol. 11 (1877) at 301 (App. B) [hereinafter “S.C. on Intemperance”]; *Leisure and Society*, *supra* note 1 at 37-38).

²⁵² “R.C. on Liquor Licensing”, *supra* note 128 at 86. The licensing regime was made even more stringent at the end of the century. An 1886 act prohibited the sale of liquor to children under thirteen for consumption on the premises (*Intoxicating Liquors (Sale to Children) Act, 1886* (U.K.), 49 & 50 Vict., c. 56), and in 1901 selling to children was forbidden except in sealed vessels (*Intoxicating Liquors (Sale to Children) Act, 1901* (U.K.), 1 Edw. VII, c. 27). See S. & B. Webb, *supra* note 106 at 144. The *Licensing Act, 1902* (U.K.), 2 Edw. VII, c. 28, following the Report of the Royal Commission on Liquor Licensing in 1899, gave power to apprehend a person found drunk in any highway or public place or on any licensed premises, prohibited the sale of liquor to habitual drunkards, and imposed a penalty for procuring intoxicating liquor for drunken persons. It also gave justices more control over structural alterations to licensed premises (see Ross, *supra* note 250 at 17). The *Licensing Act, 1904* (U.K.), 4 Edw. VII, c. 23, aimed at reducing the excessive number of licensed premises. Licences that could not be refused on specified grounds could be extinguished on payment of compensation (see M. Pink, *Paterson’s Licensing Acts, One Hundredth Edition* (London: Butterworth, 1992) at 6-7; Ross, *supra* note 250 at 18). For the history of licensing legislation generally, see “R.C. on Liquor Licensing”, *supra* note 128 at 2-5; G.J. Talbot, *The Law and Practice of Licensing* (London: Stevens & Sons, 1905); S. & B. Webb, *supra* note 106; C.H.J. Wharton, *The Whole Law Relating to Innkeepers* (London: Law Times, 1876) at 2-4.

²⁵³ The *Wine and Beerhouse Act, 1869* (U.K.), 32 & 33 Vict., c. 27, was passed to correct the deficiencies of the *Beerhouse Act, 1830*; it dealt mainly with licensing procedures for beer houses (see *infra* note 255 and accompanying text).

²⁵⁴ The *Licensing Act, 1872* (U.K.), 35 & 36 Vict., c. 94, required a justices’ licence or certificate in all cases where intoxicating liquor was sold and introduced a committee to confirm the grant of licences; established new rules as to opening and closing hours; set forth new rating qualifications for licensed premises; prohibited adulteration; and established uniformity in granting, renewing, and transferring licences. In place of conditions imposed on a licence, the statute created certain offenses for which licence holders were subject to penalties on summary conviction. It also forbade the sale of spirits for consumption on the premises to any person younger than sixteen (see Pink, *supra* note 252 at 5-6; “R.C. on Liquor Licensing”, *supra* note 128 at 5; Ross, *supra* note 250 at 15-16). The *Licensing Act, 1874* (U.K.), 37 & 38 Vict., c. 39, made minor corrections to the 1872 Act. It again altered opening and closing hours, further reducing the justices’ remaining discretionary powers as to closing, and established three closing schedules depending on the size of the local population. It abolished appeals to quarter sessions for new licences but eased the process of obtaining renewals by dispensing with the personal attendance of the licensee except in certain cases. It also contained provisions as to entry by constables and issuance of search warrants (see Wharton, *supra* note 252 at 2-4; “R.C. on Liquor Licensing”, *ibid.* at 2-5).

level, involving reviews of both licensing determinations and criminal convictions for statutory offences, suggests that enforcing the public house code was a major preoccupation of late-Victorian police, magistrates, and judges.

The predominant effect of the courts' licensing decisions was to strengthen the discretionary powers of local justices at a time when the licensing scheme governing drinking premises was becoming increasingly stringent and complex. Although houses selling beer only were temporarily exempt from licensing under the *Beerhouse Act, 1830*, after 1869 both beerhouses and public houses selling spirits were subject to annual licensing by two justices sitting in petty sessions known as "brewster sessions".²⁵⁵ To obtain a new licence or an annual renewal, proprietors were required to demonstrate their good character,²⁵⁶ and the courts allowed licensing justices wide discretion in making this moral determination. As Lord Halsbury, the Lord Chancellor, declared in 1899, "what the Legislature has ultimately done has been to give an absolute unfettered discretion to the magistrates."²⁵⁷

Nor was the magistrates' discretion limited to matters of character. Except in the case of renewal applications for beerhouses existing prior to 1869,²⁵⁸ licensing justices could also take into account the needs and characteristics of the neighbourhood. In *R. v. Lancashire*²⁵⁹ the Court of Queen's Bench construed the statutory requirement that persons be "fit and proper" to refer not merely to the qualifications of the applicant but also to the "merits of the application"; justices were therefore authorized to consider such factors as "the nature of the locality, the population, [and] the number of

²⁵⁵ *Wine and Beerhouse Act, 1869*, *supra* note 253, s. 4. The *Licensing Act, 1872*, *supra* note 254, ss. 37-50, introduced uniformity into the licensing process.

²⁵⁶ The *Alehouse Act, 1828*, *supra* note 250, s. 1, required that licence holders be "fit and proper".

²⁵⁷ *Lacey v. Lacon* (1899), 80 L.T. 473 at 475 (H.L.). Similarly, in *Sharp v. Wakefield*, [1891] A.C. 173 at 185 (H.L.) [hereinafter *Sharp*], Lord Herschell proclaimed in the House of Lords, "I think it impossible to do otherwise than hold that the discretion of the justices is not in any way fettered." See e.g. *Ex parte Morgan* (1870), 23 L.T. 605 (affirming justices' denial of renewal licence when applicant failed to produce evidence of good character, even though there was no evidence to the contrary and the previous practice was not to require character evidence).

²⁵⁸ The *Wine and Beerhouse Act, 1869*, *supra* note 253, s. 4, which returned control over the beerhouses to the licensing justices and required production of a justices' certificate to obtain an excise wine or beer licence, circumscribed the justices' discretion in the case of renewals for beerhouses existing when the act was passed ("ante-1869 beerhouses"). A renewal could be refused only on four grounds: 1) that the applicant had failed to produce satisfactory evidence of good character; 2) that the house was disorderly; 3) that the applicant had forfeited a previous licence for misconduct; or 4) that the applicant or the house was not duly qualified by law (*ibid.*, s. 19). The magistrates were restricted to these same grounds in refusing to grant an off-licence. Subsequently, the Court of Appeal limited the number of beerhouses enjoying such protection by treating ambiguous situations as applications for new licences rather than renewals (see *R. v. King* (1888), 58 L.T. 607 (C.A.) (application by holder of ante-1869 beer licence for wine licence treated as new application); *Murray v. Freer* (1893), 68 L.T. 507 (C.A.) (ante-1869 licence that lapsed for one month treated as a new application). But see *Simonds v. Blackheath* (1886), 50 J.P. 742 (transfer of ante-1869 beerhouse licence treated as renewal rather than new application).

²⁵⁹ (1870), L.R. 6 Q.B. 97 at 99-100.

houses already licensed.²⁶⁰ The position of the licensing justices to evaluate such criteria was further strengthened by the 1891 decision of the House of Lords in *Sharp v. Wakefield*,²⁶¹ which established that justices could refuse or grant licence renewals at will regardless of the previous record of the licensee. Although this had always been the formal law, prior to the decision it had been widely assumed that publicans would obtain yearly renewals if they had conducted themselves properly during the preceding year.²⁶² *Sharp* reaffirmed that justices enjoyed unfettered discretion with regard to licensing decisions and could consider the characteristics of the neighbourhood as well as the character and conduct of the proprietor.

Magisterial “discretion” also sanctioned the practice of granting licences subject to particular conditions, such as requiring the applicant to surrender an existing licence or to manage the pub in a particular way.²⁶³ Flexible procedural rules further enhanced the licensing justices’ broad authority. They were permitted *sua sponte* to oppose an application based on their own personal knowledge,²⁶⁴ were not required to state the reasons for their decisions,²⁶⁵ and in the case of new licences were insulated

²⁶⁰ *Ibid.* Such discretion also applied to transfer applications (see *Boodle v. Birmingham* (1881), 45 J.P. 635 (licensing justices had discretion to refuse to transfer a licence to a locality already fully supplied with pubs); *Ex parte Minett* (1887), 51 J.P. 84 (justices had absolute discretion to refuse to transfer a licence to a new tenant)).

²⁶¹ *Supra* note 257.

²⁶² See Girouard, *supra* note 4 at 54-55; F.A. McKenzie, *Sober By Act of Parliament* (London: Swan Sonnenschein, 1896) at 169.

²⁶³ The courts did not, however, always approve conditions. For example, in *R. v. Bowman* (1898), 78 L.T. 230, the Divisional Court rejected a condition that applicants pay £1000 to be devoted to public purposes. Mr. Justice Wills objected that if “this were allowed, in two years all granting of licences would be decided by public auction” (*ibid.* at 231). In general, the courts were suspicious of blanket conditions that precluded an entire category of applicants from obtaining a licence (see *R. v. Sylvester* (1890), 26 J.P. 151 (justices were not required to deny a beer licence based on the applicants’ refusal to comply with a general condition that they obtain an excise licence); *Raven v. Southampton Justices* (1904), 90 L.T. 95 (justices impermissibly rejected renewals based on a survey map without considering individual public houses on their merits); *Sharp*, *supra* note 257 at 180). The practice of granting conditional licences was ended by the *Licensing Act, 1904* (U.K.), 4 Edw. VII, c. 23, s. 1, which allowed the justices to refuse an existing licence only on certain specified grounds: that the licensed premises were ill-conducted or structurally defective, or that there were deficiencies in the character or fitness of the proposed holder. The power of refusing the renewal on any other ground was transferred to quarter sessions, which could do so only on payment of compensation to the licensee. See *R. v. Dodds*, [1905] 2 K.B. 40 at 46-47, 53, 56 (justices could no longer make a licence conditional on various undertakings not covered by the grounds for refusal specified in the statute); “R.C. on Liquor Licensing”, *supra* note 128 at 110.

²⁶⁴ See *R. v. Farquhar* (1874), L.R. 9 Q.B. 258; *R. v. Eales* (1880), 44 J.P. 553 [hereinafter *Eales*]; *R. v. Howard*, [1902] 2 K.B. 363.

²⁶⁵ The only exception to this policy was that in rejecting renewal of an ante-1869 beerhouse, the justices were required to identify which of the four statutory reasons was applicable (see *R. v. Justices of Ashton-Under-Lyne* (1873), 37 J.P. 85; *R. v. Justices of Huddersfield* (1876), 33 L.T. 566; *Eales*, *ibid.*; *Tranter v. Lancashire Justices* (1887), 51 J.P. 454). Applicants for renewals received other explicit procedural protections. The justices could not entertain any objection to the renewal unless

from appeals of their decisions.²⁶⁶ In *Boulter v. Kent Justices*²⁶⁷ the House of Lords clarified that the licensing justices sat as an administrative tribunal rather than as a court and were therefore not subject to judicial procedural and evidentiary requirements. As Lord Bramwell stated in *Sharp*: “The magistrates have a discretion to refuse; they are not bound to state their reason, and therefore their decision cannot be questioned.”²⁶⁸

In exercising their discretion, licensing justices became increasingly restrictive as the century advanced, reflecting both the movement for temperance reform and general societal concern about drunkenness and the excessive number of licensed premises.²⁶⁹ The temperance lobby specifically targeted the brewster sessions, sending memorials to the magistrates, investigating the reputations of applicants, attending the sessions, and even infiltrating the ranks of the licensing justices. After the 1870s the justices began to respond to the pressure, examining licences more critically and issuing refusals more frequently.²⁷⁰ However, rejecting renewal applications in the case of longstanding pubs was problematic, and a significant reduction in the number of licensed houses was not achieved until the *Licensing Act*, 1904 provided compensation to persons whose applications were rejected for reasons other than misconduct.²⁷¹

The massive legal discretion enjoyed by the justices with respect to their licensing determinations did not extend to their adjudication of cases involving statutory violations. In this regard, the courts showed little deference to the magistrates' decisions, even as to what were essentially matters of fact. The prevailing pattern was that local constables zealously detected and prosecuted infringements of the acts,²⁷² and magis-

written notice of intention to oppose, and the grounds for it, were served on the licence-holder at least seven days before the annual general licensing meeting, and the justices could only receive evidence under oath (see *Licensing Act*, 1872, *supra* note 254, s. 42).

²⁶⁶ In the case of a renewal, an applicant had an appeal to quarter sessions (see *Licensing Act*, 1874, *supra* note 254, s. 27).

²⁶⁷ [1897] A.C. 556 (H.L.). See also *Evans v. Conway Justices* (1900), 82 L.T. 704 (C.A.) (limiting reach of *Boulter* as applied to quarter sessions).

²⁶⁸ *Sharp*, *supra* note 257 at 183.

²⁶⁹ See S. & B. Webb, *supra* note 106 at 145 (after 1877 the temperance movement caused a “growing stringency of the licensing policy of nearly all benches of magistrates”); “R.C. on Liquor Licensing”, *supra* note 128 at 6 (“It is generally admitted that the number of licenses in a great many parts of England and Wales is in excess of the requirements.”). In the last decades of the century few new licences were issued (see S. & B. Webb, *ibid.* at 11, 109).

²⁷⁰ See L. Shiman, *Crusade Against Drink in Victorian England* (New York: St. Martin's Press, 1988) at 194-96, 214-15. See also Girouard, *supra* note 4 at 21-22; Davis, *supra* note 251 at 421.

²⁷¹ Justices were reluctant to deny renewals for fear of interfering with vested rights (see “R.C. on Liquor Licensing”, *supra* note 128 at 13, 117-18). After the 1904 Act the number of licensed premises dropped significantly; between 1904 and 1913 twelve thousand pubs closed (see Lewis, *supra* note 250 at 22).

²⁷² Police forces seemed keenly interested in the regulation of pubs, partly due to pressure from temperance groups (see “Introduction”, *supra* note 22 at 14; Davis, *supra* note 251 at 421). Indeed, the cases reveal that constables engaged in extensive surveillance and arrested people for relatively minor offenses (see *Cates v. South* (1860), 35 L.T. 365 [hereinafter *Cates*] (publican was prosecuted

trates—generally the same men who rendered licensing decisions in brewster sessions—invariably convicted the alleged violators. The appellate courts, however, frequently reversed the convictions on grounds of insufficient evidence, suggesting that they found the enforcement efforts of police and justices to be excessively punitive. Indeed, they often openly castigated the magistrates for their actions. In *Newell v. Hemingway*,²⁷³ to give one example, Lord Coleridge declared his “own personal astonishment that a case of this sort should have been visited with a penalty so extreme as the magistrate seems to have thought it his duty to inflict.”²⁷⁴ In the area of statutory infractions, the Divisional Court, the Court of Appeal, and the House of Lords actively set their own norms of enforcement through authoritative construction of the statutory terms, reserving liability for persons “truly” morally culpable or whose alleged violation affected the broader public.

The primary regulatory innovation of the nineteenth century was the introduction of national controls on drinking hours. Closing times, which previously had been imposed by the justices as a licensing condition, became entirely statutory. Parliament introduced Sunday closing hours in 1839—requiring pubs to remain closed from midnight on Saturday until 12:30 p.m. on Sunday—and increasingly curtailed week-

for opening eight minutes early on Sunday); *Overton v. Hunter* (1860), 35 L.T. 366 [hereinafter *Overton*] (constable entered pub at 11:10 p.m. to arrest publican at his own private party); *Smith v. Vaux* (1862), 6 L.T. 46 [hereinafter *Vaux*] (pubowner was prosecuted for leaving door open at 12:40 a.m. on Saturday night); *Brewer v. Shepard* (1872), 36 J.P. 373 [hereinafter *Brewer*] (constable arrested a person leaving a pub at 10:10 p.m. with something under his coat); *Ovenden v. Raymond* (1876), 34 L.T. 699 (C.A.) [hereinafter *Raymond*] (police entered an inn after midnight to arrest lodgers for playing billiards); *Pearce v. Gill* (1877), 41 J.P. 825 [hereinafter *Pearce*] (constables watched house for one-and-one half hours to obtain evidence that a business meeting in a pub had continued after hours, leading Mr. Justice Mellor to remark that they “were a little zealous, and might have allowed the farmers to have their drink out”); *Petherick v. Sargent* (1862), 6 L.T. 48 [hereinafter *Petherick*] (constable, upon receiving information that a woman had entered an inn with a jug, waited for her to come out, then picked up her shawl and tasted from the jug); *Avards v. Dance* (1862), 36 J.P. 437 [hereinafter *Avards*] (policeman listened at pub window for thirty minutes in attempt to overhear people gambling); *Lloyd v. Barnett* (1900), 82 L.T. 1804 [hereinafter *Lloyd*] (police prosecuted a publican for still being open at 11:15 p.m. even though patrons were obviously departing the premises)). In some areas, however, there were complaints that the police were in league with the publicans (see *McKenzie*, *supra* note 262 at 194 (town councils, often controlled by pub owners, pressured police not to proceed against public houses); *Shiman*, *supra* note 270 at 197 (police relied on publicans for information and thus were anxious to retain their good will)). The Royal Commission on Liquor Licensing observed in 1899 that in areas with small or scattered police forces, “the familiarity which springs up between police and publicans must tend to relax the springs of discipline and to hush up many irregularities on both sides” (“R.C. on Liquor Licensing”, *supra* note 128 at 165).

²⁷³ (1889), 53 J.P. 324.

²⁷⁴ *Ibid.* at 326. See e.g. *Raymond*, *supra* note 272 at 699 (it was “manifestly absurd” that lodgers in a pub should be prosecuted for playing an innocent game of billiards); *Lester v. Torrens* (1877), 41 J.P. 742 [hereinafter *Torrens*] (magistrate had construed the act so as to produce “manifestly unreasonable consequences”); *Deer v. Bell* (1894), 5 J.P. 513 at 514 (the court “could not understand” how the justices arrived at a conclusion “which seems to be quite unintelligible”); *Miller v. Dudley* (1898) 46 J.P. 606 (a conviction “ought not to be obtained on mere suspicion”).

day opening hours in 1864, 1872, and 1874.²⁷⁵ Revealingly, even in this respect the authorities were more concerned about the potential impact of the pubs on street behaviour than with any irregularities occurring inside the establishments themselves. Legislation controlling opening and closing times was in fact primarily intended to empty the streets at increasingly early uniform hours. The *Licensing Act, 1872*, for example, generated widespread approval because, as the head constable of Birmingham happily reported, "it cleared the street by midnight."²⁷⁶

Violations of the closing rules were governed by section 24 of the *Licensing Act, 1872*,²⁷⁷ which imposed a penalty on any person who at proscribed times "sells or exposes for sale, or opens or keeps open any premises for the sale of intoxicating liquors." Reflecting their persistent obsession with the streets, the judges often reversed convictions where selling might have continued after hours inside the pub but where there was no public access to the premises. That is, the courts quickly interpreted "keeping open any premises" to mean not "open for business" but literally and physically "open to the street", and this remained the rule throughout the century. *Tennant v. Cumberland*,²⁷⁸ for example, concluded that the presence of a customer after closing hours on Saturday night was not evidence that the house was "open for sale" because the front door of the establishment was shut. Similarly, where eight men—at least one of them drunk—emerged from the side door of an alehouse at 1:00 a.m. but there was no available entry into the house, the court found the evidence insufficient to prove that the house was open for selling beer.²⁷⁹ In yet another case, a constable witnessed a bar lady handing glasses of whiskey and soda to two men during prohibited hours; however, the court reversed the conviction because "open or keeps open" means "opening or keeping open the premises for people who are outside to come in, and do not include the case where people who are already in the premises stay in the prem-

²⁷⁵ See Girouard, *supra* note 4 at 14; S. & B. Webb, *supra* note 106 at 140; *Drink and the Victorians*, *supra* note 4 at 326. Justices had some discretion under the *Licensing Act, 1872* to vary closing hours, but this was almost entirely eliminated in 1874. New hours were fixed according to whether a pub was located in London, another populous place, or a rural district. London pubs were allowed to open from 5 a.m. to 12:30 a.m. on weekdays, from 5 a.m. to midnight on Saturday, and from 1 p.m. to 3 p.m. and 6 p.m. to 11 p.m. on Sundays (*Licensing Act, 1874*, *supra* note 254, ss. 3, 6. See "Royal Commission on Liquor Licensing", *supra* note 128 at 88).

²⁷⁶ Quoted in C. Steedman, *Policing the Victorian Community: The Formation of English Provincial Police Forces, 1856-80* (London: Routledge & Kegan Paul, 1984) at 154. Steedman noted that the tendency of licensing legislation was to "coerce the working-class drunkard off the streets" (*ibid.*). See "Introduction", *supra* note 22 at 15. See also Gardiner, *supra* note 188 at 239 ("Thousands of poor women in the land had reason to bless a measure that sent their husbands home at some time before the morning").

²⁷⁷ *Supra* note 254. Section 24 was replaced by section 9 of the 1874 Act.

²⁷⁸ (1859), 1 E. & E. 400.

²⁷⁹ *Jefferson v. Richardson* (1871), 35 L.T. 470 at 471. The court stated, however, that there might have been a conviction for selling. The offense of selling appears in fact to have been rarely prosecuted, possibly because of the difficulty of securing a witness to the sale.

ises after closing time to be served.”²⁸⁰ In contrast, courts readily affirmed convictions when the door was open to allow access to the street.²⁸¹ Even here, however, the courts were uncomfortable with excessively enthusiastic police efforts, declining to consider even open access sufficient to convict if the violation was too technical.²⁸²

Another continuing thread in nineteenth-century recreational decisions, the judges’ finely honed sense of moral responsibility, was especially evident in their approach to the offence of “suffering any gaming” on licensed premises.²⁸³ The gaming provision of the 1872 Act, unlike related statutory offences and even its own earlier incarnation,²⁸⁴ did not require that a publican have “knowledge” of the gaming activity.

²⁸⁰ *Jeffrey v. Weaver* (1899), 81 L.T. 193 at 195. The courts also reversed convictions for the companion offense of “selling” intoxicating liquors. For example, in *Petherick, supra* note 272, the court reversed a conviction for selling after hours where the doors were shut, even though a customer testified that the produce requested by the landlady in fact “paid for the beer.” The court merely concluded that there was “nothing which amounted to a selling.” On the same theory that there was no public access and therefore no public implications, courts were also lenient toward publicans who supplied liquor to friends after hours. In *Overton, supra* note 272 at 366-67, Chief Justice Cockburn found that the proprietor’s conviction for privately entertaining after 11:00 p.m. “cannot by any possibility be supported” because he had a “perfect right” to dine with his friends. This rule was codified in section 30 of the 1874 Act, which provided that no licensed person was “liable to any penalty for supplying intoxicating liquors, after the hours of closing, to private friends bona fide entertained by him at his own expense.” But it was impermissible for a publican to evade the law by converting patrons into “friends” after hours (see *Corbet v. Haigh* (1880), 42 L.T. 185).

²⁸¹ See *Thompson v. Grieg* (1870), 34 J.P. 214 (door was “partly open” at 4 a.m.); *Vaux, supra* note 272 (door was open at 12:40 a.m.); *Brewer, supra* note 272 (man entered pub after closing time); *Pearce, supra* note 272 (back door open).

²⁸² See e.g. *Cates, supra* note 272 (reversing conviction for house being open eight minutes before opening time on Sunday); *Lloyd, supra* note 272 (reversing conviction for door being open at 11:15 p.m. since it was obviously only to let people leave the premises). Courts were also more likely than the magistrates to excuse after-hours sales of alcohol by applying the “bona fide traveller” exemption. Section 10 of the *Licensing Act, 1874, supra* note 254, allowed a licensed person to sell liquor “at any time to bona fide travellers or to persons lodging in his house,” and the courts tended to construe the exemption liberally (see *Atkinson v. Sellers* (1858), 5 C.B. (N.S.) 442 (a bona fide traveller may travel for pleasure as well as business); *Taylor v. Humphries* (1861), 4 L.T. 514 (same); *Peache v. Colman* (1866), L.R. 1 C.P. 324 (even persons meeting a train may be bona fide travellers)). In 1872 Parliament explicitly placed the burden of proof on the publican to prove that someone was a traveller (*Licensing Act, 1872, supra* note 254, ss. 24, 51(4)). See *Roberts v. Humphreys* (1873), L.R. 8 Q.B. 483). Subsequently, though the courts did not permit a traveller to travel for the purpose of drinking only (see *Peun v. Alexander* (1893), 68 L.T. 355), if the traveller had any other purpose, the courts still construed the exception broadly (see *Sheasby v. Oldham* (1891), 55 J.P. 214 (traveller can frequent more than one house and still be a bona fide traveller); *Dames v. Bond* (1891), 55 J.P. 503 (giving a concert in a pub qualifies a patron as a bona fide traveller); *Cowap v. Atherton* (1893), 57 J.P. 8 (bona fide traveller can take a detour on the journey to obtain refreshment)).

²⁸³ *Licensing Act, 1872, supra* note 254, s. 17. A publican who allowed gambling on the premises also violated the *Betting House Act, 1853* (U.K.), 16 & 17 Vict., c. 119.

²⁸⁴ Other offences requiring knowledge in express terms were “knowingly” permitting premises to be the habitual resort of reputed prostitutes and “knowingly” harbouring or suffering a constable on duty to remain on the premises (see *Licensing Act, 1872, supra* note 254, ss. 14, 16). The gaming of-

Magistrates therefore construed it as a strict liability offence and convicted in every instance. The judges, however, imported into the statute a knowledge requirement, affirming convictions only where the landlord either had actual knowledge or was wilfully blind to the offence; they thus adopted a construction that more accurately calibrated the moral culpability of the defendant. This rule was announced in *Bosley v. Davies*,²⁸⁵ where the justices of the peace convicted a publican for “suffering gaming” when six gentlemen were discovered playing cards on the premises. There was no evidence that the defendant or anyone in his employ was aware that a game was in progress. Reversing the conviction, the court explicitly acknowledged that “knowingly” no longer appeared in the statute but nonetheless held that a publican must have either actual knowledge or constructive knowledge in the sense of “gross absence of care or wilful abstinence from knowledge.”²⁸⁶ The court issued an order that unapologetically rewrote the statute: “It is ordered, that ... although the word ‘knowingly’ is not in sect. 17 of the Licensing Act, 1872, it is not sufficient merely to prove that persons gambled in the hotel, but that proof must be given that the manageress or servants in attendance on the guests in the room knew of the gambling.”²⁸⁷ In a later case, *Somerset v. Hart*,²⁸⁸ Lord Coleridge elaborated that there might be only “circumstances amounting to slight evidence of [the publican’s] knowledge, or his probability of knowledge, but it seems to me there must be something to show the gambling took place with the connivance of himself, or of someone clothed with his authority.”²⁸⁹

Conversely, where there was a reasonable inference of knowledge or connivance, the courts readily affirmed convictions of publicans. Such a case was *Redgate*,²⁹⁰ where the landlady retired to bed and left in charge a hall porter who moved to the extreme end of the house, out of sight or sound of any gambling.²⁹¹ As in the case of

fence itself had previously required that the licensed person “knowingly suffer any unlawful games or any gaming whatsoever” (*Alehouse Act, 1828, supra* note 250, s. 21).

²⁸⁵ (1875), 33 L.T. 528.

²⁸⁶ *Ibid.*, at 529.

²⁸⁷ *Ibid.*, at 530.

²⁸⁸ (1884), 48 J.P. 327 [hereinafter *Hart*].

²⁸⁹ *Ibid.*, at 328. In *Redgate v. Haynes* (1876), 33 L.T. 779 at 781 [hereinafter *Redgate*], Mr. Justice Blackburn similarly declared: “But the mere fact of the gaming having taken place is not enough: it must be also shown that it took place by the fault or with the connivance of the party convicted.”

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*, at 781. See *Crabtree v. Hole* (1879), 43 J.P. 799 (landlord who failed to show reasonable diligence to ascertain if gaming was going on was guilty). Of course, where the publican obviously had the requisite knowledge because he himself had participated in the gambling, the courts easily affirmed the conviction. For example, in *Patten v. Rhymer* (1860), 36 L.T. 352, Queen’s Bench upheld a conviction when the landlord played a friendly card game with his friends. The court found that the legislature had intended the publican not to do anything “that might act as a bad example to others” (*ibid.*, at 353). Similarly, in *Danford v. Taylor* (1869), 20 L.T. 483, the same court found that a landlord had been deservedly convicted where he and four friends bowled for beer. The court thought it “quite obvious that a practice of this kind may become mischievous” (*ibid.*, at 484). In *Hare v. Osborne* (1876), 34 L.T. 294, it was held that even during closing hours the landlord could not play cards for money with his friends. The exemption for entertaining private friends with liquor “has nothing what-

the “keeping open” offence, however, the courts were impatient with technical prosecutions. In *Awards*,²⁹² for example, where men impulsively took bullets from their pockets and rolled them on the table for beer, the court reversed the beerhouse keeper’s conviction on the ground that “this frolic with the bullets, was obviously a mere casual act.”²⁹³

This judicial approach—emphasizing moral responsibility, disapproving overly legalistic prosecutions, and displaying concern with broader street consequences—also permeated cases involving the offence of drunkenness. A publican committed a crime against public order either by “permitting drunkenness” or “selling liquor to any drunken person”.²⁹⁴ In 1894 the Divisional Court, relying explicitly on the gaming case *Somerset v. Hart*, imported a knowledge requirement into the offence of “permitting drunkenness” as well.²⁹⁵ The court concluded that “suffering” was equivalent to “permitting”, and therefore a proprietor was not guilty of permitting drunkenness unless he “connives at it, or wilfully shuts his eyes to it.”²⁹⁶ Despite softening the statute in this regard, the courts generally demanded more oversight from publicans in matters of drunkenness than gaming, perhaps because this was the primary offence at which the statute was directed.²⁹⁷

ever to do with playing cards for money” (*ibid.* at 295). Other cases where the landlord had actual knowledge involved allowing bookies to use the premises (see *Belton v. Busby* (1899), 81 L.T. 196; *Hornsby v. Raggett* (1892), 66 L.T. 21).

²⁹² *Supra* note 272.

²⁹³ *Ibid.* at 438. The court also reversed magistrates’ convictions of licensed persons for allowing patrons to play games where gambling was not involved (see *R. v. Ashton* (1852), 1 E. & B. 286 (men could play dominoes in pub)).

²⁹⁴ *Licensing Act, 1872*, *supra* note 254, s. 13.

²⁹⁵ *Somerset v. Wade* (1894), 70 L.T. 452 [hereinafter *Wade*].

²⁹⁶ *Ibid.*

²⁹⁷ For example, in *Ethelstane v. Justices of Oswestry* (1875), 33 L.T. 339, Queen’s Bench upheld the entirely circumstantial conviction of a licensed person. A man had been found drunk at 11:30 p.m. in a ditch one hundred yards from the licensed premises. The evidence showed that the defendant’s pub was the last pub visited, but the publican had served the patron forty-five minutes earlier and the customer did not appear drunk. See also *Edmunds v. James* (1892), 65 L.T. 675 (publican could “permit drunkenness” by selling to a person already drunk); *Thompson v. McKenzie*, [1908] 1 K.B. 905 (for purposes of “permitting drunkenness”, licensed premises did not cease to be such when they were closed to the public, even as regards lodgers). This strict approach also applied to the “selling” provision, which the courts somewhat oddly did treat as a strict liability offense. In *Cundy v. Le Cocq* (1884), 51 L.T. 265 [hereinafter *Cundy*], the court found that selling to a drunk person was not confined to cases where the publican knew or had reason to know that the person served was drunk. It reached this conclusion because the word “knowingly” did not appear in the statute and because “of the general object of the Act, which is an Act for the prevention of drunkenness” (*ibid.* at 266). *Wade* distinguished *Cundy* on the ground that the words “sells any intoxicating liquor to any drunken person” were so express as to make the offense complete without knowledge (*Wade, supra* note 295 at 453). These conflicting standards were apparently a continuing source of confusion for law enforcement officials. See “R.C. on Liquor Licensing”, *supra* note 128 at 167–68. However, as in the case of selling during closing hours, there were virtually no reported cases on “selling to a drunken person”, perhaps because of the difficulty of a constable actually witnessing an illicit sale. Indeed, the only re-

Drunkenness could be committed by a member of the public as well as a licensed person. It was unlawful to be found drunk in a pub, a highway, or a public place; being drunk and disorderly triggered more severe penalties.²⁹⁸ The police focused their efforts on prosecuting individuals under the general criminal law for street offences related to pub patronage rather than on issuing summonses against publicans for permitting drunkenness. In 1876, for example, 16,713 persons were arrested for “street crimes related to drunkenness” such as assault, obstructing the police, and disorderly behaviour;²⁹⁹ in the same year, only forty publicans were convicted of permitting drunkenness and disorderly conduct.³⁰⁰ Indeed, temperance advocates complained that the police took action against drunkenness in the street but not against publicans for “permitting drunkenness” on licensed premises.³⁰¹

Reflecting an overriding anxiety about external street consequences, the judiciary generally affirmed convictions of persons for drunken and disorderly conduct inside a pub only if their behaviour had also annoyed people in the neighbouring streets. *Howell v. Jackson*,³⁰² for example, held that if a guest conducted himself in a pub so as to “disquiet the neighbourhood and the persons passing along the adjacent street,”³⁰³ the landlord was justified in turning him over to the police. This rule applied even to the seemingly private conduct of a publican on his own premises. In 1889 constables entered the pub of Neil Ferguson, a Scottish pub keeper, to find him engaged in a loud

ported case apart from *Cundy* involved a sale to a sober person, which the publican apparently thought was legal and did not attempt to hide from the police (see *Scatchard v. Johnson* (1888), 52 J.P. 389 (publican cannot sell to a sober man who then gives the drink to a drunken man)).

²⁹⁸ The Act provided that every person found drunk in any highway or other public place, or on any licensed premises, was liable to a fine, and every person in a highway or other public place who was guilty while drunk of “riotous or disorderly behaviour”, or who was driving or in possession of a loaded firearm, was liable to a penalty not exceeding forty shillings or in the discretion of the court to imprisonment for not more than one month (*Licensing Act, 1872, supra* note 254, s. 12).

²⁹⁹ “S.C. on Intemperance”, *supra* note 251 at 314 (App. D.). The number of convictions for street offenses related to drunkenness between 1838 and 1876 ranged from a low of 13,764 in 1833 to a high of 24,094 in 1841, but they generally amounted to between 16,000 and 18,000 annually (*ibid.*).

³⁰⁰ *Ibid.* at 312.

³⁰¹ W. Nott-Bower, *Fifty Two Years a Policeman* (London: Edward Arnold, 1926) at 136. Nott-Bower was the Commissioner of Police for Liverpool and later for the City of London. According to another official statistic in 1874, 135,730 persons were proceeded against for drunkenness and being drunk and disorderly, while only 1,506 publicans were prosecuted for permitting drunkenness or disorderly conduct (see “Annual Reports, Judicial Statistics (England and Wales)”, C. 1315 in *Sessional Papers*, vol. 81 (1875) at 25). The Royal Commission on Liquor Licensing similarly reported in 1899 that there was a “great discrepancy between the number of convictions for drunkenness and the small number of license-holders proceeded against for permitting drunkenness” (see “R.C. on Liquor Licensing”, *supra* note 128 at 21).

³⁰² (1834), 6 C. & P. 723, 172 E.R. 1435.

³⁰³ *Ibid.* at 1437. The patron had sued the proprietor for false imprisonment. In a similar case, *Ingle v. Bell*, [1836] Ex. Pleas 516, 150 E.R. 539 [hereinafter *Ingle* cited to E.R.], the court upheld a publican in his forcible efforts to prevent a patron from entering his pub. The court was influenced by the fact that the patron had “created a disturbance in the street, by which means a mob was assembled” (*Ingle, ibid.* at 517).

but sober argument about home rule and dogs with his wife, his barman, and a friend. The magistrate convicted Ferguson of breach of the peace, and the Court of Queen's Bench affirmed on the ground that his "cursing and swearing" could be heard early Sunday morning in the centre of the street thirty yards away.³⁰⁴

In contrast, the courts were reluctant to declare pub conduct unlawful if it did not directly implicate the peace of the streets. *Russon v. Dutton (No. 2)*,³⁰⁵ which also involved conduct by a publican on his own property, affords a revealing counterpoint to *Howell v. Jackson*. In *Dutton*, two police officers entered a pub in Chester and entered into an argument with the proprietor. Losing his temper, the publican snapped at the police, "You are too bloody keen; you can report what the bloody hell you like."³⁰⁶ Although no one heard this statement outside the establishment, the police prosecuted the publican under a Chester bylaw that prohibited the use of any "profane, obscene, or indecent language, gesture, or conduct to the annoyance of passengers" in any street or public place. Lord Alverstone agreed that the language was indecent and that bylaws "ought, if possible, to be supported,"³⁰⁷ but he viewed it as "most extravagant" in this context to treat officers as "passengers" or a public house as a "street or public place".³⁰⁸ Similarly, in cases under the *Licensing Act, 1872*, the court interpreted the statute not to apply to a publican's after-hours drunkenness so long as the public was not affected.³⁰⁹ As the understandably sympathetic Mr. Justice Lush observed, "drunkenness is now only an offence when and so far as public order is violated."³¹⁰

Strikingly, the courts were even reluctant to affirm the right of the police to enter a pub to investigate a statutory violation if the suspected behaviour did not directly implicate the quiet of the streets. Indeed, the powers of the police to intrude on pub premises contracted as the century progressed. The *Wine and Beerhouse Act, 1834* had provided that constables could enter licensed houses "when and so often as such constables ... shall think proper."³¹¹ In 1874, however, the *Licensing Act* replaced this

³⁰⁴ *Ferguson v. Carnochan*, [1889] 2 H.C.J. 278 at 281 (Scot.). The court was convinced that "a person using bad language in such a loud and noisy manner at three in the morning in his own house does commit a breach of the peace" (*ibid.*).

³⁰⁵ (1911), 104 L.T. 601 [hereinafter *Dutton*].

³⁰⁶ *Ibid.* at 601.

³⁰⁷ *Ibid.* at 602. He relied on *Kruse*, *supra* note 102 at 99, which stated that bylaws promulgated by public representative bodies should be "benevolently interpreted".

³⁰⁸ *Dutton*, *supra* note 305 at 602. Mr. Justice Hamilton agreed that "when one considers that the person who used it was a publican in his own house, no words seem to me less appropriate to say that it was the use of indecent language in a public place to the annoyance of passengers" (*ibid.*).

³⁰⁹ See *Torrens*, *supra* note 274 (refusing to apply the phrase "drunk on any licensed premises" to a publican after hours, because the pub then reverted to private premises). Mr. Justice Mellor stated, "I think the magistrate has put too large a construction on the section of the act under which the information was laid, the consequences of which would be manifestly unreasonable" because it would impose on the publican "an obligation of keeping sober the whole night" (*ibid.* at 821). See also *Warden v. Tye* (1877), 35 L.T. 852 (landlord cannot "permit himself" to get drunk under section 13).

³¹⁰ *Torrens*, *ibid.* at 822.

³¹¹ (U.K.) 4 & 5 Will. IV, c. 85, s. 7.

clause with a provision that a constable could enter a licensed pub only “for the purpose of preventing or detecting the violation” of any statutory provision.³¹² The courts subsequently curbed police powers even further by interpreting this clause to mandate an objective rather than subjective standard. In *Duncan v. Dowding*³¹³ the Divisional Court prohibited the police from entering a pub without a “reasonable basis” for suspecting a violation. The case arose in Bristol, where a publican leased a room on a weekly basis to a lodge of the Royal Antediluvian Order of Buffaloes, a popular fraternal order that held initiation ceremonies and conducted parties in the upstairs rooms of pubs.³¹⁴ One night an officer on street patrol heard sounds of music and singing coming from the pub, and upon entering the premises to investigate was refused admission to the private room. The Divisional Court concluded that the policeman’s behaviour was improper. Mr. Justice Cave, chiding the constable for overly zealous interference with on-premises conduct, found it “monstrous to suggest that the mere fact that persons are singing and playing in a room in licensed premises points to the inference that they are getting drunk.”³¹⁵ “Interference, even with licensed premises,” he declared, “cannot be justified without some reasonable ground.”³¹⁶ Thus, the courts were willing to rein in police who intruded on even the minimally respectable institution of the pub unless the offensive conduct affected the peace of the surrounding streets.

A number of general conclusions emerge from the cases involving public houses, reinforcing conclusions reached elsewhere about the attitudes and predilections of the Victorian judiciary. The courts did not rubber stamp the actions of local officials, police, or magistrates in the pub context any more than they automatically approved their decisions regarding use of municipal recreational space. Although in licensing cases they vigorously reaffirmed the justices’ discretionary authority, in reviewing their criminal decisions they disapproved the magistrates’ indiscriminate tendency to convict and instead focused on particularized objectives of their own. As in other recreational contexts, their concerns were to enhance personal moral responsibility and to ensure that licensed premises did not disturb the tranquillity of urban thoroughfares. As a corollary, they discouraged actions by police and magistrates that punished persons either not truly culpable or whose behaviour did not adversely affect the wider public.

³¹² *Licensing Act, 1874*, *supra* note 254, s. 16.

³¹³ [1897] 1 Q.B. 575 [hereinafter *Dowding*]. See also *Harrison v. McL’Meel* (1884), 50 L.T. 210 (right of constable to enter does not apply to off-licences). In *Dowding* the court seems to have simply ignored an earlier case cited in argument, *R. v. Dobbins* (1883), 48 J.P. 182, holding that a constable could enter licensed premises without suspecting the commission of an offence.

³¹⁴ See Girouard, *supra* note 4 at 16.

³¹⁵ *Dowding*, *supra* note 313 at 578.

³¹⁶ *Ibid.*

B. Fostering “Rational” Entertainments: Music Halls and Theatres

Whereas the courts strictly regulated pubs, at least with respect to conduct by publicans or customers that was morally blameworthy or extended beyond the pub walls, they perceived music halls as occupying a higher position. More “rational” and less socially corrosive than public houses, the halls were situated at a point on the spectrum of respectability midway between pubs and legitimate theatre. Their intermediate status was reflected in the actions of both magistrates and judges, who applied their regulatory powers largely to enhance the halls’ “rational” features with respect to entertainment and alcohol consumption.

Music halls evolved out of pubs when the *Theatres Act, 1843*³¹⁷ forced singing rooms in pubs to choose between becoming either dramatic theatres with a limited licence to serve alcohol or concert rooms with a full liquor licence but restricted to the presentation of variety acts. Most establishments decided to become concert rooms and, as their entertainments became more appealing and elaborate, gradually developed into formal music halls.³¹⁸ The origin of the halls conventionally dates from 1851 when the impresario Charles Morton opened the Canterbury Music Hall alongside his Lambeth public house, acknowledging the growing demand for entertainment by moving the variety acts into a separate facility.³¹⁹ Within a decade music halls emerged as the chief competitor to the pubs in working-class leisure culture, and their popularity increased dramatically throughout the century.³²⁰ It was “to the music halls,” testified a witness before the House of Commons Select Committee on Theatres in 1892, “that the vast body of working people look for recreation and entertainment.”³²¹

Although variety acts were often mildly vulgar, and music halls never attained the respectability of the legitimate theatre, they were nonetheless considered more “improving” than the pubs. Inasmuch as entertainment rather than drinking was their primary attraction, they were less conducive to drunkenness and rowdiness.³²² Moreo-

³¹⁷ *Theatres Act, 1843* (U.K.), 6 & 7 Vict., c. 68.

³¹⁸ See e.g. *Leisure in the Industrial Revolution*, *supra* note 1 at 165; Mander & Mitchenson, *supra* note 5 at 12; “Custom, Capital and Culture”, *supra* note 5 at 181.

³¹⁹ See *Leisure in the Industrial Revolution*, *ibid.* at 164; “Pubs”, *supra* note 4 at 324; U.K., H.C., “Select Committee on Theatrical Licences and Regulations”, No. 373 in *Sessional Papers*, vol. 16 (1866) at 306 (App. 3) [hereinafter “1866 S.C. on Theatrical Licences”]. Frederick Stanley, the solicitor for the London Music Hall Proprietors’ Protection Association, described how the music hall the Canterbury grew out of a singing room in the Canterbury Arms pub. Morton built a hall at the back of his premises capable of holding four or five hundred people, then engaged professional singers and admitted the wives (*ibid.*).

³²⁰ “Social Control”, *supra* note 22 at 203. In 1868 there were 28 music halls in London and 300 in the rest of Britain (see *Drink and the Victorians*, *supra* note 4 at 324-25; *Leisure and Society*, *supra* note 1 at 109). By 1892 the number of London halls had risen to 189 (see “1892 S.C. on Theatres”, *supra* note 116 at vi). The peak period of the halls was between 1890 and World War I (see *Leisure and Society*, *ibid.* at 109-10).

³²¹ “1892 S.C. on Theatres”, *ibid.* at Q. 5177. See “Pubs”, *supra* note 4 at 175.

³²² See *Leisure in the Industrial Revolution*, *supra* note 1 at 171; “Pubs”, *ibid.* at 325.

ver, they were hospitable to families. "Before the establishment of music halls, persons who now frequent them were in the habit of spending their evenings in public-houses," stated Frederick Stanley, solicitor for the London Music Hall Proprietors' Protection Association, but "[t]hey now take their wives and families with them to music halls."³²³

The law reflected the music halls' ambiguous position on the moral spectrum. They were regulated less thoroughly than the pubs; indeed, Parliament never imposed uniform national standards on the halls, preferring to leave supervision to local authorities. Nonetheless, the courts consistently upheld the wide discretion of local bodies—first the magistrates and, after 1888, the county councils³²⁴—to shore up the quasi-respectability of the halls by limiting their numbers and imposing conditions on the issuance of licences. Judges also maintained the intermediate status of music halls by ensuring that they did not encroach on the domain of the legitimate theatre by offering "superior" forms of entertainment such as ballet, opera, and dramatic sketches. The judiciary, in other words, upheld the rationalization of music halls through local regulation but also preserved the acute moral distinction between theatre and variety.

As in the case of pubs, an important innovation of the Victorian period was the refining and strengthening of the justices' licensing powers. In the early nineteenth century the only licence available for pub entertainment was an indiscriminate licence "for public dancing, music, or other public entertainment of a like kind" under the *Disorderly Houses Act, 1751*,³²⁵ any pub with such a licence could automatically function as a music hall. Justices sought to license music and dancing separately, which would allow them greater control over the entertainments offered in drinking establishments, but they believed that the 1751 statute prevented them from doing so.³²⁶ Finally, a decision at quarter sessions in 1851 permitted them to grant licences limited to "music" only.³²⁷ This legal change enabled the justices to control the growth

³²³ "1866 S.C. on Theatrical Licences", *supra* note 319 at 307 (App. 3). See *Rational Recreation*, *supra* note 1 at 157-58; *Leisure in the Industrial Revolution*, *ibid.*; "Pubs", *ibid.*

³²⁴ *Local Government Act, 1888* (U.K.), 51 & 52 Vict., c. 41, s. 3, transferred authority over the theatres outside London from the magistrates to the county councils. However, the Act contained a clause enabling county councils to delegate back to the justices the responsibility for licensing theatres, and most county councils took advantage of the clause (*ibid.*, s. 28(2)). See "1892 S.C. on Theatres", *supra* note 116 at iii).

³²⁵ (U.K.), 25 Geo. II, c. 36, s. 2. See Wharton, *supra* note 252 at 29-30.

³²⁶ See *Leisure in the Industrial Revolution*, *supra* note 1 at 169. See also "1866 S.C. on Theatrical Licences", *supra* note 319 at 301 (App. 2). Indeed, in 1834 Judge Campbell held that every licence automatically authorized dancing, music, and other public entertainment (*ibid.*).

³²⁷ "1866 S.C. on Theatrical Licences", *ibid.* at 302-03 (reprint of Queen's Bench decision). See *Leisure in the Industrial Revolution*, *ibid.* at 169.

of music halls, which required a full-fledged music and dancing licence, and “music only” licences soon came to predominate over other types of licences.³²⁸

Twenty years later, both the Court of Queen’s Bench and the Exchequer Chamber ratified this new magisterial policy. In *Brown v. Nugent*³²⁹ an informer sought to recover a statutory penalty by suing the proprietor of the Cambridge Music Hall for violating the conditions of a licence that limited him to musical productions. The defendant had permitted “dancing” in the form of an elaborate stage performance, complete with waterfall, of a ballet called “The Revels of the Sylphides”. With the exception of the two ballet dancers, there was no dancing in the hall. Upon a jury finding that dancing was nonetheless “a substantial part of the entertainment”, the Court of Queen’s Bench concluded that a music licence legally restricted the holder to musical entertainment only. On appeal, the Exchequer Chamber confirmed both that magistrates could validly confine a licence to music and that a special “music and dancing” licence was required even for “dancing” that occurred solely on the stage. Baron Kelly observed that a house kept for concerts only was totally different from one kept for dancing. In the latter case he warned, sounding the characteristic tones of Victorian moralism, “mischief does sometimes arise”.³³⁰ Moreover, in his view magistrates enjoyed substantial discretion in issuing entertainment licences to consider social criteria such as “the place and the position of the house, the nature of the neighbourhood, the kind of persons who would be likely to assemble in such a house.”³³¹ A year later the Court of Queen’s Bench affirmed that in the case of a music and dancing licence, the justices had “unconditional power to grant a licence, and may limit it for the time they think proper.”³³² The courts thus authorized the magistrates to limit the number of music halls, acknowledged the propriety of their moral norms, and sustained their broad discretion in making licensing determinations.³³³

The courts also supported magistrates who imposed conditions on music hall licences designed to enhance the respectability of the halls, such as requiring a certifi-

³²⁸ For example, in Middlesex in 1855, 255 licences were issued for music only and 50 for music and dancing; in 1865 the numbers had risen to 291 and 60 respectively (see “1866 S.C. on Theatrical Licences”, *ibid.* at 301 (App. 2); *Leisure in the Industrial Revolution, ibid.*).

³²⁹ (1872), L.R. 7 Q.B. 588.

³³⁰ *Ibid.* at 590. The legislature, he imagined, must have intended a power to licence for musical entertainments in many cases where it would be extremely inexpedient and dangerous to grant a licence for dancing.

³³¹ *Ibid.* at 591.

³³² *Hoffman v. Bond* (1875), 32 L.T. 775 at 776.

³³³ The extent of the magistrates’ discretion was a subject of complaint. Frederick Stanley, solicitor for the London Music Hall Proprietors’ Protection Association, objected to the system of licensing because there were no fixed rules and the decisions depended entirely on the opinion of whomever happened to be present. Evidence was not confined to facts, “irregular” discussions took place, and magistrates were not required to explain their reasons. There was, he concluded, a good deal of “private influence” in matters of licences (see “1866 S.C. on Theatrical Licences”, *supra* note 319 at 309-10 (App. 3.)).

cate as to the suitability of the premises³³⁴ and prohibiting music hall performances on the Sabbath.³³⁵ Most significant were conditions governing the consumption of alcohol. Until 1872 the proprietor of a music hall could receive an excise licence to sell wine, beer, and spirits without first obtaining from the justices a certificate of character;³³⁶ the *Licensing Act* of that year, however, required managers to obtain such moral certification.³³⁷ In addition to scrutinizing the character of each applicant, magistrates imposed additional conditions to regulate alcohol and heighten the respectability of the establishment, such as requiring an admission fee that could not be returned in the form of drink.³³⁸ Eventually, local regulation forced music hall proprietors to replace tables and chairs with fixed row seating and remove the bars to the rear of the auditorium; later, managers were required to operate the bars in a separate room entirely.³³⁹ Measures to reduce alcohol consumption and impose other controls accelerated when jurisdiction over the music halls passed from the magistrates to elected county councils in 1888. Certain councils—particularly the London County Council—were exceedingly puritanical, and their exacting regulations forced the closure of many smaller and less respectable halls.³⁴⁰

While sustaining local efforts to improve the moral tone of the halls, the courts equally thwarted attempts by music hall proprietors to intrude into the domain of high culture occupied by the opera, ballet, and drama.³⁴¹ Theatres suffering from the com-

³³⁴ In 1878 a statute required the Metropolitan Board of Works (replaced by the London County Council in 1889) to issue a certificate as to the suitability of the premises when the music hall manager made his annual application for a licence. The Board had the power to inspect all existing theatres and music halls, and to require reasonable alterations (see “1892 S.C. on Theatres”, *supra* note 116 at Q. 16; Mander & Mitchenson, *supra* note 5 at 20).

³³⁵ See e.g. *London County Council v. Bermondsey Bioscope*, [1911] 1 K.B. 453 at 453-54 [hereinafter *Bermondsey Bioscope*].

³³⁶ *Excise Act, 1835* (U.K.), 5 & 6 Will. IV, c. 39, s. 7. See *R. v. Commissioners of Inland Revenue* (1888), 59 L.T. 378 at 378 [hereinafter *Inland Revenue*].

³³⁷ *Licensing Act, 1872*, *supra* note 254, s. 3. See *Inland Revenue*, *ibid.* at 382.

³³⁸ Such a condition was validated in *Ex parte Richards* (1904), 68 J.P. 536.

³³⁹ See e.g. *Drink and the Victorians*, *supra* note 4 at 325; Mander & Mitchenson, *supra* note 5 at 21. The growing commercialization of the music halls supplemented the regulatory efforts to rationalize them, as “respectability” translated into more efficient and profitable management. Fixed stall seating brought higher audience capacity, allowed for price differentials, encouraged seat reservations, and simplified the running of multiple nightly shows. Limitations on drink controlled the volatility of the audience and prevented random interruptions of the performance. Controls on the content of the acts and the number of encores ensured timely scheduling (see “Custom, Capital and Culture”, *supra* note 5 at 195-96; “Social Control”, *supra* note 22 at 203-04 (the moderation of the music halls by the 1890s was in part due to business calculation by managers and entrepreneurs)).

³⁴⁰ *Rational Recreation*, *supra* note 1 at 162; Mander & Mitchenson, *ibid.* at 20.

³⁴¹ Managers frequently tried to counteract or evade the prohibition on theatrical productions. At the Canterbury, for example, Charles Morton presented *opera buffe* in the form of a one-act musical extravaganza called “The Enchanted Hash”, avoiding an injunction by producing the piece in dumb-show with dialogue coming from the corner of the stage as an “explanatory text” (Scott, *supra* note 5 at 140). Testimony to the 1866 Committee indicated that the practice of introducing pantomime and

petition of music halls jealously guarded their monopoly, successfully suing halls that presented pantomimes or dramatic sketches for violating the terms of their music and dancing licences.³⁴² The judges sympathized with the contemporary view that it was important to segregate the two forms of entertainment, considering them “as different as two things can possibly be”.³⁴³ Legal decisions thus played an important role in maintaining the hierarchy of respectability and stabilizing the music halls in an intermediate position between pubs and legitimate theatre.

As has been noted, theatres stood at the moral pinnacle of the Victorian entertainment industry.³⁴⁴ Prohibited from allowing either drinking or smoking in the auditorium, they had become by mid-century a predominantly middle-class form of entertainment.³⁴⁵ Like the music halls, they were primarily regulated by local authorities through licensing requirements. The *Theatres Act, 1843* required theatres in London to obtain a dramatic licence from the Lord Chamberlain; playhouses outside London applied to four justices at a special licensing session.³⁴⁶ The courts, as usual, upheld the absolute discretion of local licensing bodies to evaluate the qualifications of applicants. In *Ex parte Harrington*,³⁴⁷ for example, a rejected applicant challenged the refusal of a theatre licence on the ground that the statute required the justices to award a licence to any qualified applicant. Mr. Justice Field in the Divisional Court declared that “he had never heard an application for a *mandamus* to justices made on slighter or less sufficient grounds.”³⁴⁸ Agreeing with his colleague, Mr. Justice Stephen also pointed out that magistrates “were no more bound to give their reasons in such a case than a jury were bound to give reasons for their verdict.”³⁴⁹ On appeal, the Court of

ballet in music halls had already commenced at the Canterbury and other halls (“1866 S.C. on Theatrical Licences”, *supra* note 319 at 307-08 (App. 3.)). During its first theatrical licensing session in 1889, the LCC discovered that a great many music halls were in fact presenting dramatic sketches (see “1892 S.C. on Theatres”, *supra* note 116 at Q. 73 (testimony of Thomas Fardell, former chairman of Theatres and Music Halls Committee of the LCC)).

³⁴² See “1866 S.C. on Theatrical Licences”, *ibid.*; “1892 S.C. on Theatres”, *ibid.*; Bailey, *supra* note 5 at 186.

³⁴³ “1892 S.C. on Theatres”, *ibid.* at Q. 577 (Mr. Fardell), and at Q. 864. The relative respectability of the music halls was also indicated by the fact that in London the police had lesser rights to enter music halls than pubs. Although a “constable” could enter any unlicensed place where music and dancing was occurring, in *Garland v. Ahrbeck* (1888), 5 T.L.R. 91 at 92, Baron Huddleston held that a “constable” entitled to recover costs in a prosecution meant only a parish constable, and as a result the London police made no further effort to make arrests (see “1892 S.C. on Theatres”, *ibid.* at Q. 14).

³⁴⁴ A court first commented on the respectability of the theatres as compared with other forms of entertainment—especially street entertainment—in *Betterton’s Case* (1695), 5 Mod. 142, where it held that unlike a rope dancer, a playhouse was not a nuisance *per se*.

³⁴⁵ See “1892 S.C. on Theatres”, *supra* note 116 at Q. 864 (witness testifying that “the class who frequents music halls as a rule is not the class that frequents theatres”); C. Barker, “A Theatre for the People” in Richards & Thomson, *supra* note 6 at 14-15.

³⁴⁶ *Theatres Act, 1843*, *supra* note 317, ss. 2-5.

³⁴⁷ (1885), 4 T.L.R. 435 (C.A.).

³⁴⁸ *Ibid.* at 436.

³⁴⁹ *Ibid.* at 437.

Appeal confirmed that the determination of whether an applicant was “fit and proper” lay wholly within the discretion of the justices; the special licensing sessions would otherwise be a “solemn farce”.³⁵⁰ Interestingly, *Harrington* involved an attempt by a music hall company to extend its operations into theatrical productions, and the justices’ refusal may well have reflected their desire to maintain separate management structures for the two forms of entertainment.

A critical factor that accounted for the greater respectability of theatres was the reduced presence of alcohol. The law prohibited the sale of drinks from permanent stations in the seating area, though any licensed theatre could automatically obtain an excise licence to keep barrels of beer, gin, and brandy in the pits and could send hawkers into the auditorium to sell drinks from baskets.³⁵¹ The Divisional Court ruled that even selling to this extent was only permitted during pub hours, regardless of when the performance concluded.³⁵² In addition, the courts validated local efforts to further heighten the moral tone of theatres by conditioning licences on a promise not to sell alcohol on the premises at all. A county council in Yorkshire attempted to eliminate drinking entirely by refusing to issue a theatre licence unless the applicant agreed not to apply for the limited excise licence to which he or she was automatically entitled. In *R. v. County Council of West Riding*,³⁵³ the Divisional Court affirmed the right of the local authority to impose such a restriction; Mr. Justice Cave expressed his disinclination to “lay down ... any rules by which the discretion of the committee is to be guided in such a case as this.”³⁵⁴ Mr. Justice Wills pointed out that in the instant case there was a public house within twenty yards of the theatre and an unconditional licence would multiply facilities for drinking in an undesirable neighbourhood.³⁵⁵ Two years later Chancery followed Queen’s Bench in upholding the right of the Manchester County Council to require an applicant for a theatre licence—again the proprietor of a music hall seeking to expand his operations—to enter into a legal covenant not to

³⁵⁰ *Ibid.*, Lord Fry. Lord Justice Lopes concurred that it was “most important that they should inquire into the nature of the building and the character of the person who was to be the manager” (*ibid.*).

³⁵¹ *Excise Act, 1835*, *supra* note 336, s. 7. Indeed, the *Licensing Act, 1872*, which required places of entertainment to obtain a certificate of character from the justices prior to obtaining an excise license, specifically exempted “theatres”—but not music halls—from this requirement (*Licensing Act, 1872*, *supra* note 251, s. 72). See *Inland Revenue*, *supra* note 336. See also “1866 S.C. on Theatrical Licences”, *supra* note 319 at Qs. 54-60; Wharton, *supra* note 252 at 26; R.M. Montgomery, *The Licensing Laws* (London: Sweet & Maxwell, 1905) at 133.

³⁵² *Gallagher v. Rudd* (1897), 77 L.T. 367. The theatre was licensed to remain open until 11:30 p.m. On the evening in question the performance concluded at 10:55 p.m. and the bar was kept open until 11:20 p.m. The proprietor was convicted of violating the *Licensing Act, 1874*, *supra* note 254, s. 3, which required all premises in which intoxicating liquors were sold to close at 11:00 p.m.

³⁵³ [1896] 2 Q.B. 386 [hereinafter *West Riding*].

³⁵⁴ *Ibid.* at 387. He conceded that a general rule that a theatre could never be licensed unless the licensee agreed not to apply for a liquor licence might be invalid, but it had “been left to the committee to have regard to the circumstances of each particular case which comes before them” (*ibid.* at 388).

³⁵⁵ *Ibid.* at 389.

apply for a liquor licence.³⁵⁶ The Vice Chancellor noted that the council had exercised its discretion and that “the courts refuse to lay down any precise definition of the limits of such discretion.”³⁵⁷

Later that same year the Court of Appeal came close to upholding a blanket local ordinance prohibiting alcohol in theatres. The *Theatres Act* empowered the justices to “make suitable rules for insuring order and decency,”³⁵⁸ and in the 1890s authorities throughout Kent adopted rules entirely banning the sale of alcoholic beverages on theatrical premises. A proprietor complained that a comprehensive ordinance of this nature deprived the licensing body from exercising unfettered discretion in individual cases, but in *R. v. Sheerness Urban District Council*³⁵⁹ Lord Rugby gave his opinion that such a rule could indeed bind the local authority.³⁶⁰ The statement was extreme, for the courts were usually careful to require individualized determinations and eschew the application of broad predetermined policies in licensing decisions.³⁶¹ Indeed, Lord Rugby held alternatively that the Council had heard enough evidence to make a particularized judgment.³⁶² His pronouncement indicated, however, the extent to which many judges were willing to go to promote sobriety and moral probity in the theatre. Partly in consequence of these legal decisions, theatres became so virtuous by the late nineteenth century that attending a play was a legitimate activity even for the religious public.³⁶³

³⁵⁶ *Manchester Palace of Varieties v. Manchester (City of)* (1898), 62 J.P. 425 [hereinafter *Manchester Palace*]. The court, obviously wishing to uphold the principle of *West Riding*, *supra* note 353, decided the case despite acknowledging that it was not the appropriate forum (*Manchester Palace*, *ibid.* at 426).

³⁵⁷ *Ibid.* In a somewhat odd statement, given that renunciation of alcohol was an absolute precondition to receiving a licence, the Vice Chancellor observed that the licensees had agreed to the covenant “voluntarily and without duress” and now inappropriately sought release from their obligation: “If they wish to be released from the undertaking,” he commented, “they should abandon the license” (*ibid.*).

³⁵⁸ *Theatres Act, 1843*, *supra* note 317, s. 9.

³⁵⁹ (1898), 62 J.P. 563 (C.A.) [hereinafter *Sheerness*].

³⁶⁰ *Ibid.* at 564. Lord Justice Smith, however, was of the opinion “that the district council were not bound hand and foot by the resolution adopting the rules” (*ibid.*).

³⁶¹ See e.g. *West Riding*, *supra* note 353; *Manchester Palace*, *supra* note 356; *R. v. London County Council*, [1918] 1 K.B. 68 at 73-75.

³⁶² *Sheerness*, *supra* note 359 at 564. His fellow judge agreed that the council had heard sufficient evidence about the existence of other clubs in the neighbourhood to reach a particularized decision (*ibid.*).

³⁶³ See Best, *supra* note 10 at 217. The respectability of theatres was further evidenced by the fact that the police lacked power to enter licensed playhouses to inspect their operations. Alexander Bruce, Assistant Commissioner of the Metropolitan Police, testified before the 1892 Select Committee that the police had no power to enter licensed theatres for purposes of inspection. When asked whether the police thought it would be a good idea to have this power, he responded that constables should not judge the good conduct or otherwise of licensed theatres (see “1892 S.C. on Theatres”, *supra* note 116 at Qs. 4088-92, where it was observed that the police did have power under section 46 of the *Metropolitan Police Act* to enter unlicensed theatres, as well as a further power under the *Theatres*

In the Victorian era, therefore, two forms of entertainment—pubs and legitimate theatres—bracketed the spectrum of respectability, with music halls holding an uncertain middle position. The courts exercised strict supervision over pubs through licensing requirements and discriminating controls over illicit sales, gaming, and drunkenness. At the same time, they channeled music halls toward greater “rationality” by upholding local regulations regarding licences and restrictions on alcohol consumption. The judges stopped short, however, of permitting music halls to become so respectable as to infringe on the rarified realm occupied by the legitimate theatre. By validating the efforts of theatres to maintain their monopoly over drama and high culture, and by upholding the licensing authorities’ refusals to grant theatre licences to music halls, the judges maintained a strict demarcation between establishments located at different points on the spectrum of respectability.

C. The Cinema: Defining the Moral Status of a New Recreational Form

The moral sensibility of the judges confronted a new challenge when a novel form of entertainment, the cinema, made its appearance at the end of the nineteenth century. Introduced in 1896, cinemas quickly became a wildly popular form of mass entertainment.³⁶⁴ The government and the courts did their utmost to position them as moral analogues to theatres rather than pubs, pursuing this objective through a comprehensive regulatory scheme that prohibited alcohol, restricted hours of operation, and implemented safety requirements. The impetus for close monitoring of theatres came from a series of deadly fires that occurred in 1907 and 1908 in Barnsley, Newmarket, and Stratford.³⁶⁵ The resulting *Cinematograph Act, 1909*³⁶⁶ mandated asbestos-lined projection rooms and authorized the Home Office to promulgate further safety regulations.³⁶⁷ In addition, it empowered county councils to issue cinema licences “to such persons as they think fit to use the premises” and under such conditions as “the council may by the respective licences determine.”³⁶⁸

Act, 1843 to take out a summons against a theatre for being unlicensed, but they did not exercise these powers except in exceptional circumstances (*ibid.* at Qs 4103-07)). Not surprisingly, however, the police prevented theatre patrons from obstructing the street, even by standing in an orderly entrance queue (see *infra* notes 427-32 and accompanying text).

³⁶⁴ Field, *supra* note 7 at 13-18.

³⁶⁵ See *ibid.* at 18-22; P. Wild, “Recreation in Rochdale, 1900-1940” in J. Clarke, C. Critcher & R. Johnson, eds., *Working Class Culture: Studies in History and Theory* (London: Hutchinson, 1979) 140 at 154.

³⁶⁶ (U.K.), 9 Edw. VII, c. 30.

³⁶⁷ Regulations coming into force at the beginning of 1910 confined flammable film “as closely as any slave of the lamp”, requiring it to pass from one metal container to another until it reached a fire-proof projection room. Nitrate stock remained the standard medium for film shows for forty years (Field, *supra* note 7 at 22).

³⁶⁸ *Cinematograph Act, 1909*, *supra* note 366, s. 2(1).

Local authorities, especially in London, used their discretionary licensing powers under the Act to promote the respectability of movie theatres by enhancing their temperance and sabbatarian features. In 1910, for example, the LCC granted a cinema licence to the Bermondsey Bioscope Company only on condition that its cinema, the London Bridge Picture Palace, remain closed on Sundays, Good Fridays, and Christmas Day. The company subsequently challenged the restriction as *ultra vires* an act—the title of which was *An Act to Make Better Provision for Securing Safety at Cinematograph and Other Exhibitions*—intended to secure public safety. In *Bermondsey Bioscope*³⁶⁹ the Divisional Court refused to limit the Act's scope to its title and instead construed it to authorize expansive local powers, including the right to impose Sabbatarian conditions. Mr. Justice Avory commented that the courts had frequently considered Sabbatarian restrictions in the case of music hall licences, and “no one had been bold enough to come into Court and say” that the council could not impose such conditions in those circumstances.³⁷⁰ Although the LCC and other similarly inclined town councils eventually relented and allowed Sunday showings, they directed the cinemas to show only inspirational movies on Sundays and to donate their profits to charity.³⁷¹ The courts thus upheld the wide discretion of local authorities to impose conditions ensuring that the cinema, like the legitimate theatre, would be rational, Christian, and morally uplifting.³⁷²

³⁶⁹ *Supra* note 335.

³⁷⁰ *Ibid.* at 453. The judge continued that he had “been unable to discover any distinction for this purpose between the condition which is imposed in the ordinary case of a music-hall licence and the condition which is impugned in the present case” (*ibid.* at 454). In the same case, Lord Alverstone referred to the “recognized principle” that a court should interfere only reluctantly with the regulatory authority of a public body (*ibid.* at 452).

³⁷¹ Field, *supra* note 7 at 26.

³⁷² This judicial deference to local regulation was generally true despite an aberrant decision in 1915 finding it *ultra vires* for the Halifax local council to condition a cinema licence on refusing to admit children in the late evening (*Theatre de Luxe (Halifax) Ltd. v. Gledhill*, [1915] 2 K.B. 49). The majority held that there was no connection between the basis for the condition, which was to protect the health and welfare of young children, and the “subject matter” of the licence, which was the use of the premises for cinema presentations. The court conceded that according to *Bermondsey Bioscope* conditions need not relate to safety, but it found that in the instant case the exclusion of children did not even relate to cinematograph exhibitions specifically but rather to health and welfare issues that would apply to any place of entertainment: “[T]he authority was addressing itself to a social question entirely independent of the management of this place as a picture theatre” (*ibid.* at 57). Lord Atkin dissented. Though he was reluctant to allow a public authority to burden a “very substantial public industry”, he found the terms of the *Cinematograph Act, 1909* to be “quite unrestricted” and the majority’s decision to be inconsistent with *Bermondsey Bioscope*, which allowed the imposition of conditions in the public interest (*ibid.* at 58-60). Later cases, which upheld further licensing restrictions, distinguished *Gledhill* and criticized its reasoning. See *e.g. Ellis v. North Metropolitan Theatres*, [1915] 2 K.B. 61 (upholding a limitation of cinema showings to certain days of the week); *R. v. Burnley Justices*, [1916-17] All E.R. 346 (upholding a limitation on opening hours, a ban on indecent films, and a condition that the cinema not give gifts to children or admit them if disease broke out at their schools).

In the sphere of indoor recreations generally, therefore, the courts consistently upheld the broad authority of local bodies to impose conditions that would elevate the moral tone of commercial establishments. They played a critical role in suppressing the more objectionable features of pub life, channeling and rationalizing the music halls, preserving and accentuating the respectability of legitimate theatres, and situating a new cultural institution—the cinema—at a superior point on the hierarchy of respectability. Further, they attempted to control the incidental effects of recreational facilities on the surrounding streets. As will be shown, these judicial priorities were equally evident—perhaps even more so—in the sphere of private law.

V. Private Law: Nuisance and Judicial Management

Private litigation, generally involving nuisance suits between neighbours, offered the courts a further opportunity to chart the course of recreational change, particularly with respect to the outdoor consequences of indoor entertainments. Although plaintiffs in such cases—usually homeowners suing adjacent commercial facilities—invariably prevailed in their suits, the usual ground for the courts' private law decisions was not the injury suffered by plaintiffs themselves; it was rather the general annoyance to the public caused by the presence of noisy and obstructive crowds in the city thoroughfares. Shooting ranges, fetes, circuses, amusement parks, racetracks, clubs, theatres, and music halls all succumbed to legal action not primarily for the inconveniences inflicted on neighbours or patrons but for their adverse impact on public street life.

While firmly imposing liability, however, courts were flexible on relief, fitting remedies to the moral status of the offending enterprise. They declined to issue injunctions against respectable and quasi-respectable entertainments such as theatres and music halls, preferring a “managerial” approach that involved pressuring the parties to reach reasonable private accommodations. In contrast, they dealt harshly with disreputable amusements such as horse racing, displaying little reluctance in this context to order coercive relief. In private as in public law, the courts controlled the streets, reinforced the hierarchy of respectability, and fostered the “rationalization” of popular recreation.

A. Basic Legal Principles: Moore and Brewster

The seminal case establishing the law of nuisance as applied to recreational facilities was the 1832 decision of *R. v. Moore*.³⁷³ A criminal public nuisance case, *Moore* remained throughout the nineteenth century the major precedent in the sphere of civil private nuisance as well.³⁷⁴ The defendant, a gun maker, operated a rifle range

³⁷³ *R. v. Moore* (1832), 3 B. & Ad. 184 [hereinafter *Moore*].

³⁷⁴ A civil nuisance claim could sound either in private or public nuisance. A private nuisance action was based on noise or obstructed access to premises. A plaintiff could also sue in tort for public nuisance by alleging “particular” damage from a defendant’s crime of obstructing public passage in the

where people practiced shooting at live pigeons and stationary targets. Crowds of spectators gathered outside the grounds to shoot at birds that escaped, and Moore was indicted for permitting “a great number of idle and disorderly persons, armed with guns and fire-arms, to meet and assemble in the streets.”³⁷⁵ In his defence, he argued that he was not answerable for the acts of those whom he had driven off his own grounds and could not otherwise control. Emphasizing the commercial nature of his enterprise, the court responded that Moore was not an “innocent householder” but rather a businessman seeking “to make a profit to the annoyance of all his neighbours.”³⁷⁶ Lord Tenterden relied on the “old principle”—for which, interestingly, neither he nor any of his colleagues provided legal authority—that if “a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable.”³⁷⁷ Mr. Justice Littledale agreed that the defendant’s intentions were irrelevant and that a nuisance need not be the “necessary” result of his actions: “[I]f it be the probable consequence of his act, he is answerable as if it were his actual object.”³⁷⁸

Moore was followed in *Walker v. Brewster*,³⁷⁹ the first important private nuisance recreational case. In 1867 the proprietor of a Wolverhampton music hall rented a house and grounds to use for commercial public “fetes” that offered dancing, music, and fireworks. Walker, an adjoining resident, sued for annoyance and damage to his premises caused by the fireworks and brass bands.³⁸⁰ The Wolverhampton mayor, chief constable, and members of the town council had all frequently attended the fetes and vouched for their “respectable character”, testifying that the proprietor had carefully excluded prostitutes and other “improper persons”.³⁸¹ The court, however, was concerned not with the composition of the guests but rather with the nuisance caused by “idle vagabonds” who congregated in the Waterloo Road to listen to the music and watch the fireworks. Witnesses for the plaintiff testified that the fetes attracted “a very large concourse of persons of the lowest class”, who choked the roads and exposed passersby to disgusting language.³⁸² Moreover, these crowds gathered most unsuitably

street. See e.g. W.V.H. Rogers, ed., *Winfield & Jolowicz on Tort*, 11th ed. (London: Sweet & Maxwell, 1979) at 353-57; J.R. Spencer, “Public Nuisance—A Critical Examination” 1989 Cambridge L.J. 55 at 73-76. See also “Right of Passage”, *supra* note 30 at 933, n. 38.

³⁷⁵ *Moore*, *supra* note 373 at 184.

³⁷⁶ *Ibid.* at 188.

³⁷⁷ *Ibid.*

³⁷⁸ *Ibid.* “Judgment was not pressed” as the defendant entered into recognizances to discontinue the shooting (*ibid.* at 189).

³⁷⁹ (1867), L.R. 5 Eq. 25 [hereinafter *Brewster*].

³⁸⁰ The plaintiff complained that groups of boys climbed the walls of his grounds and infringed his privacy; that fireworks frightened his horses; and that rockets fell on his roof and broke the glass of the greenhouses and conservatories. The fetes, he claimed, were a “grievous nuisance” that were destroying the possibility of the house being used as a “gentlemen’s residence” (*ibid.* at 26). The plaintiff’s witnesses also deposed to the noise and din from powerful brass bands playing continuously for several hours.

³⁸¹ *Ibid.* at 27-28.

³⁸² *Ibid.* at 27.

in a community of "a quiet and retired character, with houses of a superior class, occupied by persons of standing and position."³⁸³

Vice Chancellor Wood concluded that even though the plaintiff's complaint was actually directed against the people who had been refused admission, the defendant had nonetheless committed a legal nuisance by attracting such persons to the street. Drawing on the "unimpeachable"³⁸⁴ authority of *R. v. Moore*, the court stressed the commercial nature of the enterprise. In response to the defendant's argument that if he were responsible for the conduct of unadmitted persons, "no ball or garden party can ever be given in London,"³⁸⁵ the court noted emphatically the difference between an "occasional entertainment of one's friends" and the situation where a person "makes a business and a profit by giving entertainments."³⁸⁶ Moreover, in an urban setting fireworks and band performances would attract crowds as a "necessary" and not merely a "probable" consequence.³⁸⁷ Displaying little interest in the inconvenience to the plaintiff himself, the court's decision focused primarily on the attendant street obstructions.

Turning to remedies, the court permanently restrained Brewster from holding "any public exhibition or other entertainment whereby a nuisance may be occasioned."³⁸⁸ Though the plaintiff's attorney immediately objected that such relief left open the whole question of what specific conduct constituted the nuisance, the Vice Chancellor preferred to leave the injunction in a general form. The defendant might make changes—he might modify the band, for example—and in that case it would be "difficult to fix the amount of annoyance that might be occasioned."³⁸⁹ The court thus left room for the parties to arrange the precise outcome through private negotiation, a frequent characteristic of relief granted to "quasi-respectable" recreational enterprises in the period.

Together, *Brewster* and *Moore* exemplified three persistent features of the judicial posture toward private recreational nuisance. First, as in the area of public regulation, the courts emphasized the threat posed to public order and morality by unruly street crowds. Second, judges awarded relief in significant part based on the position of the entertainment in the moral hierarchy. A "fete" attended by town notables was treated more flexibly and leniently than a pigeon-shooting range. Third, the courts were suspicious of profit-making entities that impinged on the rights of neighbouring private

³⁸³ *Ibid.*

³⁸⁴ *Ibid.* at 31.

³⁸⁵ *Ibid.* at 30.

³⁸⁶ *Ibid.* at 33.

³⁸⁷ *Ibid.* at 34.

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.* He observed that if the plaintiff sought a contempt order, he would have to prove the nuisance in any event.

householders.³⁹⁰ This basic orientation, well established by the 1860s, continued to inform the judicial response toward civil recreational litigation in succeeding decades.

B. Civil Nuisance Suits: Music Halls, Private Clubs, and Race Tracks

The differentiated judicial treatment of entertainment facilities along a moral spectrum was evident in late-Victorian neighbour suits against quasi-respectable music halls on the one hand and lower-ranked entertainments—boxing clubs, novelty shows, and race tracks—on the other. Though plaintiffs largely prevailed in every type of lawsuit, in the case of more reputable institutions the courts' approach to relief was managerial rather than coercive. In *Jenkins v. Jackson*,³⁹¹ for example, an accountant and auctioneer who occupied rooms on the first floor of a large building in Cardiff sued his landlord for permitting an upstairs tenant to open a music hall on the premises. Jenkins claimed that the dancing and music caused noise and vibrations in his offices and that music hall patrons cluttered the staircases.³⁹² Lord Kekewich, finding the case to be "of considerable interest", ruled that the defendants were not legally responsible for people going up and down the staircase but that the noise and vibrations constituted an actionable nuisance. He was reluctant to grant an injunction, however, preferring to leave relief to the disposition of the parties. Noting that the litigants should have "the good sense to prevent the trial of any question at all,"³⁹³ the judge considered the complaint partially if not wholly remediable without his interference. The defendant, he suggested, could "take more care in the way in which he conducts his dancing" or improve the partitions to reduce vibrations and noise. Nominal dam-

³⁹⁰ These themes were also evident in a circus case decided two years after *Brewster*. In *Inchbald v. Robinson* (1869), L.R. 4 Ch. 388 [hereinafter *Inchbald*], the court declined to order an injunction on the basis of crowds, but the circumstances were quite different from those in *Moore* and *Brewster*. First, the circus was a respectable entertainment that remained popular with all social groups throughout the nineteenth century. See e.g. M.B. Smith, "Victorian Entertainment in the Lancashire Cotton Towns" in S.P. Bell, ed., *Victorian Lancashire* (Newton Abbott, U.K.: David & Charles, 1974) 169 at 183; *Leisure in the Industrial Revolution*, *supra* note 1 at 173-74; A.D. Hippisley Coxe, "Equestrian Drama and the Circus" in David, James & Sharratt, *supra* note 6 at 109-118. Second, the circus at issue was less likely to draw crowds because, unlike the outdoor entertainments in *Moore* and *Brewster*, people outside the gates could not see the performances. Third, the temporary crowding occasioned by people "going to or leaving" the circus merely involved patrons exercising their right of passage. Finally, though the court did issue a permanent injunction based on noise, the relief was moot because a year and a half had elapsed since the plaintiff had brought suit; by the time of the injunction, the circus had closed and grass had grown over the site. In the course of the proceedings, Lord Cairns did reaffirm the bedrock principle that a nuisance consisted of collecting crowds "immediately before a residence, so as to block up the approaches to it" (*Inchbald*, *ibid.* at 390). See Note, "Nuisances by Causing Crowds" (1868) 32 J.P. 115 at 115 (commenting about *Inchbald* that the "vice of drawing crowds has been often alluded to in recent cases as a nuisance in itself").

³⁹¹ (1887), 40 Ch. D. 71 [hereinafter *Jenkins*].

³⁹² The landlord countered that Jenkins knew when he signed the lease that the building had been constructed for the "express object of being used as a music hall, and had been so used" (*ibid.* at 72).

³⁹³ *Ibid.* at 78.

ages would give the plaintiff a decision on the merits that he could later enforce with an injunction if the defendants did not "mend their ways".³⁹⁴ While clearly favouring the private accountant over the purveyor of mass entertainment, the judge declined to exercise his full remedial powers, instead prodding the parties toward a resolution that would allow the music hall to continue in a more subdued and "rational" form.

Another case a few years later again reflected the relatively lenient judicial treatment of music halls. *Riess v. Oxford*³⁹⁵ was a suit brought by a jeweler against the neighbouring Oxford Music Hall, another Charles Morton enterprise that opened in 1861.³⁹⁶ In 1892 the hall booked a troupe of women known as the "Dahomey Amazon Warriors" who lodged on the premises and also performed at Morton's other music hall, the Canterbury.³⁹⁷ Between 7:30 and 8:30 p.m. each evening, the women emerged from the Oxford on Tottenham Court Road and travelled to the Canterbury in Lambeth. According to the plaintiff, the troupe was dressed in "extremely vulgar attire", and a crowd of two thousand persons regularly assembled to witness its departure. Relying on *Moore* and *Brewster*, the plaintiff alleged a nuisance by virtue of obstructed access to her shop and demanded a temporary injunction to restrain the logistical arrangements.

Mr. Justice Kennedy confirmed that collecting a large crowd to obstruct the highway, whether intentional or otherwise, was an actionable wrong, but he denied the plaintiff's request for an injunction. He offered a number of reasons for his refusal. The Oxford had contracted with the manager of the "African savages" to transport the performers to other engagements, and an interim injunction would require the music hall to breach its contract. Moreover, though the Oxford might be liable for the collection of crowds, it could not control the behaviour either of the spectators or the performers³⁹⁸—a factor, it should be noted, that the court in *Brewster* had disregarded when granting an injunction. In addition, relief was not really necessary: the police were competent to deal with crowds; the obstruction injured the plaintiff for only a limited time each day; and the nuisance was apparently diminishing. Concluding that the balance of convenience thus favoured the defendant, the court decided to await the trial of the action. The judge may also have been influenced, of course, by the fact that the plaintiff was only a business establishment rather than an individual householder. *Riess* revealed the continuing predilection of the courts when dealing with music halls

³⁹⁴ *Ibid.*

³⁹⁵ (1893), 37 Solic. J. 842 [hereinafter *Riess*].

³⁹⁶ Scott, *supra* note 5 at 141.

³⁹⁷ Charles Morton introduced the "turns" system when he opened the Oxford. He engaged performers already booked at the Canterbury, who travelled across the river to appear on the same day at the two locations (see *Rational Recreation*, *supra* note 1 at 150-51; Vicinus, *supra* note 5 at 256 (performances occurred continuously from early evening until just past midnight, and a "turn"—a performance of five or six minutes—could be performed nightly at up to five different places)).

³⁹⁸ Citing *Jenkins*, *supra* note 391, the defendants had stated that they were only landlords and could not control the movements of the troupe off their premises (*Riess*, *supra* note 395 at 842).

to segregate liability from relief. They tended, in other words, to find defendants liable on the merits but not necessarily subject to stringent remedies.³⁹⁹

In contrast, in *Bellamy v. Wells*⁴⁰⁰ the court showed itself eager to issue an injunction in nuisance against a private club. The court's quite different approach in *Bellamy* is explicable on several grounds. First, unlike the quasi-respectable music halls in *Jenkins* and *Riess*, *Bellamy* involved a disreputable boxing establishment. Second, the plaintiffs in *Bellamy* were adjacent householders rather than business people. Finally, the operation of the boxing club in *Bellamy* affected not just neighbours but also passersby in the public streets.

Bellamy arose in 1890 when several residents of Gerrard Street, Soho, sued the proprietor of the neighbouring Pelican Club, a "Bohemian" private club with over twelve hundred members. The club promoted boxing competitions as well as concerts and entertainments that began late in the evening and continued until the early hours of the morning. Although professional indoor boxing exhibitions—unlike outdoor prize fights—were lawful, they were still morally dubious.⁴⁰¹ The plaintiffs objected to the raucous music and singing, the all-night whistling for cabs and carriages, and the "large and rough" crowds that assembled in the street to await celebrated pugilists. Eminent counsel appeared for both sides. The Solicitor-General, Sir Edward Clarke, represented the plaintiffs, and Attorney-General Sir Richard Webster, along with R.B. Haldane, argued on behalf of the defendants. Clarke contended that the defendants could turn "night into day if they please" but only so "as not to interfere with the comfort of homely people."⁴⁰² Webster countered that the defendant did not invite or intentionally draw the crowds and that there must be a certain amount of "give and take" in the London streets.⁴⁰³

Lord Romer thoughtfully considered the argument that the boxing club had not invited the street crowd but, invoking *Moore*, concluded that the defendant's "object or desire" was irrelevant. The only operative question was whether the collection of a

³⁹⁹ Courts also declined to issue injunctions in the case of other quasi-respectable entertainments. For example, in *Bock*, *supra* note 85, a hotel owner erected a skittle alley next to his hotel in a street in King Williamstown, South Africa, mainly occupied by private residences. The sound of the balls against the wooden floor and the cries of the players caused considerable noise at night, and one of the neighboring residents sued in private nuisance. After considering such factors as the nature of the place, the timing of the activity, and the many years the game had been played on the spot, the court concluded that the skittle alley was indeed a nuisance. However, it refused an injunction because the game could be played "much more quietly" (*ibid.* at 110). But see *Barham v. Hodges*, [1876] Wkly Notes 234 (playing skittles in a garden adjoining the plaintiff's premises caused a nuisance that entitled the plaintiff to an interlocutory injunction).

⁴⁰⁰ (1890), 60 Ch. D. 156 [hereinafter *Bellamy*].

⁴⁰¹ The poor reputation of professional boxing was partly a legacy of prize fighting and partly a result of the persistence of corruption (see *Recreations*, *supra* note 1 at 51. See also *supra* notes 35-52 and accompanying text).

⁴⁰² *Bellamy*, *supra* note 400 at 159.

⁴⁰³ *Ibid.* at 160.

crowd was the “probable consequence of the defendant’s acts.”⁴⁰⁴ The judge contrasted the proprietor of a “Bohemian” club with an ordinary resident: “[W]hatever may be the right of a householder when using his house in an ordinary way,” the defendant was “carrying on a large business as a club proprietor, and a business of a peculiar kind.”⁴⁰⁵ In his view the “give-and-take principle” might require tolerance of an “occasional neighbour’s ball”, but not ongoing commercial activity of this nature. Lord Romer accordingly issued an injunction restraining the defendants from causing a nuisance either by cabs or crowds drawn to the area.⁴⁰⁶

Presented with similar facts, therefore, the judges responded quite differently. In enjoining the whistling for cabs, Lord Romer’s decision in *Bellamy* conflicted both with *Jenkins*, which refused to hold a music hall responsible for patrons going up and down the stairs, and with *Reiss*, which excused a music hall from an obligation to control spectators or even its own performers. The real difference between the cases, of course, was that the offending activity in *Bellamy* was both less morally “respectable” and more invasive of the peace of the public thoroughfares.⁴⁰⁷ Nonetheless, the court still declined to close down the objectionable entity entirely. As Lord Romer noted, his limited injunction would “not in any way prevent the defendant from efficiently carrying on the business of the club in a reasonable manner.”⁴⁰⁸ Though treating a boxing club more severely than a music hall, the court still acquiesced in its continued operation so long as the proprietor “rationalized” it and ameliorated its negative impact on the neighbouring community.

Not surprisingly, amusements and exhibitions of an even less wholesome character—especially those possessing little economic importance—invited even greater judicial intervention. In 1886 the Court of Chancery granted a householder’s request for an injunction against a neighbour who had placed organs, swings, roundabouts, and a rifle-shooting gallery in his back yard. Mr. Justice Kekewich noted that the organ playing in particular “interfered with the ordinary comfort of the neighbours, people

⁴⁰⁴ *Ibid.* at 161.

⁴⁰⁵ *Ibid.* at 162. In addition to interfering with the ordinary comfort of neighboring occupiers, the club had lowered the rental value of their houses.

⁴⁰⁶ The judge decided that an injunction was warranted as the boxing contests were to occur at least four times during the “season” between October and July. He did not issue an injunction with regard to the music and singing in the club premises because the plaintiff’s counsel “scarcely relied upon this part of the case” (*ibid.* at 163).

⁴⁰⁷ In another contrast to *Bellamy*, the court refused to enjoin preliminarily the assembling of over 300 cabs between 9 and 11 p.m. to take persons home from the more respectable Earl’s Court Exhibition at the Philbeach Gardens. Mr. Justice Kekewich commented that the cab nuisance was in part attributable to the police, who had insisted that the cabs “go on for the season”. Moreover, the question required “serious consideration”, and he declined to decide it on motion. He further refused to issue an injunction against noise from the gas engine that worked the lift in the tower and the playing of bands from 3 to 11 p.m. The defendant had abated these nuisances, and the judge preferred to rely on the defendant’s assurances and grant the plaintiff liberty to renew the motion if necessary (*Germaine v. London Exhibitions* (1896), 75 L.T. 101).

⁴⁰⁸ *Jenkins*, *supra* note 391 at 164.

who were not fastidious or over-sensitive, and only wanted to live like ordinary English people."⁴⁰⁹ A few years later a Stoke Newington houseowner obtained an injunction against a novelty dealer whose exhibition of an "African Lion-Faced Lady" caused an "assemblage of rough people" to gather in a London street.⁴¹⁰ Similarly, *Spruzen v. Dossett*⁴¹¹ enjoined the proprietor of a merry-go-round from playing a steam organ that seriously inconvenienced three adjoining householders.⁴¹² An injunction also issued in *Becker v. Earl's Court*,⁴¹³ where the court closed a small amusement fair consisting of a roller coaster, cake walk, and merry-go-round that operated on weekdays from midday until eleven o'clock at night. An artist who lived nearby complained that the shouts and shrieks of the patrons interfered with his residential comfort and the pursuit of his profession.⁴¹⁴ Mr. Justice Eve agreed that the owner of the amusements was causing too much noise in a quiet neighbourhood.⁴¹⁵

As entertainments subject to an injunction, boxing clubs, novelty exhibitions, and fairgrounds were joined by the least respectable entity of all, the race track. The middle classes viewed horse racing as morally degenerate because of its longstanding association with gambling and corruption.⁴¹⁶ In *Dewar v. City and Suburban Racecourse*

⁴⁰⁹ *Winter v. Baker* (1887), 3 T.L.R. 569 at 570. The judge further observed that when "people come to be amused in this way—with swings and roundabouts—one's ordinary experience told one that they would shout; it was a necessary consequence of their mode of enjoying themselves. There was nothing improper in it, but it could not be permitted to interfere with people's comfort" (*ibid.*).

⁴¹⁰ See "1892 S.C. on Theatres", *supra* note 116 at Q. 65. That same year a showman mounted an exhibition in Whitechapel Road that attracted customers by means of a reputed Zulu dancing at the door with bells. The novelty dealer drew a large crowd and a magistrate fined him for obstructing the public footway and causing a crowd to assemble. The magistrate recommended that the police issue a summons against the showman every day to force him out of business (*ibid.*).

⁴¹¹ (1896), 12 T.L.R. 246.

⁴¹² Mr. Justice Stirling observed that although the wife of one of the plaintiffs suffered from a nervous disability and a nuisance ought not to be considered from the point of view of a person in bad health, "it could not be said that the occupier of a house was any the less entitled to enjoy ordinary comfort in the use of his house by reason of one of its inmates being an invalid" (*ibid.* at 247).

⁴¹³ (1911), 56 Solic. J. 73.

⁴¹⁴ The plaintiff relied on *Robinson and Brewster* (*ibid.* at 73).

⁴¹⁵ The judge determined that the plaintiff was of an unusually nervous sensibility and had not established his own case. He described the plaintiff as being "in a run-down condition, the noise had got on his nerves and caused a kind of mental paralysis" (*ibid.*). However, he concluded that an injunction was warranted because the noise affected the health of the plaintiff's wife's and kept their child awake at night.

⁴¹⁶ See *Rational Recreation*, *supra* note 1 at 22 (racing was the sport of corruption par excellence, associated with disorder, crime, sex, alcohol, and gambling). The respectable middle and working classes did not attend racing events (see Vamplew, *supra* note 3 at 13, 133-34, 138-39). A free social event in the eighteenth century, racing became increasingly commercialized in the nineteenth century; by the 1850s most race meetings charged admission from spectators who came long distances by rail (see Vamplew, *ibid.* at 13). For the most part Parliament did not regulate racing, however, leaving it to self-regulation through the Jockey Club. By the turn of the century the sport had become somewhat more respectable, profiting from the victory of the Prince of Wales' horse Persimmon in the Derby of

Company,⁴¹⁷ the Court of Chancery unhesitatingly enjoined a racecourse on the basis of both noise and crowds. *Dewar* arose in Dublin, where the defendants had established a racetrack in a respectable residential locality. At the instigation of a Sabatarian organization, several homeowners sued the track on the ground that the races—which were chiefly held on Sunday—attracted large disorderly crowds of people, generated traffic that obstructed the thoroughfares, disturbed church services, and generally functioned as a “resort of persons of bad character”.⁴¹⁸

Finding for the plaintiffs, the Vice Chancellor relied on *Moore*, “a case that had ever since been followed”⁴¹⁹ in its principles that a person could not profit to the annoyance of his neighbours and was answerable for the nuisance of collecting a crowd. Invoking *Brewster* as well, the judge pointed specifically to the “numbers of the lowest classes who could not pay for admittance” and whose presence outside did not “add to the comfort or quietness of the neighbouring householders and their families.”⁴²⁰ The court also considered the character of the neighbourhood, a “residential district for the middle classes” for whom a quiet Sunday was an important feature.⁴²¹ Obviously, the area was “a most unsuitable place” for establishing a racetrack. The judge dealt with ambiguities and gaps in the evidence by drawing inferences adverse to the defendant: even without any proof of a negative state of affairs, “it might have been anticipated that it would exist from the establishment of such an entertainment in such a locality.”⁴²² “No majority, however large,” he exhorted the defendants, “is entitled to interfere with the common right of a minority, though small, to the enjoyment of the comfort and quiet of their homes, and the free use of the public thoroughfares which lead to them.”⁴²³

In terms of relief, the judge granted an injunction restraining the defendants from holding races on Sunday, interfering with church services, or obstructing the streets and public roads leading to the track. The same court that had previously held that a theatre or music hall, despite liability for drawing street crowds, could not be expected to control them, now held that a race track—like a boxing club—must refrain from attracting vehicles and taxis. *Dewar* thus confirmed judicial willingness to hold disreputable enterprises fully responsible for their unfortunate public consequences.⁴²⁴

1896 (see *Vamplew*, *ibid.* at 98-99, 107-08; *Recreations*, *supra* note 1 at 51). On the courts' attempts to control betting at race tracks, see *supra* note 92.

⁴¹⁷ [1899] 1 Ch. 345 [hereinafter *Dewar*].

⁴¹⁸ *Ibid.*

⁴¹⁹ *Ibid.* at 350.

⁴²⁰ *Ibid.* at 352-53. The court also referred to *Inchbald*, the latter case establishing “another important principle, namely, that the noise of a performance constituted a nuisance calling for the interference of the court” (*ibid.* at 351).

⁴²¹ *Ibid.* at 352.

⁴²² *Ibid.* at 353.

⁴²³ *Ibid.* at 356.

⁴²⁴ The courts' attitude toward private citizens who used their own homes for “respectable”, albeit profit-making, leisure-related activities was more sympathetic than toward purveyors of mass commercial entertainments of any type. In 1893 two London neighbours in a street of semi-detached

However, while issuing a coercive injunction, the court refrained—as it had in the case of the boxing club—from closing down the offending entity entirely, allowing it to continue upon condition that it would substantially alter its mode of conducting business. Accommodating commercial development to some degree, the courts' injunctions afforded even obnoxious enterprises the opportunity to remain in business if they significantly moderated and "rationalized" their operations.

C. The Apotheosis of Recreational Nuisance: The Entertainment Queue

The evolution of civil nuisance law in the recreational context culminated in two cases, *Barber v. Penley*⁴²⁵ and *Lyons v. Gulliver*,⁴²⁶ which involved not disorganized street gatherings but the seemingly "rational" phenomenon of an outdoor admission queue. The cases captured and illuminated dominant themes in nineteenth-century recreational law. First, the courts' preoccupation with street crowds led them to characterize as a nuisance even such disciplined street behaviour as waiting in an orderly line. Second, the judges tended in the case of respectable and quasi-respectable facilities to induce the parties to negotiate private settlements rather than to impose even mildly coercive relief. Finally, the judges responded selectively to enterprises variously situated along the entertainment industry's spectrum of respectability. Though both *Barber* and *Gulliver* dealt with relatively "deserving" recreations, the establishments nonetheless occupied distinct positions on the hierarchy of "rationality". *Barber* involved a legitimate theatre, *Gulliver* a music hall; the plaintiff in *Barber*, a common lodging house owner, was less socially respectable than the lacemaker who

houses entered into a dispute about their respective music making. One family consisted of serious musicians: the mother taught music at a school and took private pupils at home; the daughter, a medalist of the Royal Academy of Music, gave lessons on the piano and the violin; and the son, an amateur, practised the violincello. The defendant, a wood engraver, complained that the music interfered with his work and retaliated by making unpleasant noises on musical instruments. Suits and counter-suits followed. In *Christie v. Davis*, [1893] 1 Ch. 316, the court found that practising and giving music lessons did not create a legal nuisance; indeed, the profession that the family practised was "a perfectly legitimate and proper one" (*ibid.* at 327). It did observe, however, "for his guidance in future" that the son should cease practising his cello at eleven o'clock. The court enjoined the neighbour from making noises in his house so as to vex the musical family. In *Campbell v. Paddington Borough Council* (1911), 50 L.J. K.B. 739, the court similarly upheld a respectable plaintiff's use of her home for business purposes. The plaintiff, who occupied premises overlooking Edgware Road, had rented her windows to a customer to observe Edward VII's funeral cortege. Meanwhile, the borough council erected a grandstand blocking the view from her windows. She sued in nuisance, claiming damage to her business in the amount of £100. The court acknowledged that the plaintiff's injury was minor but found for her in both public and private nuisance. Mr. Justice Avory observed that the defendants had unlawfully erected a structure in a public street that seriously interfered with the plaintiff's enjoyment of her house and caused her special damage (*ibid.* at 743). Thus, though generally supportive of local regulatory bodies, the courts were willing to hold them liable when infringing on a plaintiff's use of her premises for such "rational recreation" as viewing a royal funeral.

⁴²⁵ [1893] 2 Ch. 447 [hereinafter *Barber*].

⁴²⁶ [1914] 1 Ch. 631 [hereinafter *Gulliver*].

sued in *Gulliver*. Thus, *Barber* concerned a common commercial plaintiff—one who catered to workingmen—suing a highly reputable defendant, whereas *Gulliver* presented a smaller gap in respectability between the plaintiff, a dealer in luxury goods, and the defendant, a semi-respectable music hall. These disparate circumstances influenced the burdens placed on the plaintiffs regarding both evidentiary requirements and relief.

In *Barber*, the plaintiff landlady operated a common lodging house for workingmen adjacent to the Globe Theatre in the Strand, which was showing the popular comedy *Charley's Aunt*. Crowds collected outside the pit entrance at 5:30 p.m. for the 7:30 performance, obstructing access to the plaintiff's premises precisely when her customers sought lodgings after the day's work. Counsel for the theatre argued that the case differed from *Brewster* because the crowd was not caused by an attraction visible from the street. Lord North, however, found the distinction between indoor and outdoor performances to be meaningless; if a defendant did "within his premises what causes a nuisance outside,"⁴²⁷ it did not matter whether the crowd was drawn by something visible. Although a person who rented premises next door to a theatre could not expect to have the same amenities as someone living in a private house in the West End, the judge observed, she still had a right to be free of nuisances. Lord North distinguished *Jenkins* on the ground that customers on the stairs were legitimately "passing backwards and forwards", whereas here the complaint was not that people "came and went" to the theatre but rather that they collected in the street and remained there.⁴²⁸

Though finding for the plaintiff on grounds of both public and private nuisance,⁴²⁹ the court nonetheless refused to grant an injunction. Lord North observed that the nuisance had been abated by a police patrol, and he virtually absolved the defendant from any duty to rectify the situation: "It is said the Defendant ought to prevent this; but he cannot do it, of course he has no control over the streets."⁴³⁰ Demonstrating con-

⁴²⁷ *Barber*, *supra* note 425 at 457 (citing *Bellamy*). An early case exhibiting concern with theatre crowds in the street was *Betterton's Case*, *supra* note 344, where competitors sued a playhouse in Lincoln's Inn Fields on the ground of nuisance. The court held that theatres were not nuisances *per se*, "but only as they draw together great numbers of people and coaches, and sharpers thither, which prove generally inconvenient to the places adjacent" (*Betterton's Case*, *ibid.* at 142).

⁴²⁸ *Barber*, *ibid.* at 457, 459. If a crowd had collected on the stairs in *Jenkins*, he observed, Mr. Justice Kekewich's view would doubtless have been very different. Lord North also noted that a private party was a different case, quoting *Original Hartlepool Collieries v. Gibb* (1877), 5 Ch. D. 713 [hereinafter *Gibb*], to the effect that it was not unreasonable that a neighbor "should give an evening party occasionally and that there should be a file of carriages running across your door" (*Barber*, *ibid.* at 453).

⁴²⁹ The collection of playgoers in the street, he observed, was to some extent a public nuisance but would certainly be a private nuisance to the plaintiff (*Barber*, *ibid.* at 449).

⁴³⁰ *Ibid.* at 460. He continued that the defendant "cannot put persons in the street to regulate the crowds, and one of the first things the police would do would be to prevent the interference by other persons with the traffic of the street."

fidence in the ability of the police to “duly perform their duties”,⁴³¹ he concluded that an injunction was unnecessary. Thus, a court apprehensive about street gatherings established a legal standard favouring the plaintiff but segregated that question from the matter of relief, declining to issue an injunction on behalf of a common lodging house proprietor against a highly respectable enterprise drawing a relatively “rational” crowd.⁴³²

A few years later, the Court of Appeal definitively disapproved the statement in *Barber* that an entertainment enterprise could not be expected to control a street queue so as to relieve a nuisance. Revealingly, it did so in a case involving less deserving defendants and more respectable plaintiffs. In *Gulliver*,⁴³³ the plaintiff lace merchants operated a shop two doors from the Palladium Theatre of Varieties, a large music hall containing over three thousand seats.⁴³⁴ The hall held popular daily performances at 2:30 and 6:30 p.m., at which times a stationary queue inevitably formed on the curb or in the gutter outside the entrance where seven hundred people were admitted to the upper circle, the cheapest part of the house. Upon the plaintiffs’ motion for an interim injunction to restrain the obstruction, the judge temporarily resolved the issue by pressing the music hall manager, Charles Gulliver, to minimize the queue by opening the auditorium doors an hour earlier.⁴³⁵

The case came on for trial before Mr. Justice Joyce, who easily found a public nuisance. Acknowledging that no one was actually prevented from entering or leaving the plaintiffs’ shop—the police had assisted customers in elbowing their way through—he still found an annoying obstruction that was “calculated to deter customers to a very slight extent, at all events, if no more.”⁴³⁶ In this case, moreover, the queue attracted street musicians and acrobats. Though the lacemaker had thus established the music hall’s liability, the judge on balance did not consider it necessary to grant an injunction. The defendants had agreed to open the doors earlier and matters had remained in a satisfactory state; continuing the *status quo* would not interfere with the performances but only “very lightly diminish the considerable profits which the man-

⁴³¹ *Ibid.* However, inasmuch as the plaintiff was justified in bringing the nuisance action, she would receive costs. According to a legal comment the same year, the case illustrated “the difficulty of apportioning the relief to the circumstances in this class of cases” (Note, “Nuisance Caused by Crowds” (1893) 57 J.P. 561 at 562).

⁴³² The judge rejected the defendant’s claim that the crowd consisted largely of idle loafers and hangers-on found in the neighbourhood of theatres. He doubted whether that category of persons was present before the theatres were open. Even if the defendant were correct, this would only make things worse, because attracting non-theatre goers would be a separate and distinct ground for a nuisance (*Barber, ibid.* at 450).

⁴³³ *Supra* note 426.

⁴³⁴ The Palladium opened in December 1910 and continued to offer variety bills until 1961 (see Mander & Mitchenson, *supra* note 5 at 30, 38). It had a capacity of 3435, of whom 690 patrons sat in the upper circle (see Howard, *supra* note 6 at 140).

⁴³⁵ The music hall therefore relinquished some income, because a patron could gain earlier admittance upon payment of a sixpence fee (*Gulliver, supra* note 426 at 641).

⁴³⁶ *Ibid.* at 635.

agement are deriving.”⁴³⁷ He awarded the plaintiffs costs and nominal damages of twenty shillings.

A majority of the Court of Appeal affirmed the decision below. Lord Cozens-Hardy, Master of the Rolls, agreed that there was no need to prove damages specifically. This was not a case “in which it is at all necessary for them to say, ‘we can prove that we have lost £1, £2, or £3, by reason of this.’” Rather, he declared, one must “take one’s own common knowledge of the world in a thing of this kind.” The judge was untroubled by the meager evidence of damage; he would have concluded that the queue had deterred customers even “in default of any evidence.”⁴³⁸ Lord Swinfen Eady, joining this analysis, called particular attention to the commercial nature of the music hall enterprise. The defendants, he emphasized, sought “to make a profit to the annoyance of all their neighbours.”⁴³⁹

Definitively resolving the question of police responsibility, Lord Cozens-Hardy confessed that he was unable to appreciate how the defendants could escape from an obviously wrongful act by blaming it on the police.⁴⁴⁰ He thus rejected not only the analysis in *Barber* but, by implication, the courts’ reluctance in *Jenkins* and *Riess* to find music halls responsible for controlling the actions of passersby or performers. *Gulliver*, an authoritative decision of the Court of Appeal in the early twentieth century, in fact heightened the liability of quasi-respectable enterprises such as music halls for drawing obstructive street crowds.

Though finding that the plaintiffs were entitled to an injunction, the Court of Appeal followed the trial court in declining to issue one. The earlier opening of the theatre had caused the defendants some extra expense, but in dispelling the crowds and satisfying the plaintiffs it was an “excellent substitute for the injunction.”⁴⁴¹ Officially sanctioning the defendants’ “voluntary undertaking”, the court again rationalized the operations of a music hall rather than closing it. Lord Swinfen Eady even suggested that the parties’ arrangement had increased the comfort of patrons by saving them from “standing in line in the wet and mud”.⁴⁴² The court thus placed its imprimatur on a private arrangement, albeit one negotiated under judicial pressure.⁴⁴³

⁴³⁷ *Ibid.* at 636.

⁴³⁸ *Ibid.* at 641.

⁴³⁹ *Ibid.* at 647. In the present case, therefore, he was satisfied that the plaintiffs had established an “intolerable nuisance”.

⁴⁴⁰ *Ibid.* at 644.

⁴⁴¹ *Ibid.*

⁴⁴² *Ibid.* at 650.

⁴⁴³ The appellate judgment, however, was not unanimous. Lord Phillimore hailed the rationality of admission queues, observing that the most reasonable use of the highway in the circumstances was to place theatregoers in organized lines under the control of the police rather than forcing them to walk backwards and forwards “scrambling for place”. The music hall queue, he declared, was “very nearly as inoffensive a queue as can be seen”, and characterizing it as a nuisance would doubtless “interfere with trade and business” (*ibid.* at 652). Lord Phillimore concluded that the optimum solution, as in

The pair of queue cases, *Barber* and *Gulliver*, confirmed that judicial attitudes toward street crowds had only become more strident with time; even on the eve of World War I, judicial tolerance did not extend to the orderly “crowd” of an admission queue. The cases further reflected the courts’ managerial approach toward relatively respectable establishments, which they prodded into reforming their operations rather than treating punitively. That judges imposed a greater evidentiary burden on the lodging house keeper in *Barber* than on the lacemakers in *Gulliver*, and were willing to shunt responsibility for a nuisance onto the police in the case of a reputable theatre but not a quasi-respectable music hall, illustrated the discriminating responses of a judiciary whose rulings were finely calibrated even at the relatively “deserving” end of the moral spectrum.

In general, the nineteenth-century private nuisance cases displayed a consistent set of judicial attitudes toward recreation, and they afforded the courts further opportunities to realize objectives also pursued in the area of public law. Judges remained apprehensive about collective activity in the streets and imposed legal liability on commercial enterprises—even indoor facilities—that attracted popular gatherings in urban thoroughfares. The Victorian governing classes held fast to the association of public crowds with disorder, crime, and immorality, even in such utterly nonthreatening circumstances as an organized theatre queue. As in the sphere of public regulation, the courts displayed more anxiety about the assumed societal threat posed by street crowds than about any adverse consequences suffered by patrons or even neighbours of recreational establishments. In addition, judges remained acutely sensitive to a recreation’s position on the spectrum of respectability. While willing to coerce enterprises at the lower end of the scale, such as commercial race tracks and boxing clubs, they accommodated semi-respectable entities such as music halls by ruling for the plaintiffs on the merits but refusing to issue injunctions.⁴⁴ Using both

Barber, would be to ask the police to prevent the nuisance: “[E]very trader has a right to make his shop window as attractive as possible, and ... it is for the police to regulate the traffic” (*ibid.* at 661).

⁴⁴ The segregation of liability from relief seems to have been much less common in non-recreational suits involving private nuisance in the nineteenth century. In industrial pollution cases, for example, plaintiffs after the 1850s simply did not prevail against manufacturing entities, and where the courts equitably “balanced” the interests of commercial enterprises against those of private plaintiffs, the process generally occurred in connection with liability rather than relief. The absence of liability removed the courts’ leverage on defendants to moderate their behaviour. On the infrequent occasions where plaintiffs did prevail in environmental cases, the courts correspondingly issued injunctions (see Brenner, *supra* note 11 at 413-14; McLaren, *supra* note 11 at 193). In labour cases, companies that sued unions in private nuisance for inflicting economic pressure uniformly both prevailed on the merits and obtained injunctions (see R. Vorspan, “The Political Power of Nuisance Law: Labor Picketing and the Courts in Modern England” (1998) 46 *Buff. L. Rev.* 593 [hereinafter “Political Power of Nuisance Law”]). Similarly, in nuisance cases against political or religious groups for street obstruction, the Victorian courts easily found liability and willingly granted injunctions and imposed criminal penalties (see “Right to Passage”, *supra* note 30). Thus, in the labour and political cases the plaintiffs almost invariably won, whereas in the industrial pollution cases they usually lost. In all three areas, however, the decisions on liability normally dictated the award of relief; there was little evidence of the “managerial” approach characteristic of recreational cases.

blunt legal instruments and subtle pressures, judges directed recreational change in the service of their vision of broader cultural rationality.

Conclusion

As this investigation into the role of the courts in the nineteenth-century transformation of popular recreation demonstrates, the judiciary played an important function in "rationalizing" the major institutions and practices of urban leisure. That the judges worked to discipline and reform traditional pastimes is not in itself especially surprising. What is remarkable is their nuanced approach to recreational change and the variety of strategies that they employed to suppress, channel, or encourage leisure activities of various types. They applied a refined moral barometer, acting restrictively in the sphere of public law by enforcing comprehensive local regulatory schemes and upholding "morally deserved" prosecutions; behaving managerially in the context of private law nuisance by pressing quasi-respectable commercial establishments to moderate and rationalize their operations; and creatively wielding the common law to establish segregated urban spaces for popular exercise and sports. Indeed, as reflected in their rulings on relief as well as liability, the judges' discriminating treatment of recreations along a spectrum of respectability only intensified rather than weakened as the century progressed.

Such judicial action revealed several underlying objectives. First, deriving from their unmitigated distaste for street crowds, the courts worked assiduously to cleanse the thoroughfares of traditional leisure pastimes. Second, reflecting the growing sentiment that national security and industrial productivity required a healthy and well-exercised population, they laboured affirmatively to replace the street as a locus of recreation with confined and controlled sporting grounds. Third, and most generally, the courts advanced a particular vision of the appropriate ranking of recreational conduct, with amateur exercises and games at the pinnacle of the hierarchy of respectability, followed in descending order by theatres and cinemas, music halls and amusement parks, and finally pubs, horse races, and prize fights. Perhaps the signal achievement of the courts was their validation of the physical and moral demarcations that lay at the heart of the Victorian world view. The judiciary reinforced the well-defined ordering of nineteenth-century cultural life into a series of discrete physical and moral spaces.⁴⁴⁵

⁴⁴⁵ The response of the courts in any individual case, of course, depended on a variety of factors including the relative status of the litigating parties. On the one hand, judges invariably favoured private householders over commercial establishments. Although the law may have sanctioned "give and take" between neighbours (see *Gibb*, *supra* note 428 at 722), it required householders to "give" far less than commercial enterprises. On the other hand, courts willingly allowed customary rights to interfere substantially with property rights of private landowners, even when landowners used their land for residential purposes. Moreover, the success of commercial establishments in litigation depended to a large extent on the particular moral rankings of their adversaries; theatres, for example, prevailed against music halls but succumbed to suits by neighbouring residents. The fact that the relative re-

From a broader perspective, the recreational cases suggest that scholars should use caution in adopting such historiographical conventions as treating “preindustrial”, “traditional”, and “customary” as collectively antithetical to “industrial”, “modern”, and “entrepreneurial”. While attacking such “traditional” recreations as animal fighting and street sports, the Victorian legal code fostered the oldest recreation—play on a village green—as the highest and most “rational” leisure pursuit. Similarly, judges achieved the thoroughly “modern” and “rational” objective of securing space for popular athleticism in crowded cities by exploiting the “customary” doctrines of the common law. In addition, when judges decided in favour of private residents in suits against neighbouring commercial establishments, they did not necessarily oppose “entrepreneurial” activity in favour of “traditional” property rights; rather, they acted in a managerial capacity, balancing legitimate interests that came into conflict. In short, standard historical categories do not adequately encompass the reality of nineteenth-century legal developments.

Finally, perhaps the most intriguing insight of this study is the extent to which Victorian judges were willing to vindicate popular rights. They consistently forced municipalities to establish sites for non-commercial public recreational use, and they staunchly supported popular communal claims against landlords attempting to preserve their private property. This behaviour contrasts with their conduct in other contexts in the nineteenth century, for example, their consistent hostility to popular use of outdoor spaces by trade unionists and political demonstrators.⁴⁴⁶ That a right to recreation posed a lesser political or social threat than a right to protest or picket—and that such a right arguably even served as a stabilizing force by providing a disciplined and moral focus for popular energy—should not obscure the fact that, on some occasions and in some contexts, the courts ruled against governments and private landowners and in support of popular rights. Only by focusing on judicial rulings in the recreational as well as political and industrial contexts can historians do justice to the complex role played by the courts in the social and cultural transformation of Victorian England.

spectability of particular litigants generally determined the outcome of individual cases must be borne in mind when attempting to distill generalized rules from individual decisions.

⁴⁴⁶ See “Political Power of Nuisance Law”, *supra* note 444; “Right to Passage”, *supra* note 30.

