

CULTURAL MODELS OF PROPERTY AND CONFLICT AT THE COAST

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INTRODUCTION

On the coast we witness property conflicts that would seem odd elsewhere. For example, consider the owner of an expensive beach house who starts harassing surfers and surf fishers because they are cluttering his view and invading his privacy. Wouldn't you think an inland homeowner was a bit crazy if he tried to stop kids from bicycling on the street outside his house? Now consider a visitor to a state beach. She is walking along the surf line and enjoying the swash passing over her feet. Then she comes to a fence on which hangs a large sign: "Private Beach No Trespassing." She is uncertain as to whether she can continue and angry that someone would bar her from the beach. But wouldn't it be odd if a stranger became angry because you wouldn't let her lounge around on your lawn any time she wanted?

"[P]roperty doesn't just happen *[P]roperty* is an enactment." (Blomley 2002, 557). People enact property based upon cultural models, which are the inter-subjectively shared cognitive tools. Property disputes can essentially happen in three ways: first, the cultural model is faulty; second, the model is not shared; and third, multiple models conflict. This abstract introduces seven cultural models of property and provides some examples of how each can be problematic along the coast.

CULTURAL MODELS

Cultural models are imaginative structures that people use to evaluate experiences, interpret observations, make judgments, make inferences, resolve problems, and make classifications. Often they are simplified representations of the world that highlight only selected features of our biophysical and social environments. Quite importantly, cultural models motivate and organize people's beliefs and values. Sometimes people use cultural models consciously, but often they are so taken-for-granted within a group that they seem like commonsense (Kempton et al. 1995). While the terms cognitive or mental models are often used, cultural models is used here because we are interested in models that are intersubjectively shared to a substantial degree (Shore 1996) and, therefore, capable of forming the basis for enacting property. Many, but not all, cultural models rely on a type of metaphorical logic (Lakoff & Johnson 1980). We take knowledge about one thing and metaphorically apply it, typically taking knowledge about something tangible and well understood and using it to conceptualize something new, complex, or abstract. (Lakoff 1993). While the land may be tangible, property is not land. "Property is a social fact or it is no fact at all." (Schmid 1999, 233). As a social fact, as a social enactment, property is multifaceted, imprecise, and constantly contested at the margins. Consequently, we use several cultural models to understand, debate, and enact property. These models, however, do not form a consistent system, so one model can conflict with another. This abstract introduces the sovereignty, community, landscape, ecology, commodity, moral order, and productivity models

THE SOVEREIGNTY MODEL

The sovereignty model focuses on the relationship between property rights and individual autonomy. The dated saying, "A man's home is his castle," metaphorically maps the feudal hierarchy onto domestic life. The father is at the *head* of the household just as the king was the *head* of the *body politic*. Neighboring parcels are separate, autonomous domains. Through the sovereignty model, we conceptualize the connection between property, personal control, security, and privacy. The model can be seen in the language of American legal scholars. Schwartz (1965) argued that American property law leaves property owners "with virtually uncontrolled *dominion* over the use and disposition of his property," and "virtually *sovereign* power" (quoted in Scheiber 1989, 221, 234). The U.S. Supreme Court explained in *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979), that if a property owner is denied the right to exclude others, it "will result in an actual physical *invasion*." In *Loretto Teleprompter Manhattan CATV Corp*, 458 U.S. 419, 426 (1982), the Court stated, "Our cases ... establish that when the physical *intrusion* reaches the extreme form of a *permanent physical occupation*, a taking has occurred" (italics added). *Occupation* is the term used to describe the military takeover of a country by a foreign military force. National security is mapped onto personal security, making the integrity of boundaries paramount. This model is about personal control through separation within a conceptual container.

But no other boundary is like the coastline. Here the right of the individual to exclude and the right of the entire nation not to be excluded collide at a line in the sand that is constantly shifting. Typically, tidelands are owned by the state subject to the public trust (Slade 1990; Cole 1997). As a result, the sovereignty model is reversed for the oceanfront portion of a coastal parcel, that is, for the portion that matters most. For a portion of the parcel, ownership is not held by a single sovereign owner, but instead is covered by two titles: the *jus privatum* and the *jus publicum*. The first can be privately held, but the latter is held by the State in trust for the public. The dominant title is the *jus publicum* and the subservient title is the *jus privatum* (Slade 1990). The sovereignty model fails when private rights are subjugated to those of the public.

Moreover, the conceptualization of where subjugation ends and individual dominion begins is not clear or shared. Different states follow different rules to set the boundary (Cole 1997). But worse, most people on the beach during the peak season—when crowding and conflict are most likely—are nonresidents, who frequently do not know the state's rule. Custom also diverges from the law. For example, beach visitors on Nantucket customarily enjoyed more access to private beaches than the Massachusetts Public Trust Doctrine of 1640 provides. New residents and visitors will not know the customs.

And even if rules are widely understood, the boundary may not be adequately knowable to enact the sovereignty model. Fences, hedges, and such are signifiers of property boundaries that can be key to maintaining property rights and avoiding conflict (Rose 1994). But the foreshore's slope and shape are often in flux, so such stable markers are not feasible. Moreover, few visitors or beachfront residents know where to locate the intersection of the shifting shore and the arithmetic average of high-water heights observed over an 18.6-year cycle. If one looks at the at the sovereignty model's source domain for instruction here,

one sees that real sovereign nations that are burdened with unclear borders can endure ongoing, violent disputes with their neighbors. Does it make sense to have a property rule that encourages conflict? Justice Scalia in *Nollan v. California Coastal Commission*, 107 S.Ct. 3141 (1987) thought that it did. But the Rhode Island Supreme Court thought differently in *State v. Ibbison et al.*, 448 A.2d 728 (1982). The Rhode Island Supreme Court upheld the dismissal of trespassing charges saying that they doubted “that any boundary could be set that would be readily apparent to an observer” and that “any municipality that intend[ed] to impose criminal penalties for trespass on waterfront property above the mean-high-tide line must prove beyond reasonable doubt that the defendant know the location of the boundary line and intentionally trespassed across it” 448 A.2d 728. In their view, the sovereignty model was unworkable along an unavoidably vague boundary.

THE COMMUNITY MODEL.

Most people conceptualize their property as embedded in a community. A good community is a place that maximizes positive social interaction and minimizes negative ones. The property line is not a guarded border; that line is instead typically the door. The drive and yard are accessible within limits that are set by social rules. This infringement on autonomy does not slide into the tyranny of the majority due to understandings of neighborliness. There is an old idea of property as being based upon propriety, which is understood as what is "proper" in the ordering of social and political life (Rose 1994). Certainly the beach has traditionally been a place where people have gathered and experienced community. More recently, the beach has been a place where people go to escape the strictures of society—a place to misbehave (Lencek & Bosker 1999). As more beachfront owners are seasonal and as more tourists populate the sand, interaction is more among strangers than among neighbors and the expectations of community propriety lose their hold. Add SUVs that can carry beer kegs and stereo systems onto the beach and all propriety disappears. Then the Nantucket owners start to close the beach. The strong connection between a community and its beach, however, can also be seen when private owners try to block access that the community has long enjoyed. For example, in *Gion v. City of Santa Cruz*, 2 Cal.3d 29 (1970), members of the community simply tore down barricades on the road and continued to use the beach. It is hard to imagine another circumstance where the community would support what would normally be vandalism and trespass. This is a case of the community model dominating the sovereignty model. It is also motivated by the moral order and productivity models which are introduced below.

THE LANDSCAPE MODEL

When it comes to coastal property, views are expensive. People purchase a place from which to consume the world like a landscape painting. Buying views, though, is problematic and it conflicts with the sovereignty model. The visually consumed landscape is on the other side of the boundary and belongs to someone else, frequently the public. It is as if the owner of the coastal property has purchased a view easement, but paid the previous owner of the benefited parcel and not the owner of the encumbered property, who has never received payment. Still, purchasers pay handsomely for the view and courts and politicians have been sympathetic when property owners have opposed dune restorations, offshore wind power projects, clamming, aquaculture, and other activities that would ruin their view. Thus, the landscape model can conflict with the ecology and productivity models.

THE ECOLOGICAL MODEL.

In this model, property is part of an interconnected, functioning ecosystem. This interconnectedness creates obligations to neighbors, the larger community, future generations, and other living organisms (Hunter 1988). Coastal environments can be highly dynamic areas that can *threaten* structures. Owners clamor to *armor* the shoreline. These coastal *defenses* and other activities like renourishment can disrupt coastal processes (Nordstrom 2000), causing a direct conflict between the sovereignty and ecological models. If one property owner's coastal engineering disrupts sediment flows to downdrift owners (Bush et al. 1996), then the ecological and community model can be undermined.

THE COMMODITY MODEL

The commodity model metaphorically maps understandings from buying and selling personal property onto real property. Modern surveying techniques, recording devices, and property laws, allow land to be *held* and *transferred* in a manner that does not require a community demonstration of rights such as by walking the property and handing over siesin (Blomley 1994). This model allows someone in Wisconsin to buy a time share in Myrtle Beach without ever knowing (or caring) what the community practices have been.

THE MORAL ORDER MODEL

People can conceptualize landscapes (or seascapes) as worthy of preservation through the moral order model. There is a hierarchy with God at the top. Humans are below God but they have been delegated the right to own property (Locke (1978 [1704])). However, some landscapes are of such a qualitatively higher nature and they have been reserved by God and should not be open to private ownership or human alteration. Often these are *awe inspiring* places that people argue should be held by government for preservation.

THE PRODUCTIVITY MODEL

One of Locke's defenses of private property was that it encouraged the mixing of our labor with the earth to make it more productive. This model applies to the coast in a number of ways. Part of the reasoning for the public trust doctrine was that the tidelands could not be "improved" in the conventional agricultural way and that they were most productive if they were open to fishing and gathering. A reason for taking land out of the public trust has been for port development to increase productivity. Arguments over preserving waterfronts for water dependent uses often utilize the productivity model. Finally, when shoreline property owners clash with clam diggers or nearshore aquaculture operators, we are seeing a clash between the sovereignty and landscape models on the one hand and the productivity model on the other.

CONCLUSION

While this short abstract did not allow for an in depth discussion of the cultural models of property, it did show how these models can operate, conflict, and fail. Understanding and appreciating these models can be an important step in avoiding and diffusing conflicts. It can also be an important step in developing rules for property that are more appropriate for coastal property.

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