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Does (property) diversity beget (landscape) sustainability?

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It is trite to say that 'context is everything.'[1] But in the case of property, traditionally perceived as a bundle of abstract, artificial, and metaphorical rights, context is (almost) nothing. Since the late 19th century, property has been generally isolated from place, community and landscape, being relational only as and between so-called jural persons. Professor Joseph Sax for instance refers to this disconnect when he identifies 'community' as the 'missing blank in American property law'.

We canvass today a line of enquiry that Ann and I have been developing, a work-in-progress that aims to articulate a revised metaphor for property intrinsically linked to context, and an image that encourages the 'seeing' of various forms of property in landscapes. The notion of a diverse, inter-connected, many dimensioned *mosaic* of property rights and uses, is one at odds with the law's traditionally unsustainable 'separateness…and reflexivity.'[2] Time limits necessarily constrain the detail we can discuss today, but a copy of our most recent paper submitted to the IUCN's Academy of Environmental Law has been distributed. We welcome your input, comments and thoughts.

In articulating this property mosaic, we observe analogous theories in the literature of non-legal disciplines, such as political science and community ecology, which Ann will talk to. These theories suggest that greater diversity, rather than singular uniformity, enhance systemic stability and sustainability. By applying these ideas to property, (which I will address) we enquire whether a diverse mix of property rights, claims and uses, may likewise enhance the sustainability of place and landscape, be it legal, ecological, aesthetic, political or economic sustainability. Thus the title for our putative line of enquiry, does (property) diversity beget (landscape) sustainability?

Traditional approaches to property have imposed, and self-imposed, constraints on property's discourse. This narrowness has strait-jacketed property rights, divorcing them from concepts of

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[1] Jane Holder & Carolyn Harrison, 'Connecting Law and Geography', *Law and Geography* (2003) 3, 'The conviction that law can be properly be understood only by reference to its place in, and relationship to, social, economic, political, and ecological systems underpins contemporary critical and socio-legal scholarship. Yet such an argument conjures up a powerful challenge to approaches to law which idealize law's separateness, and rationality…, and which portray law as deaf to material, physical, spatial, and cultural influences.'

[2] Ibid

obligation, duty and stewardship, and also a world dominated by the physical (places, landscapes, spatialities, and natures). Rather the dominant metaphor of property since the late 19th century has been that of a bundle of sticks, or a bundle of rights. Each stick in a given bundle represents one or more of the hallmark (and sometimes the not-so-hallmark) rights of property; for example, the right to possess; the right to alienate; the right to use and enjoy; the right to exploit; and paramount of all (at least from a private property perspective), the right to exclude.

The bundle metaphor suited the then times; an expanding industrial era where the seemingly infinite divisibility and flexibility of property rights unleashed an intensive, exploitative use of land. Some of the upsides of the bundle metaphor included its contribution to the commodification of property, fuelling economic growth and wider prosperity. It also remains a convenient image; (an expanding or contracting) bundle that has served generations of property law lecturers well as a pedagogical tool.

The downside includes the harm the metaphor has caused to the institution of property itself. The bundle, by distancing property rights from the external things of the world, it is argued, was artificial and inherently self-destructive. It facilitated an infinitely exponential division of property that ultimately would 'slice and dice' thin air. Kevin Gray thus posited that property is ultimately and logically 'nothing.' Gray argued that the trend of ongoing fragmentation resulted in property losing its core distinctiveness, becoming indistinguishable from personal rights, and imploding into nothingness. While this worst case scenario may not have come to be, the bundle metaphor, by outlasting its arguable use-by date, has contributed to property's insularity and introspection.

Such navel-gazing has impacted on property's relevance. And because property is a dynamic social institution, contrary to many who mistake its stability for stagnation, this has also caused harm, by making property seem out of sync with what's going on in our world, such as the challenge of sustainability in this era of "environmental consequence."[3]

One response to this environmental dilemma can be seen in debates about the ongoing relevance of the bundle metaphor. On the one hand there are those who remain faithful to the

[3] Courtney White, (2008) *Nat. Res. J.*

bundle, preferring to tweak it. Rather than 'throwing the baby out with the bathwater', some jurists argue it is preferable to evolve the bundle, with public cords of obligation binding private rights together[4], or new green sticks being inserted in lieu of non-green ones[5]. Conversely there are many who seek revolution rather than evolution, replacing the bundle with a completely new metaphor[6]. If we were to describe ourselves as being in one camp rather than another, our multi-dimensional mosaic may be a reluctant 'revolutionary'. Indeed such a tag (or at least the revolutionary part) would come as no surprise to those familiar with our work on pastoral leasehold tenure in the High Country. To some, we are the Anti-Christ and Deputy Anti-Christ personified. However labels only take you so far, whether in terms of Anti-Christs, or 'bundles' of sticks. As Carol Rose would argue (and getting back to the point) the bundle metaphor is just that, a crude metaphor, not an entity in its own right.

With that caveat in mind, what is this 'mosaic'[7] that builds on the underrated dynamic of change inherent in property? The image of a property mosaic is that of a place-specific, diverse, interconnected network of property types and uses: private, public, and common; exclusive and shared; competing and co-existing. This mosaic offers the potential for property to develop a new holistic paradigm for an environmental age, one that enables multiple use over exclusive dominion; context as well as individual rights; inclusion over exclusion; and stewardship[8] over exploitation. What the mosaic is *not* is the once dominant notion of the private/public divide in property, the deceptively simple dichotomy between private and public property. Arguably the mosaic is the antithesis of the public/private divide. In rejecting the purity of the divide, we join a much larger chorus of opinion that acknowledges the divide is porous; public interests proliferate in private property, and vice versa.

Important to the 'mosaic' is the emphasis placed on property other than private property. While common and public property is unlikely to overtake private property's dominance, it is important that other property types are *seen* in landscapes as valid components of a greater whole.

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[4] Myrl Duncan

[5] Robert Goldstein

[6] For example, Tony Allan's 'web of interests'

[7] American scholars Sally Fairfax et al articulate this increasing complexity of property claims and uses in terms of the 'mosaic' image. They argue that the mosaic at its 'best [may]…represent a new, collaborative, and sophisticated approach that can approximate the elusive win-win model so frequently touted in conservation circles.' Sally K Fairfax, Lauren Gwin, Mary Ann King, Leigh Raymond and Laura A Watt, *Buying Nature The Limits of Land Acquisition as a Conservation Strategy, 1780-2004* (2005) at 272.

[8] For example, the notion of land stewardship is discussed in Margaret Davies, *Property meanings histories, theories* (2007) at 130-131

Surprisingly to some, property rights are not exclusively private; the words 'property' and 'private property' are not synonymous and interchangeable. Therefore the constituent parts of any "mosaic" may include private, public, or common property,[9] or importantly hybrid blends. The curious myopia[10] that all property is private, obfuscates the plurality of property, and reflects an historical tendency for private property to demonise its alternatives as inefficient or primitive.[11] By being so 'oddly oblivious,' we tend to overlook the existence and values of other types of property, and their capacity to shape a wider narrative. Carol Rose writes that there are 'great bodies of law about common property' based on 'an ethic of moderation, proportionality, prudence, and responsibility to others'[12], values with implication for sustainability. By being cognisant of a potential variety of property types, the place and role of public and common property is reinforced and revalidated, and enables diversity in lieu of monotony. Public property should not be an oxymoron, nor should common property be an anachronism.

Equally important to the mosaic is the heightened role of use rights in property and the consequential scope *use* (contrasted to *dominion*) allows for other rights to co-exist. Many may be familiar with William Blackstone's description of property as that 'sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion to all others…' Fewer may be familiar with the next paragraph 'there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground…' The problem with Blackstone, according to Carol Rose, is that people don't read *enough* Blackstone. A private owner's exclusive use right could theoretically co-exist with the diffuse interests of the unorganized public at large, provided they are not competing. Frederick Law Olmsted's contemplative visitor[13] to public property need not necessarily unreasonably

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[9] Common property while the most obscure (and overlooked), is perhaps the most instructive form of property in conceptualising the mosaic.

[10] Carol M. Rose, 'The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems', 83 (1998-1999) *Minn. L. Rev*. 129, at 155.

[11] For example the proponents of the enclosure movement in 18th century England dismissed commoners as economically inefficient, and contrary to the dominant discourse of improvement.

[12] Carol M Rose, 'Given-ness and Gift: Property and the Quest for Environmental Ethics', 24 *Envtl. L.* 1 (1994) 27.

[13] Joseph L. Sax, *Mountains Without Handrails Reflections on the National Parks* (1980) 19 -20
Olmsted formulated a philosophic base for the creation of state and national parks. The park (Mariposa) was established for the preservation of its scenery….Striking scenery has a capacity to stimulate powerful, searching responses in people. "Few persons can see such scenery as Yosemite…and not be impressed by it in some slight degree." (20) Olmsted offers his distinctive hypothesis, the basis for his prescription for the national parks. Gainful activity offers no opportunity for the mind to disengage from the task of getting things done, and to engage instead on thoughts removed from the confinements of duty and achievement. He calls this the invocation of the

interfere with a private right holder's peaceful use. Particularly where the private right holder's 'sole and despotic dominion' is theoretically (at least) more qualified than absolutist rhetoric would otherwise suggest.

Our paper looks at three landscapes; two in the United States, and the third, the High Country of New Zealand's South Island. As we admit, we have chosen these landscapes because they lend themselves to our line of enquiry. We observe that property mosaics are never static; these three over time have been respectively constructed, transformed, or de-constructed, and in the process we observe implications for landscape sustainability. The community of 'The Sea Ranch' in northern California is the setting for the construction (from a relatively blank slate) of a diverse mosaic of property interests. In the Northern Forests of the New England, USA, a pre-existing mosaic has been re-invented out of economic necessity. While in the High Country of the South Island, a statutory mosaic of property tenures is being dismantled and devolved into simpler, more unitary property arrangements.

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To our first case study, the constructed mosaic of the Sea Ranch. The Sea Ranch is a 4000 acre residential development along 10 miles of Sonoma County coastline.

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Before the original developer Oceanic Properties bought the family owned Rancho del Mar in 1963, the property mosaic was simple, a large privately owned sheep ranch with a history of ranching, farming and felling timber. Any public interest in the landscape existed only in the dormant public trust along the wet sands, and the meandering State Highway 1.

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In 1963 one private owner was substituted for another. But the new owner Oceanic Properties was imbued with an Aquarian-like vision for the land, described by founding landscape architect Lawrence Halprin in the terms of 'living lightly off the land'. He described Sea Ranch as:

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contemplative faculty. For Olmsted the preservation of scenery is justified precisely because it provides a stimulus to engage the contemplative faculty.

> A feeling of overall ‘place’, a feeling of community in which the whole was more important than the parts…if the whole could link buildings and nature into an organic whole rather than just a group of pretty houses, then we could feel that we had created something worthwhile which did not destroy, but rather enhanced the natural beauty we had been given.

Halprin’s original design was heavily influenced by large stretches of ‘commons’ that would serve environmental and aesthetic objectives and ‘share the landscape rather than having it sequestered in separate private ownerships.’

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In 1965 as the development plans gathered pace, a Residents Association formed in which common property in the development was vested. The insertion of the Residents Association added a common property interest to the pre-existing private and public interests.

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In the following decade, one more interest was added to the mosaic: an assertive awakening of public interest in beach access, and the preservation of coastal vistas. This was a tumultuous period for The Sea Ranch, a community conceived in an era of Ralph Nader and Rachel Carson, a time of environmental idealism, now ironically jeopardized in terms of its overall development and expansion by environmental legislation.

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In 1980 the lengthy impasse ended when the State of California entered the mosaic via a specific bill, asserting all Californians’ interest in the beach. The Bane Bill ended the planning powers of the Northern Californian Coastal Commission in return for the guarantee of 5 dedicated access easements to the beach, a near halving of the number of house sites, some public housing, a public reserve, and dedicated scenic corridors.

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- The Sea Ranch demonstrates the construction of a mosaic from relatively simple property arrangements in the early 1960s, to a more complex inter-connected mix of public, private and common property type's post 1980. A shift from 'look-but-don't-touch' to more guaranteed public access to the coast, a landscape of shared multiple use rights, not a singularly private dominion.
- How has the constructed diversity of property interests enhanced sustainable landscapes at The Sea Ranch?

  Aesthetically: In all probability, the original communal and architecturally visionary covenants and plans for development from 1963 would have created an aesthetically sustainable landscape, even without public involvement in mosaic. But aesthetic sustainability was enhanced by public property interests; the imposed scenic corridors from CA 1, and the substantial down-sizing of the development.

  Legally: given beach access rights in US public trust doctrine, it was necessary to add the public interest to the property mosaic to create a legally sustainable landscape. Before the 1980 Bane Bill, the landscape was beset with ambiguity over the rights of public access to the beach. The creation of dedicated public access rights after 1980 replaced divisive uncertainty with legal certainty.