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# Feminist perambulations: Taking the law for a walk in the land<sup>1</sup>

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Time and space, the dimensions through which we inhabit our world, are crucial to any attempt to make (give) shape to our sense of the world. Lefebvre (1991, 2004) and de Certeau (1989) write of the need to walk to know a place: not merely the topology of place in terms of tracing a path through the physical environment, but to become sensitive to the time and rhythm of place, constitutive of, as well as constituted by, the ‘everyday lives’ (Lefebvre, 1971) of people.<sup>2</sup> This deeper geography of place, a fleshy map of the many intersections between the physical environment and the inhabitation of it, grounded and embodied in the everyday movement of people, is the primary impetus for our ‘feminist perambulation’,<sup>3</sup> for taking ‘the law’ for a walk ‘in land’: an expression through which we attempt an articulation of our concern, as feminists working in the subject area named ‘land law’, to re-embed ‘land law’ into the ‘everyday’, the ‘space that claws and gnaws at us’ (Foucault 1986:23). As Blomley (1994: 76) describes: ‘... the essence of law is always understood as disembodied rather than formed in material and historical conditions’ and for Berman also (1983) this ‘dis-embedding’ has characterised the traditions of legal scholarship. Thus to ‘take the law for a walk’ back into the everyday of land is the focus of both this chapter and our collection.

But two caveats have to be entered even at this stage of introducing our perambulation. First, this is not intended as a walk around ‘everyday life’ which then moves into a critique of the extent to which ‘law’ adequately, or not, meets the needs and expectations of ‘ordinary people’ (especially, but by no means exclusively, women), important though this has been to feminist work. Such a form of walking presumes a ‘reality’ to material conditions and pursues a form of legal critique which can do no more than require of law that it meets the needs exposed from an examination of that ‘reality’. This form of walking in the everyday makes too many presumptions of the relationship between ‘law’ and its ‘context’, in which law is portrayed as little more than a tool to meet social needs, rather than being constitutive, not only of those conditions, but also of the ways in which we perceive of, and analyse, them. Therefore we must guard against any presumption of the kind of dualism encountered in critiques founded on a representation/reality

approach. Second, we are interested in a form of walking which allows us to open (our) perspective beyond 'law' as it maps the terrain of 'everyday lives', by bringing into our vision acts of 'the mappings of law', specifically its scholarly depiction as 'Land Law'. In this way we are able consider the extent to which these acts of mapping construct and restrict our potential for walking.

Feminist geographers have been at the forefront of moving into explorations of terrain beyond the orthodox topography of their subject. Rose (1993), for instance, (drawing from Bondi and Domosh 1992), sought a move away from the stance of geographers as 'detached explorers', with their distant, disembodied envisioning of the world, which renders unseen or unimportant 'women and everyday spaces' (the title of her second chapter). Although it may satisfy institutional criteria and institutional imperatives of what is held to be good geographic scholarship, this approach (necessarily) fails to provide maps which allow for a more nuanced and detailed account of everyday life or which would (again necessarily) bring onto the map the figure of the 'explorer' to disrupt his privileged construction as external to, removed from, the process of constructing the 'object of study'. Rose not only challenges the 'gaze' of the 'scholar/explorer' (which she links to masculinist pleasures), but also questions the extent to which this configuration of a perspective from the 'outside' and 'above' is actually able to 'see', let alone 'encounter', in terms of a 'deeper' or 'embodied' geography.

An 'embodied geography' insists upon the need to return to the physicality of place, and 'people' it within the dimensions of time as well as, (and therefore), space. It also insists upon the need to recognise that any interpretive act, any act of mapping, requires examination in and of itself. In the traditional mapping practices of legal scholarship, as we shall examine later, 'distance' and 'height' is manifested in ever increasing abstractions which remove the 'scholar/explorer' even from the practices of law itself, let alone its impacts on the messiness of 'everyday lives' (Bottomley 1996, Lim, 1996).<sup>1</sup> An 'embodied geography' of our terrain therefore requires that we try to break through the constraints of traditional acts of mapping which presume to define our 'object of study' and place us as no more and no less than the distanced 'scholar/explorer'. In this sense, there is a doubled effect: not only do we seek to re-embed law in the everyday, but also ourselves. Hence to take the law for a walk is, at the same time being, ourselves, taken for a walk. As Klee (quoted in Kudielka 2002:53) wrote of being taken for a walk by the line he drew, as the line meandered over the page and opened up new possibilities to him, so our walking of law is not a form of walking in direct lines towards things we can already see, but rather a perambulation through which, within which, we are open to new encounters. This form of walking is an embodied process of seeking to think differently rather than being caught within the sediments of the past. We hope to create a process through which we may more freely explore the potential for alternative acts of mapping, which are rather more informative and malleable in terms of encountering the 'everyday' of our present and our potential for futures.

### **To begin, modestly and with lightness of foot**

de Souza Santos (1987) pointed out the extent to which the process of (orthodox) cartography distorts 'reality' on the ground. Maps are projections which filter out those details which are determined unimportant for technical reasons, such as the requirement to be flat and the need for scale. They are also inscribed with the ideology of the cartographer. For de Souza Santos 'the relations law entertains with social reality are similar to those between maps and social reality'. He continues: 'Indeed laws are maps; written laws are cartographic maps; customary informal laws are mental maps' (1987:282), with striking resemblances between law's distortions and processes of projection, to those carried out in this form of cartography. de Souza Santos points to colonial and postcolonial practices which affect cartographic constructions, of which the gross deflation of the whole size of the African continent in maps produced under British imperialism is an obvious example. Similar questions are raised about law: What practices did/do 'we', from a western perspective, deploy in deciding what would be/is recognised as law? What violence was/is done to societies and communities upon which western style law was/is imposed, or whose legal regimes were/are reinterpreted through western legal concepts and techniques? Such questioning does enable a focus on the characteristics of law 'as we know it', as well as re-opening complex questions concerning the relations between legal and socio-cultural systems. It begins to open the way for walking with a fresh lightness of foot and a readiness to act on the moment in choosing our way.

Defining through law, access to, and control over, property, especially 'land' as a fundamental economic resource, has been, and is, a contested site of particular significance. In recent years there have been attempts by indigenous peoples to 'reclaim' territory, with all the difficulties of representing and protecting use rights (often held collectively) through the vector of western law (Belgrave 2007). Attempts to impose 'rational' systematised property relations upon land, introducing cadastral and land titling systems, with the aim of liberating its economic potential to generate capital, highlights the privileging in western law of individuated, private property holding focused on 'ownership' and formal legal systems to encourage land markets (De Soto 2000). Through the related patterns of economic and legal globalisation, locally differentiated but increasingly closely enmeshed, 'land' and 'law' as 'Land Law' is presented as transcending juridical boundaries. These patterns require that we very carefully delineate the juridical map within which we operate or from which we move.

Bringing into account postcolonial struggles over land and law is an important element in destabilising westernised presumptions about both the heritage and the future(s) of Land Law. We mean this in two ways: not only are we challenged to think more carefully about 'maps' which presume the benefits of westernised Land Law systems, especially when they are presented as the necessary culmination of 'development', but also that such work enables us to interrogate our own heritage and the constraints which have been imposed upon us by the prevalent hegemony of the 'ownership model' and private property (Blomley 2004). In fact, we could think of such a 'return' to an examination of our own condition as a necessary 'obligation' placed upon us by acts of mapping which refuse an encounter with the 'maker of the map'. As so well argued by Dewsbury and Thrift (2005: 101), this form of travel is not about the 'importing of (arti)fact, it is not one that charts places. Rather it presents ...encounters' and in this 'foreignness subjects us; it makes

subjects out of us through the way in which we counter-actualise the encounters we have with the other, the strange, the unique and the elsewhere and the not known. In this space we experience without interpreting, thus we experiment, moulding what we did know with that is hitherto unknown to us.' In Strathern's words (1988: 16), when writing about the uses of ethnography as a tool in research: 'the intention is not an ontological statement to the effect that there exists a type of social life based on premises in an inverse relation to our own. Rather, it is to utilize the language which belongs to our own in order to create a contrast internal to it.'

At the same time we must seek to guard against becoming intellectual nomads, taking seriously the critique that movement can be sometimes no more than 'slipperiness', 'a flight from philosophical responsibility rather than a flight toward anywhere' (Dorn 1998:185). Therefore we construct for ourselves two 'compass points' to keep ourselves sufficiently grounded and with some direction. First, we aim to keep contact with a material topography, the land, on which our travelling takes place. Again, to repeat, it is not that we offer 'land' as an unmediated 'real', but rather that it gives us a sufficient 'material grounding' for walking. Second, our feminism continues to require of us that we address the materiality of women's condition: in this case in relation to the resource of land. Again, this is no more than a sufficient 'material grounding', but it is one that gives us a sense of purpose and direction, a place from which we can begin to walk. (When in doubt sidestep, even cultivate some elusiveness, guard always against escape into pure metaphor or worse colonialist and post-colonialist myths of nomadism.)

Both this travelling and a 'return' must be undertaken modestly. The theorists with which we work, and our own feminist practices, insist upon 'walking' as a series of small incursions into the terrain, from which we might be able to draw lines, explore intersections between these lines, realise that some lines turn back on themselves or follow paths already well trodden. To walk is to look up from the path and glimpse things we did not expect, pause for a moment's reflection to catch up with the present moment, receptive to beginnings in movement all around, to recall half-remembered old trails, see horizons open and mirages fade, with endings and beginnings, chaos and order, endlessly present. In other words, we have to take a certain level of risk, walking without the certainty of 'sticking to' established paths on established maps, even sometimes cherishing and passing through derelict spaces (Massumi 1992: 103-4). Such incursions are acts which disturb, disrupt and unsettle rather than mimic heroic feats of exploration, seeking the revelation of entire, newly discovered, terrains. When Daniels (1993: 8) writes in his work on landscape, his 'intention is not iconoclastic, to smash the aesthetic surface of landscape images, to describe some deeper, more authentic world of social relations...', but rather to 'render their meanings more mutable and ambiguous' and to 'emphasise fluency rather than fixity', he could also have been describing our own project.

Therefore whilst writers such as de Souza Santos graphically and usefully describe the 'distortions' of imposing Westernised maps, including legal ones, onto other territories – we need to be clear, following Daniels, that this is not to suggest that, as a general proposition, our task is to create maps which are more faithful to 'reality'. We have to guard against any suggestion that maps are no more than

representations of ‘a real-world beyond map’, to be judged by their congruency with ‘the real’. The question is the extent to which certain forms of mapping constitute forms of ‘reality’ and enable or inhibit our ability to envision the fuller, complex messy plenitude of our ‘everyday lives’. Because no form of mapping can be finally complete – in the things that slip and seep through, that do not fit and insist upon becoming visible, we operate often, and necessarily so, as if there is a ‘real’ behind the map. The danger lies in envisioning this ‘real’ as an all encompassing, absolute, complete and fully formed landscape simply waiting to be revealed (Strathern 2001). In this sense, rather than ‘distorting’, maps push and pull ‘reality’ into certain shapes and forms. We can share with Rose and de Souza Santos a critique of the effects of orthodox cartographies, and seek, with Deleuze and Guatarri (1998) different forms of mapping beyond ‘mere tracing’. However, we do not do this in order to better represent a ‘reality’ but to be able to open ourselves to the new, the unexpected and the disruptive, to the plural potentials of our many ‘realities’.

The motif of walking is a statement of engagement with cartography itself which can begin to open up terrain. Our perambulation, our form of wandering, is therefore one of ‘walking purposefully’ – it is an exploration which seeks other ways of encountering and imagining our world and our potentials. Our feminism offers a starting point. We can begin by looking for the fleeting appearances of the figure of W/woman (or women), sometimes found in places we would not expect to encounter her. From these moments of visibility we can begin to consider what might be drawn from these encounters in terms of, for instance, parallel lines or intersections of similarity. Our ‘modest engagement’ through walking does not presume to use an abstract map of gender relations, but rather seeks to tease out the relevance, or even the possibility, of such a map. We expect, as a result of our walking, to ‘know more’ of the constellation of conditions which impact on women’s access to the resource of ‘land’. But this form of mapping is not for making generalised statements about ‘the condition of women’, or seeking ‘causes’ and ‘origins’. It is not about finding answers and insisting on the ‘right’ programmes for reform. It does no more than raise questions, possibilities and potentials. Refusing the comforts of the old maps, which have so beguiled and constrained us, involves a modest subversive exploration motivated by the hope of, the need for, opportunities for new encounters.

### **The collection, this chapter**

When we first (many years ago) considered the possibility of this collection, we had to consider our terms of reference. Should this be a collection about ‘land’ or ‘property’? Should we refrain from reproducing such a distinction derived from our legal tradition which, in the ‘everyday’, is perhaps not so sharply ‘lived’ as it is ‘understood’ by legal scholars? Would the extraction of ‘land’ from a wider mesh of property relations be to lose its ‘place’ within ‘everyday lives’? However, the distinction has the merit of delineating certain ‘forms’ of property: those defined as ‘land’ and those sets of legal relations which are not ‘land’ *per se* but touch it so closely that we can think of them as ‘part’ of ‘the law relating to land’. As we shall see later this is by no means an adequate or settled account of the vexed question of exactly what ‘land law’ is, but it serves for now to differentiate ‘land law’ from a more generalised account of ‘property’ in law.

‘Property’ does not, within our legal tradition, hold together as a legal construct.<sup>4</sup> It is no more than a term for an amalgam of rules which coalesce around certain types of objects or activities which gain some focus and status from the use, or importation, of a ‘property’ label (Murphy et al 2004). It offers, in fact, a rather interesting series of examples of finding routes by which to assert and defend claims over use, exploitation of, and economic returns from, objects or activities which, within our cultural traditions and political heritage, are given greatest strength if they can be thought and presented as ‘property rights’. This is essentially pragmatic, but it is rendered problematic when it is called to account with a demand for a definition ‘of’ property in law. Within our scholastic tradition, defining a subject area such as ‘property law’ is achieved through a process of identifying a ‘core principle’ which stabilises and legitimates the area of law as an internally coherent and externally differentiated site. However, as Worthington (2000: 655) laments in her casebook on personal property:

At the end of all the readings in this book it is necessary to ask what is really meant by the word property? Is it simply a label which the law attaches to achieve a desired end? Is it a word which describes a unified concept, or does it have different meanings in different contexts?

Having introduced a selection of reading exploring these issues, she goes on to say that ‘attempts to find positive answers tend to add uncertainty rather than remove it’. Gray (1991) argued that ‘few other legal notions operate such gross or systematic deception’ as property, which he described as ‘a vacant concept ... oddly enough rather like thin air’. However, to refrain from this pursuit would be to accept that there is nothing more to the object of study than a collection of rules, lacking the internal coherence and carefully defined boundaries that a ‘core principle’ would guarantee. Even worse, the object of study, on close inspection, might be revealed as uneven and messy, marked by pragmatic compromises forged from struggle and opportunistic use of law for an outcome, rather than the smooth and comfortable application of established principles to new situations. The multiple operations of random forces do not match the expected reflection of the law in the coherent and rational Empire of the Same.

Gray later expressed eloquently the thwarted desire from within the scholastic tradition to ‘find’ and capture property, beyond and behind the law, in other places such as philosophy, as just as surely ‘the pursuit of an illusion’. He famously wrote:

With private property, as with so many illusions, we are easily beguiled into the error of fantastic projection upon the beautiful, artless object we think we see. We are seduced into believing that we have found an objective reality which embodies our intuitions and needs. But then, just as the notion seems reassuringly three-dimensional, the phantom figure dances way through our fingers and dissolves into a formless void (Gray 1994:175).

We could, of course, through an examination of the many appearances in law of a figure named property, or perhaps more correctly the many tracings inscribing

'property' onto sets of practices, pursue an investigation into the strength of the seductive call (the 'siren call' to echo Smart 1989:25) of the illusion. We might even begin to open up to examination the importance of the very elusiveness of the figure: in not only keeping open a pursuit which keeps property scholars engaged in such a compelling search, but at the very same time provides the all important shadow (the seeming depth) to what might otherwise be revealed as a far too pragmatic intersection of forces. Rather than lamenting that absent presence, we should turn not to examine the 'failure' of the positivist promise of an essence but rather directly engage with the power, the affect, such a pursuit of such a promise has had.

The absence of a 'magnetic core' in law elicits a shift in the search for a 'grounding principle' in 'law' into that grey borderland where 'jurisprudence' and 'philosophy' meet. Here there are quick turns, towards politico-philosophical justifications for the ownership of private property (primarily Locke 1964) or towards explanations of the inter-relationship between 'object' and 'subject', that is 'what' can be owned and 'who' can own (primarily Hegel 1975), to try and ground 'property relations'. Together these trajectories have proven to have such force in constructing our 'idea' of property that they seem unassailable. It is as if the domain they have made possible has allowed the idea of property to come into being. Indeed, when placed within the context of a lineal pattern of development 'into' this fully formed 'property idea', (as in the exportation of it to developing countries), the power of the idea draws not only upon a form of 'naturalisation' (it 'seems' so obvious that this is what property is about) but also upon the presumption that this is the most sophisticated form of property thinking, enabling the necessary development of commodification and market economies. Thus 'property' as constituted within this configuration trumps all other possible ways of thinking property. 'Property' becomes constrained into a pattern of private ownership and exchange. Within this pattern, property is presumed to carry the characteristic of 'absolute dominium': the ability to control and alienate at will being the imprimatur of 'ownership'. And yet, whether this is sustainable as a philosophical trope or not, we know that it is not, has not and cannot be sustained in law (Gordon 1996; Gray & Gray 1998; Pottage 1994; 1995; 1993).

Further, although a concentration on the ownership of private property has certainly had the effect of suppressing other forms of holding and using land, both of a collective nature and in terms of recognising use value, it has not been able to completely eradicate either the memory and practices of, or demands for, other 'property practices' (Blomley 2004, Gray & Gray 1998; Rose 1994). The major constraint on recognising and thinking through other 'property practices' has come about, we would argue, not so much because of 'law' but because of the forging of a link between 'law' and a particular pattern of politico-philosophical thinking. To break this chain, or at least to weaken it, would enable a consideration of potentials within law.

Yet so much 'theory work' on 'property' remains caught within, and continues to invest in, this paradigm as if axiomatic rather than open to critique. Thus such feminist work as that of Radin (1993; 1996) continues to constrain itself within the trope of 'ownership' as a strategy for empowerment, without considering the potential of alternative 'property practices'. Whilst Radin argues that this is no more



than a strategic move addressed to finding a place within the dominant paradigm of ownership, she necessarily reinforces the idea that it is, in reality, the only, or best, form of using 'property thinking'. This is also true of the seeming intransigence of the object/subject distinction – which continues to try and confine property practices into a duality which, again, draws strength from the linkage made between specific patterns within philosophical thinking and 'law'. The potential made visible by a de-coupling movement is lost. As Pottage (2004) argues so forcefully, if the operation of such a duality was ever actually possible in law, sustaining it now is certainly impossible as we, and the law, engage with such issues as 'body parts' and genetic material. Yet, adherence to the presumed operation of the object/subject duality still marks, and inhibits, much contemporary scholarship, including feminist work (Davies and Naffine, 2001:201). Thus most 'property theory' manifested in the contemporary academy seems, to us, to remain overburdened by, and layered into, restrictive philosophical mapping practices. Rarely are the conventions of the 'private ownership model' or the distinction between object/subject challenged. 'Law' is read as mapped from and within these tropes, despite the difficulties of maintaining them and without confronting, recognising, the limits this places upon our thinking and therefore upon a fuller engagement with emerging or potential 'property practices' in law (Pottage 2004).

If, on the one hand, 'property' in law offers no definitional core and, on the other hand, when linked with 'property theory', settles like sediment into a restrictive account of ownership of objects, then we do not find it, for our purposes here, useful to pursue this figure of property. It is rather as if we are placed at a cross roads and offered either a pathway which will link places through little more than a similar term and over thin ground, or a pathway which is (already) signposted back to the past with little prospect of a new view. We recognise that we could try and bend these pathways, crossing between and through them, rather than following the well trodden paths. In doing so, (especially helped by the maps of scholars who have already refused to be constrained to the paths), we could seek to examine the many 'whys' and 'hows' and 'with what effects' the utilisation of the 'property label' has in law through the refusal of either a map which seeks essence and 'core' as its defining feature, or a map which continues to deploy the symmetries of a landscape of theory divided into public/private, object/ subject and so on and on. But that would have been a different project and one which would have cost us the loss of a focus on 'land'.

However, we could argue, that such a spotlight on 'land' is not merely a turning away from a broader investigation of 'property', but rather provides an alternative form of engagement with 'property' by insisting on a strategy of embodiment and embedding. 'Property', in this account, needs to be examined through micro-strategies focused on specific sites and the constellation of practices within those sites. 'Land' is such a site, through which we can encounter the many ways in which the figure of property is given shape and form. In the everyday, the practices of property, within a set of sites linked through no more and no less than an idea of 'land use' in its many variables, we can begin to re-engage with 'property' not as an elusive lady but rather as what we have made, or could make, of 'her' in all her many, plural, aspects. Thus a different form of mapping, refusing mere tracings, constructed through a particular form of walking, in law, is our attempt to rethink/re-

engage with that slippery terrain formed somewhere between, and inside of, land and law and property.

So – we begin with land and law. From that configuration we permit a combination of choice and chance to guide us to the figure of W/woman in different land/law scenarios and our perambulation within and through this collection has begun. We will visit a number of sites, each with a different guide, and from these outings we might start to sketch a map of parallel lines and intersections.

When we received the chapters for the collection, we found, teased out from them, patterns and repeating themes which by their persistent presence intrigue us. It becomes clear from these chapters that women's access to property/land is predicated upon, and mediated through, a complex pattern of socio-economic factors in which familial relations remain central. Further, it is more often the use value of property/land rather than ownership claims which are significant. And, as we track through our different encounters, we find significant gender issues beyond the well trodden site of the home which require that we, again, refuse any simple division between public and private law.

However, we have chosen not to reflect upon these patterns in this chapter. To follow the common practice of outlining the chapters in an introduction and drawing out from them our own 'readings' of them, would be to constrain our own methodology of walking maps into existence. Not only does leaving open any mapping exercise at this stage most appropriately represent our own encounter with the material, we hope also that it will more readily allow the reader to develop their own engagement with the text(s). To borrow from Nast and Pile (1998: 15) 'like pick up sticks, many lines could be chosen, juxtaposed, or heaped upon one another ...'. Our role then, in this chapter, is not to provide an introduction which might be to fore-call or fore-close these potential encounters with a route map. It is rather to explore why it is that an orthodox map of Land Law would place many of these sites 'off map', dangerous places and experience very great difficulty in including them within the traditional mapping exercise. In this sense we are willing to say, with Rose (1993), that seeking the figure of W/woman becomes an exercise in gendering the orthodoxies of our subject as masculinist, in that the mapping practices they uphold are inimical to the feminist project of a more inclusive, open, scholarship which can address potentials for futures rather than constantly re-inscribing the past.

## **The cartography of Land Law**

We turn then to examining our own heritage: the cartography of Land Law as it appears in the academy, sustained by a plethora of textbooks of ever increasing thickness and weight, articles and journals, practiced in the handing down of a tradition from one generation to the next, through Land Law courses which are compulsory for every student of law in this country.<sup>5</sup> These courses derived their origin, primarily, from a concern to address client-need for future practitioners and thus concentrate on those aspects of the market in land which we associate with private property ownership and conveyance. However, attempts to transmute them into truly scholastic enterprises worth of study in universities, insisted that a study of such practices could only be accomplished by setting them within a frame of

‘Land Law’ which underpinned the pragmatic practicalities of the conveyancing process. This was accomplished through a doubled effect of presenting ‘law’ as a set of rational and coherently established principles, which had emerged over a long period of time. Thus at one and the same time Land Law was given legitimacy derived from long duration, but was taken out of a time frame by a focus on the establishment, with the help of legal scholarship, of an internally coherent doctrinal map. Land Law came into being within the academy. Torn from its origins in the dimensions of space and time, it became embedded into a set of scholastic practices which, whilst seemingly predicated within space and time, was actually concerned with leaving both behind in order to establish a ‘place’ within the academy. (Bottomley 1996, Lim, 1996.)

The heritage of these scholastic forms derives, at least in part, from an era when academic law struggled to establish its legitimacy, in the latter half of the 19<sup>th</sup> Century. Sugarman (1991) has documented how legal scholars, laid claim to a ‘special body of expertise’. They emphasised that while law may appear disorderly, it is in fact cohesive due to its grounding ‘upon relatively few general principles’ which the scholar ‘was in a unique position to tease out’ (Sugarman 1991:38). The most obvious product of the ‘naming and claiming’ being the textbooks of the ‘core law’ subjects, with their ‘celebration of law as general principles’, ‘organised in numbered paragraphs or as codes subdivided into numbered rules’ (Sugarman 1991:39). These same forms were (super)imposed as part of the colonial encounter, with the codification of legal norms, such as those of Islamic law, both by and for imperial officials and as an ‘imperial archive’, into the medium of a familiar text (Lim 2001). The image of law evoked by these scholarly forms is that of ‘a proudly erect tree’ (Massumi 1988:xii), with its branches regularly pruned and its foliage carefully clipped by the trained gardener.

Contemporary scholars true to this heritage, continue to try and display the integrity of their chosen subject area, to produce the textbooks and to rationalise their area of work into discrete areas around ‘core characteristics’. Here an interesting elision takes form. These ‘core characteristics’ are those which, the reader is told, are ‘present’ in the law, yet to maintain them often requires acts of separation and suppression. These acts serve to maintain the illusion that the textbook is no more than a record of the law and that the law is capable of being rendered into such discrete patterns. Take the simple example of easements, rights held by a property owner over another’s land, for instance a right of way. These rights are defined, now by statute, as ‘land’ (we shall return to this later) sutured to the ownership of the property and passing with it on sale. The classical rendition of the characteristics of an easement (that is ‘when’ a practice can be recognised and enforced as embodying this form) are cited in the textbooks of Land Law as derived from Re Ellenborough Park [1956] Ch 131. However, a reading of the case reveals that bringing these attributes into a definitive list was the action of a textbook writer, Cheshire, although given legal authority in the judgment.

Why turn to Cheshire and not earlier case law to extrapolate the decision? Pressing the case further reveals that previous case law was ambiguous, reflecting as it did pragmatic and plural conveyancing practices in which rights were inscribed in legal documents without sharply delineating the ‘character’ of the right.

Cheshire, who took a major part in the design for codification of land law in the 1920s, was firmly implicated in ‘modernising’ land law, which required an exercise in precision, a level of certainty about ‘which’ legal form was being brought into land and what particular ‘drawer’ it would occupy in the statutory chest. These patterns of clarification and formalisation can be viewed as no more than what was required for the better functioning of an emergent market in land: but the important point here is the process by which the ‘core characteristics’ became naturalised: from textbook into law and then back into ‘text of law’.

The mutual roles of judge and academic in mapping a level of coherence and certainty onto the plural practices of the practitioner may certainly serve to enhance and sustain the conveyancer’s role. However, the conveyancer will continue to respond pragmatically, selecting and deploying legal forms as appropriate for a client’s needs, sometimes creating new blends when no suitable device is available. This is particularly the case in relation to easements understood as only one form of establishing rights and responsibilities between neighbouring land owners. In practice, the inter-relationship between ‘easements’ and ‘covenants’, which builds and sustains a network of obligations, requires that we move between and often through them: blending and bending them to our purpose. But their distinctive origins and ‘core’ (one is ‘land’, the other no more than a ‘contract in land’), and the consequent differences required for the construction and implementation of them, still require that they are presented as ‘separate’ species in their own chapters of the text.

Cheshire’s role in describing the characteristics of easements became the starting point for a section of the map of Land Law. Not only were the pragmatic issues of the conveyancer ‘lost in the middle’, but also as far as possible each entity is rendered coherent to itself, with the focus on the characteristics of each legal mode rather than its effects. Descriptions of ‘characteristics’ quickly become acts of definition and more interconnected accounts of the ways in which seemingly disparate parts are mutually constitutive are excluded. An examination of how cases deal with and develop the doctrinal fabric becomes an exercise in the extent to which they build upon, ignore or subvert ‘core principles’. This internal stabilisation of the subject area through the effect of classification also operates to detract from the porous nature of the subject boundaries, mapping an assertion of coherence onto much more complex phenomena.

One instance in this area being the call for an end to what many now see as the unwieldy, and no longer useful, distinction between easements and covenants in land and their replacement with an integrated ‘land obligation’. Sparkes (2003:713), who perhaps more than any other textbook writer celebrates what he regards as the ever increasing rationality of Land law, describes the lack of development of land obligations as ‘an astounding defect in our law’ and as being ‘a category of rights needed to regulate the legal relationship of neighbours’. At one level this is simply interesting in that it breaks through not only the presumed differences of ‘core’, but also calls into account the distinction between ‘easement’ constructed as ‘land’ and ‘covenant’ constructed as a ‘contract in land’. Sparkes is, in effect, refusing to maintain a slippage between ‘land’ and ‘contracts’, which reveals the porous nature of the subject as historically constituted. Land Law is not a hermetically sealed site. It is dependant upon inter-relations with other legal

forms and practices: most obviously contracts and equity. Thus, whilst appealing to the rationality of the need for a more cohesive category to ‘regulate the legal relationships between neighbours’, he is at the same time asserting the need for a more modern form of internally coherent Land Law. This form is not founded on keeping easements and covenants in separate places and thereby to a great extent avoiding fully confronting not only their inter-relationship but also what their differences reveal of the construction of Land Law. Rather it insists that they are merged into one account within one site, thus enabling a continued movement towards an ever more complete and contained rationality.

## **On boundaries**

As Waddams (2003) has so ably and concisely argued, attempts to divide private law into watertight compartments is always a fraught act of mapping which requires heroic feats of delving down from the abstract heights to find and preserve an underpinning ‘core principle’. One problem for the academic seeking to maintain the overarching coherence of Land Law is the need to establish its basic ‘legal principle’ capable of being contrasted and compared with those in other areas of law. Yet Land Law hangs together as no more than a set of practices associated with the holding and use of land from which it is difficult to extrapolate basic principles. We can turn to statutory definitions of ‘land’<sup>6</sup> as forming one focus but it is all too obvious that the borders between ‘land’ as a legal construct and the practices associated with it cross subject boundaries. The simple fact is that the subject area is a hybrid; born out of contracts and equity, but continually destabilised by both as they remain directly implicated in land law’s development (much more than mere traces of history). Further, the subject area is increasingly governed by statutory forms constituted within their own imperatives (especially in relation to registration), which again detracts from a jurisprudential grounding for the subject area (Pottage 1995).

It requires very partial accounts of history to suppress those difficult times when either the absence of ‘a core’, or the presence of a mixed jurisprudence, is all too obvious (Gordon 1996; Waddams 2003). Just as it requires keeping ‘registration’ on the margins, as if no more than a gloss on an established text, rather than engaging with the radical redrawing of ‘land law’ through new sets of requirements. Sometimes a destabilising paradox cannot be easily slipped into the text as ‘belonging’ to one area or another. However, such a threat to the coherent and bounded nature of the subject must be dealt with, the tree pruned and the fortress defended. A recent example of this, which will be examined more closely later in this chapter, is the outcry from some academics in response to the House of Lords judgment in Oxley v Hiscock [2004] EWCA Civ 546; [2004] 3 All ER 703. It is claimed that that an error was made in treating implied trusts (as within the domain of property) and proprietary estoppel (as within the terrain of equitable remedies) as if they were congruent with one another, or even worse, the same thing (Thompson 2004; Hudson 2005). Academics sometimes police the integrity of the area so industriously that they are in a position to tell a judge that he is, in principle, wrong (Thompson 2004). The ‘scholar/explorer’ does not merely describe, but also prescribes. Not only do such acts of mapping suppress and render invisible crucial ‘unevenness’ or ‘breaches in the wall’, they also inhibit our potential understandings of developments in law.

Such cartographies are connected to a more general aversion to randomness, contingency and coincidence found amongst orthodox lawyers and legal theorists. A focus on localised acts of mapping doctrine extrapolated from the judgments in cases, into the carefully classified detail of the law in the textbook requires continued and careful pruning. Indeed displaying such skill has frequently been the hallmark of the successful scholar. As Goodrich (1986: 209) wrote: ‘lawyers have always been indecently zealous to reduce behaviour to rules, and, in constructing the abstract world of the doctrine and science of law, have tended to be forgetful both of the irrationality and chance embedded in social life as well as the instability and change intrinsic to human purpose and human personality’. Whilst many legal scholars would readily agree that, around the edges, the law may be contingent, they (and the law) are nevertheless sustained by adherence to fixed and hard certainties. Consequently, loosely constructed situations, or simple contingencies, become burdened with coherence. Many tactics are employed in attempts to sustain a rational account. For instance, middle order ‘justifications’ lying behind doctrinal ‘lines of authority’, are debated by legal scholars in terms of which is the most ‘satisfactory’. Are testamentary secret trusts upheld because equity will not allow a statute to be used as an engine of fraud, or because they are not really testamentary trusts at all? In relation to constructive trusts, does ‘the search for principle’ continue? Often extrapolations of doctrine from judgments ‘leave behind’ the clear policy elements folded within them and avoid an examination of a particular historical conjuncture, which might have ‘explained’ more clearly (and coherently!) the grounds for the decision. This is even more crucial as a mode of operation when the decision has subsequently become embedded into a line of authority (as in, for example, Saunders v Vautier (1841) Beav 115). The garden is kept neat and the trees clipped to perfection. (So much may happen with/in a case or a rule or a right, we may tell its past and its future in multiple ways, but too often its record is no more than an ex post facto, seemingly inevitable, linear journey towards what is actually a footnote but has consumed the fullness of the text itself.)

The defence of the borders and suppression of that which is contingent, follows the scholar into the constructed ‘reality’ of doctrinal analysis. Such journeys are well documented (Bottomley 1996) and one example here will suffice. The concept of ‘touch and concern the land’ is used as foundational in the law of leases, as well as easements and restrictive covenants, to determine the extent of, (and to create), liability in relation to land which is owned by or shared with another person. In leasehold law, this concept is used to decide whether a first tenant may wander off and escape her history, her original contractual liability, and whether a new landlord or tenant is to be bound by a promise made by others. The phrase is said to originate in Spencer’s case (1583) 5 Co Rep 16a and a vast number of land cases go through here. It became the event of Pattison v Mayor of Congleton (1808) 103 ER 725, a fairly cobwebbed ‘touch and concern’ case but which religiously appears in the texts. Here the lessor (the town council) imposed a covenant in the lease of a silk mill to the effect that the mill should only employ workers certificated as resident within the parish. The promise was breached by the lessee – effectively, he was employing migrant labour. The town council had imposed the covenant to prevent ‘foreign poor’ entering the town; once resident, they might necessitate a rise in local taxes which would not only increase the costs of the mill itself and render the lessee less able to pay the rent, but would also

reduce the value of the lessor's reversion. Although the meaning of 'touch and concern' is defined to include any effect on the value of the leased land or on the lessor's reversion, it was held that this covenant did not 'affect the value of the land demised'.

Was this decision because of the 'true' interpretation of 'touch and concern', or was it because of national policy in relation to localities erecting boundaries preventing the free movement of workers? Were parish councils – the year after the abolition of the British slave trade and in war-time – to be allowed to control local immigration at the expense of other parishes? What combination of forces brought this case on war-time poor law policy within the law of leases, into the category of 'cases on touch and concern', so that it must be followed by 'like cases'? What throws of the dice made 'touch and concern' itself a ground of land law? And what throws of the dice brought the Landlord and Tenant (Covenants) Act 1995 which abolished 'touch and concern' for new landlords and tenants? A case can be like a dead leaf hanging on a tree, but is also a fish darting in water, or a bird flying between the branches. However, these multiple operations of random forces do not match the expected reflection of law in the fixed aerial photographs and must be suppressed.

We might think of this 'cartographer' of law as one who is constantly engaged in protecting their territory; stabilising the 'fortress-core' and defending their boundaries against attacks and incursions, both locally and regionally. Sometimes he turns adventurer and looks to territories that seem ill defended as potential sites to extend the terrain of his map. Is Land Law too narrowly defined in the modern world of complex property relations? Is 'property' not better thought of as a branch of obligations and, indeed, is not obligations better thought of as branches of an overarching arboreal law of restitution? Such questioning is, of course, properly part of a scholarly examination of subject areas: but, in practice, this often becomes a battle over the territory of borderlands and investments in defending fortress-core. The development (the huge growth) of areas of 'law which does not fit' may be rendered invisible within and to scholarship, unexamined and unexplored. In such cases as, for instance, 'anti-social behaviour law', a hybrid which is neither simply in the civil realm nor simply in the criminal realm and defies traditional categorisation, emerging practices of law are left to create a 'new' place in the margins largely ignored by the mainstream academy (Bottomley and Moore 2007).

'Grounding principles' are inscribed upon the law retrospectively and the boundaries of legal subject areas are, and always have been, porous. It is the job of the academic to make what sense can be wrought from the complex 'everyday' of the law. However, what must be guarded against are the acts of mapping which transmute into cartographies of no more than 'mere tracings', banal repetitions designed to satisfy, empower and consolidate the academically defined territory, rather than enhance a more forward and outward looking pattern of scholarship.

Potentially enabling futures may be curtailed by the presence and utilisation of texts, even in the courts of law, which continue to emphasise traditional features, to gain comfort from the reassertion of orthodoxies, rather than take the risks and disturbance from considering innovations. We have already discussed one aspect

of 'land law' which reveals the porous nature of the boundary between 'land' and 'contracts'. Such 'incursions' are often developed as 'creative linkages' which allow for movement, they are pragmatic and enabling in the instant case. They are made possible by traces of history and blurrings in jurisprudence which lie fallow, no more than shadows of possibilities, until brought into play when offering a hook upon which to hang a new route map required for movement forward. But, for the scholar/explorer the task is to make 'sense' of these incursions, by re-embedding them within the existing maps, enforcing order in the face of potential chaos and defusing the unsettling nature of boundary blur.

One of the hardest tasks in land law in this country comes from the intersection between common law and equity, in the area of the map labelled 'trusts'. Here the territory is hard to defend against the destabilising aspects of equity in its remedial modes. A response in the recent past was imperialist incursions from the (then) vibrantly expansive restitutionary approach (Birks 1985; Jones and Goff 2002), intent on redrawing maps of both common law and equity, but challenged by academics successively defending their terrain, providing key secondary texts which would be deployed in the courts. However, this incursion is not the particular concern of this chapter, rather we return to the case of Oxley v Hiscock which permits a focus upon a further defence against disorder in land law.

### **Defending fortress-land (an outpost of fortress property)**

The judgment in Oxley v Hiscock disrupted the smooth surface of land law. Its suggestion that beneficial interests acquired (recognised) through the jurisprudence of the imputed trust could be equally theorised through estoppel principles challenged the presentation of the two concepts as discrete juridical forms. In their history the imputed trust has been treated and understood within 'land law' as a property right, while estoppel is essentially an equitable remedy. The distinction has been important for feminists, since in the jurisprudence of land law a property right, a claim to a thing 'itself' is not limited by orthodox contractual doctrine and is potentially enforceable against third parties. Forged on the middle ground of contracts and equity, the property right gives rise to a stronger claim, more than simply compensation for its loss. We intend briefly to track the case law recognising 'property right held through trust' to demonstrate not only its hybrid nature but also the simple fact that recognising rights for (usually) women in circumstances where the home was held in another's name required a claim carrying property status. A property right can trump countervailing claims, principally that 'ownership' vested in the person 'holding title to land'.

One objective of the modernising 1925 legislation was to provide sufficient certainty and formality to enhance the market in land. As a consequence, holding a trust interest in land was deemed to be no more than a money interest, as opposed to a property interest capable of binding third parties. Lord Denning in Bull v Bull [1955] 1 QB 234 held that it could also be an interest giving the right to live in the land itself. The 'owner' (the person who held title) could not exclude the person claiming the trust benefit. Eventually, through a series of steps and creative interpretation of the legislation, this right to occupy land derived from a money right took on the characteristics of a property right 'in land', which would later be confirmed as being 'more than a money right' by new legislation.<sup>7</sup> The



claims of (mostly) women to these rights in land held by their partners were concerned not only with having their interest recognised and protected in law, but also with the proportion of their claim upon the home vis-à-vis the title holder or in some cases third parties. Traditionally the extent of the claim was a matter of tracking economic investment in the form of direct financial contributions, raising some disquiet amongst feminists. Again a creative judiciary found ways of decoupling proportions of ownership from reliance on an economic account to the detriment of many women, providing an assault upon the fortress of 'land law'. It led to mainstream academic criticism of (some of the) judges for the old offence of importing a lack of certainty, particularly into an area of law which demands high levels of certainty, and worse that it had been achieved through the construction of a 'fiction' of common intention.

The judicial enterprise of recognising social justice imperatives and circumventing case law which impeded the development of a more responsive body of rules did not merely require a 'move away' from privileging certainty. Creative decision making also allowed for a progressive seepage of factors recognising social 'reality', including 'why' a woman might not have been able to accumulate wealth into 'land law'. And the latest judicial manoeuvre, in Oxley v Hiscock, suggests that the decision about the proportions in which the beneficial interests in land are held is better decided by deploying the jurisprudence of estoppel rather than the 'fiction of common intention'. Thus, there is the opening of another possibility, that the principles of estoppel might also be used to raise the claim itself. And so law always becomes, it flies, swims and walks: 'It is not a question of any special place on earth, nor of any given moment in history, but rather of a model that is ceaselessly set up and that collapses, of a process that ceaselessly extends itself, breaks off and starts again' (Deleuze and Guattari, 1988:20). It is not surprising that the decision in Oxley v Hiscock provoked an outcry from some orthodox academic land lawyers for confusing an area of law which requires certainty and for conflating a traditionally remedial principle – estoppel – derived from equitable principles addressed to limitations in contract law with a 'property right'. However, the vehemence of some authors such as Thompson, the reaction, as well as the willingness to challenge the judiciary and their role as producers of law, was less predictable and worthy of consideration.

The traditionalists are countered by other established authors, who for the sake of convenience we will term as 'more progressive' thinkers, who have an essentially pragmatic approach to the decision as an enabling move (Battersby 2005; Dixon 2005). Theirs is broadly an argument that one area – estoppel – has now developed to the extent that it might be usefully deployed in a related area and that it has begun, anyway, to be deployed in certain circumstances such that it can carry some features of property-in-land. In other words this approach is not wedded to a belief that 'property-in-land' holds 'core characteristics' which must be policed, but recognises that it is no more than an effect, brought about by a constellation of features being grafted onto a set of practices, constituted by outcome rather than by adherence to fundamental principles 'properly' applied. Academic authors necessarily and understandably spend much of their time helping to locate shifts in judicial thinking, including any possible impacts in future cases (Watt 2003:40). However, to be constantly concerned with policing orthodoxies is to be necessarily blinded to the pragmatic movements of judges

who respond to new situations, by blending and bending forms, and leaning on the rules, to allow for a responsive approach to new problems or situations.

Like conveyancers, judges do not operate in compartmentalised segments of law and neither are they over-concerned with doctrinal or conceptual purity when they can envision other ways of moving forward (Watt 2003:40). To take another much more prosaic example, the rule concerning certainty in leases which was, in the texts, unquestionably certain but became retrospectively uncertain with the case of Prudential Assurance Co Ltd v London Residuary Body [1992] 3 WLR 279 (HL). The case expresses a meeting of forces, including the force of the rule that a lease must be a 'term of years absolute'<sup>8</sup>, a rule which is said to define the essence of a lease as enjoyment of land for a fixed duration with a predetermined beginning and end. However, it is clear in Prudential that several kinds of lease are possible, in this case a lease 'from year to year', and other cases show that alternative labels may also be attached, such as contractual and estoppel licences, which can have similar effects to a lease. The law may state the essence of the lease, but what the judges actually do with the rule is to enable parties to enter and give effect to their negotiations. And there are other such examples in leases, as for instance in Bruton v London and Quadrant Housing Trust [2001] 1 AC 406, where a 'personal lease' was found by creatively deploying contracts to enable the 'tenant' to take advantage of an implied repairing lease where 'land law' had effectively placed a block on finding a route forward.

It is one thing to attempt to situate these developments in judicial thinking and try to fore-call what judges will say, or not say, in future cases. This is what academics do. However, it is quite another thing to critique the judiciary in the courts of authority as being 'wrong' on the law, or an area of law. We turn again, then, to consider why some 'traditional' thinkers have responded in such a way to Oxley v Hiscock. What is at stake appears to us to be two-fold: first, the effort expended in 'maintaining' a coherence to property-in-land is exposed; and second, the general concern with the 'lack of certainty and formality' in an area in which the economics of the market are challenged by social imperatives according to which other factors are sufficiently significant to demand recognition in law. Put crudely, attempts within 'Land Law' to engage with the messy consequences of gender relations and home use/ownership disrupt and render problematic assertions that property-in-land is expressive of an internally stable and rational account of 'land as law'.

It is not, of course, that the law of the 'family home' is the only area which disturbs the familiar and the reassuring, but it is often the most persistent and most problematic for more 'traditional' thinkers. It is no surprise that they, as much as any feminist author who views land law and land lawyers as unresponsive to women's needs, wholeheartedly support suggestions for the expulsion of such troublesome subjects to a different (more marginal) area of law. Family law is regarded as the most suitable repository by commentators from a range of perspectives. However, such an act of exclusion would not finally stabilise 'property in land'. We have suggested that rather as, by tradition, 'ownership in land' is no more than a bundle of divisible rights and claims, so 'property in land' is no more than a bundle of sticks. It is a constellation of forces which, if the bundle is sufficiently weighty, may give the effect of 'property in land', a sum greater than

its parts. This effect draws upon other discursive practices for the ‘final touch’. Primarily it utilises ‘common sense’, what Gray (1994:75) called ‘intuition’, but there is also as suggested already an attempt to derive support from a philosophical grounding, with reference to a ‘core principle’, to search beyond land, beyond property-in land, delving into that most abstract and erudite of scholastic fields to seek property.

Gray’s (1994:75) description of the beguiling and illusive figure of private property which seduces scholars of land law, in part because of the need for an objective foundation or core principle to provide at least the appearance of a coherent field of study, is one to which we have already referred. Attempts are made to map property as ‘something’ which can be rendered into ‘ownership’ arising in, or from, a claim to be able to exclude others from the use of that ‘thing’. Either there is a focus on the ‘thing’ itself as holding certain properties which make it reducible to property or, instead, on the relational patterns (between subjects in relation to objects) which render the ‘thing’ property by excluding others claims to use it.<sup>9</sup> The pursuit of this ‘illusive lady’ serves to fend off the realisation that ‘land law’ is merely a collection of rules, although at the moment of capture, as Gray suggests, the figure dissolves.

However, we would say that she has value in and of herself, in that her virtue lies in her floating and shifting form, to be, if you like, something we all ‘know’ because of her very irreducibility. This is not to deny that within our western tradition she has become enmeshed in certain patterns, especially as the recognition of those patterns might help us to free her, if and when she seems useful to us. But the rendition of ‘her’ as a very particular type of ‘object’, limits an account of her to those western traditions, or at least privileges them as ‘authoritative guides’ to what she should be or how she should be ‘properly dressed’. It also inhibits potential for attempts at thinking ‘property’ as no more and no less than a way to organise access to, and use of, limited resources (as part of an array of legal forms and cultural practices).

### **The ‘scholar/explorer’ in the tree**

The features of traditional Land Law scholarship we could, following Rose, characterise as essentially ‘masculinist’. Such a portrayal is possible with respect to the pleasures derived from battles over the authenticity of legal doctrine and the ‘proper’ terrain of the subject. The method used in, and patterns of, the constant struggle to defend the integrity of the territory, also exhibit ‘masculinist’ tones. These consist of repeated references to increasingly abstract ‘core’ principles as ‘present’, but often it is the strength of the assertion rather than the relevance or rationality of the principles which is notable. Waddams (2003) points out that at the level of legal doctrine and in the everyday of legal practice, continued attempts to stabilise sharp distinctions between private law subjects inhibit a fuller account of law as it crosses subject boundaries, which is capable of exposing those boundaries as porous and questioning the seeming stability of ‘core principles’. In short, conventional academics are involved in acts of reification distancing them from the ‘everyday’, in order to maintain their traditional role and practices. As Rose (1993) indicates, although in the context of her own discipline, this necessitates standing outside and above the messiness of ‘law’ to assert over it an

orderly regime which is made available to the scholar/explorers because of their distanced perspective on law-out-there. Their 'every-day' closeness to the acts of mapping which allows them to 'find'/construct the underlying patterns of core principles that seem more immediate than the untidy, chaotic and often pragmatic operations of law.

The descriptions of law from 'scholar/explorers' are presented as both normative and prescriptive. Normative in the sense that the values of certainty and coherence are valued above all else, and prescriptive in that judgment of the 'law-out-there' is in terms of whether or not it matches the prescribed standard. This becomes particularly problematic when, again as Rose (1993) points out, the presence of the academics themselves, their practices and perspectives, within this picture are unacknowledged. Unlike geographers, the legal 'scholar/explorer' is in a paradoxical position. He can see and take pleasure, a particular pleasure, in those instances when as an individual he has a direct impact on the subject, the law-out-there. When an academic article is cited in judgment, it operates as a major reinforcement of the writer's position as not just a mere commentator on the law but as part of 'the law' itself.<sup>10</sup> We can expand Rose's analysis by recognising not only the masculinist pleasures of holding such authority, but also the masculinist way in which these articles are written and received as dispassionate accounts of law. When an account is out of line with what has been argued in the courts it can be presented as a better account of law, or even true law, as opposed to a description imbued with the values of the authors. Paradoxically then, the legal 'scholar/explorer' becomes the repository of 'real' law, trumping the law of the courts and, sometimes, with his descriptions being utilised as maps to guide the judiciary back onto the correct path. There are a small number of signed paths and where they divide 'we' must take either this one or that one, in a continuing sequence of limited choices, safeguarded against the mutability of chance and contingency.

It may well be that it is the disorderly, 'off-route' cases that offer more enabling maps for those who 'come to law' looking for small, progressive incursions into an otherwise unfriendly landscape, within and in between the frontiers of law. However, drowned in doctrinal detail and countering any threat to the borders of the subject area as a scholarly enterprise, the legal 'scholar/explorer' avoids and excludes potentially destabilising 'realities'. Anything pertaining to the family is problematic, not least because 'family law' approaches are soft, pliable and fail to offer clear-cut rules (Smart 1989:15; Bottomley & Roche 1988: 95-96). The border with 'family matters' in trusts and estoppel is strongly policed amid constant reminders of the need for clarity, matched with dire warnings about the dangers of discretion and of taking into account broad social factors when making rules or applying them. It is as if this particularly leaky border must be sealed and resealed against the potential of fluidity and threat of pollution. So much has been marginalised and excluded that it is no wonder that feminists have tended to look to equity (rather than trusts within Land Law) or family law as sites holding more potential in meeting women's needs. Others have gone further off-map into the more malleable and possibly more attractive terrain of environment and housing. 'Evacuating' the area of Land Law serves, incidentally, the ongoing process of 'securing' Land Law's borders and keeping out potentially disruptive public law elements. It is as if the subject has been emptied of so much of its potential, left

like a pattern of dry bones in a desert for the remaining ‘scholar/explorers’ to pick over.

To map the evidence of the way in which the masculinist pleasures found in the traditional rendition of Land Law inhibit the potential of the subject area and foreclose a deeper geography of embodiment is a task beyond the limited space offered in this chapter. However, we argued earlier that despite its intractability, there has been no lack of investment in presenting Land Law as a coherent subject area, a set of doctrinal instances expressing adherence to a set of core elements rendered visible through carefully constructed historical accounts. The pattern expressed in this form of construction, to borrow from Deleuze (1995:146) is that of a tree ‘an arborescent process’ with hierarchically arranged branches and roots – a tree of knowledge. Vertically imaged Land Law emanates from a central core, rather than a splintered horizontal network of related practices. The pattern is set for the legal ‘scholar/explorer’ ‘in the tree’, although it requires heroic acts of reification to sustain. He needs not only to deliver a rational and internally coherent account of the law, but also to record his skill in being able to find/construct the account.<sup>11</sup> We would argue that for legal ‘scholar/explorers’ in land two strategies mark their acts of mapping: excessive concentration on doctrinal detail; and an awkward and ambiguous relationship with land registration which is clumsily grafted onto Land Law.

Registration may be on the map, but it remains confined to Land Law’s margins. Strangely, the most seemingly bureaucratic aspect of land and law is pushed into the outer realms of the terrain where the more informal rights such as those derived from estoppel also dwell. What the state guarantee of land title and related interests in land recognises and upholds is those aspects of land use which hold an economic value and are significant to the market in land. Thus it is those things which encourage the market which are portrayed in the account of ‘land’ as Land Law. The reconstitution of the subject through registration cannot be ignored, but what this signified for many scholars was that Land Law was essentially dominated by conveyancing, the product and practices of the market place, a collection of rules concerned with the exchange of land. Land Law becomes the study of statutes and the practices of registration, mere training for conveyancers.<sup>12</sup> Ironically perhaps, as the law relating to the exchange of land is, therefore, slipping away from the land lawyer, the response of the legal ‘scholar/explorer’ is to become even more fixated on the doctrinal heritage of the subject. Faced with a terrain of regulation through registration, which offers little of value to the scholar, the struggle goes on to embed Land Law into a jurisprudence of principles and the courts’ response to novel situations not covered by statutes, as if by keeping this body still alive the reality that the subject is actually, rapidly, contracting, can be suppressed. There is an effort and energy, but essential futility to this which is not unlike that of early 20<sup>th</sup> century white colonial explorers who stalked across African deserts seeking to make their mark and give their names to sand dunes and fossil trees (Ondaatje:1993).

## **Law, land**

Land Law derives the specificity of its terrain from its focus on the land conveyance, the market and definitions of ‘real property’ and ‘land’. An orthodox

history of ‘how we got here’, which predominates in the Land Law of the classroom and the textbook, helps to give shape and form to this terrain. However, many histories of the complex relations between people, law and the land which did not ‘succeed’ or ‘survive’ are simply, perhaps understandably, written out and forgotten, with only the traces of the losses, compromises and resilience of the less powerful who fought to protect their few rights. It could be said that this exclusion is a matter only for historians, but we would argue that it should also be of importance to lawyers and academics. These other histories remind us that land is a limited and contested resource. Law as a social construct privileges those who have been able to assert their economic and social power, embedding that privilege within authoritarian legal discourse; but the power of law is not a simple one-way, all-enveloping, relation and that discourse remains ‘incomplete’ and is resisted. Not only must it respond to the demands made upon it by the socially and economically powerful, but also it can never, within its own rhetoric be finally closed to attempts made to use it by the less powerful.

Matsuda (1987:323) argued two decades ago for the ‘irrational position’ of simultaneously having faith in the law – ‘having a right to participate equally in society with any other person’ – and at the same time suspending that faith – ‘rights are whatever people in power say they are’. Similarly, de Souza Santos (1995:348) argued that the twin pillars of law are emancipation and regulation. Sometimes the proponents of the counter discourse may force the law to live up to its own rhetoric, although it may be difficult to predict when such an occurrence will arise. Here the question is the extent to which inscribing law in the academy as a set of practices in a particular form inhibits any potential in keeping open, or opening, progressive potentials which might enable the less powerful to resist dispossession or assert claims which protect fragile access to land. Without overemphasising its importance, the academy is a component in drawing and maintaining acts of mapping which are more open to disruption. However, to achieve this is to accept that maps might need to be uneven and disorderly, allowing for lines which extend beyond and over neat boundaries, which may or may not indicate new terrain, let alone be capable of mapping as ‘territory’ in any conventional sense.

The loss of the rural commons and informal rights in law provide two examples of what has been written out of history, although remaining of immediate significance today. Traces of the demise of customary rights of access to land can still be found in the public law protection of common lands. The residues and recollections of the loss of informal rights in law with the sharpening focus on ‘ownership’ are more difficult to detect, particularly as we move ever more deeply into a fully registered system. Folk memories of the commons are now almost obliterated by time and the shift to urban patterns of living, with access to land now seen principally as concerned with recreation rather than having any economic or political dimension (other than the protection of ‘their’ land by the landowners). It is difficult to recover the much more overtly politicised notion of what it means to lose rights of entry to, and use of, an economic resource held by a community for the community benefit, an important mechanism by which the value and interdependency of ‘community’ was inscribed in and through the landscape of everyday practices (Home 2007 forthcoming; Guadagni 2002). The general trajectory towards the triumph of the individual property owner and the parallel

dispossession of those whose claims to their plots were informal or customary, defined not only the use of land but also the lens through which ‘law’ redefined land. However, the triumph of ‘possessive individualism’ is still not quite complete, as evidenced by the attempt in the Land Registration Act 2002 to ‘tidy up’ adverse possession, marginalise and suppress the traces of disruptive histories.<sup>13</sup> And, paradoxically, within a logic required by a focus on the register, certain informal rights under s116 of the same Act, particularly estoppel rights, are elevated to a new status.<sup>14</sup>

Tracking and bringing into account these shadows reminds us that the history of private property is not one of ‘natural origins’ but one of political struggle (Charlesworth 2007 forthcoming). Those struggles continue today, most obviously in the examples of indigenous peoples asserting their rights to land from which they were dispossessed. While communal/customary claims can all too often only be reasserted by translation into forms that can be understood within the capitalist market place (Belgrave 2007), what is important is the extent to which some of those struggles, for example in Scotland centred around the provisions of the Scottish Land Reform Act 2003, are now focused on the means by which rights can be achieved through the assertion of a ‘collective holding’ (Sellar 2003; Bryden and Geisler 2004). In Africa and South America, informal land tenure systems and a network of informal rights and practices within kin groups have resurfaced to contest the hegemony of western models of registration of title (Durand-Lasserve and Royston 2002; Home & Lim 2004).

This is not simply a rural issue, since the urban and peri-urban ‘squatter settlements’ are being progressively ‘regularised’ or ‘legalised’ (Fernandes and Varley 1998; Payne 2002). Some are being accredited with the new status of formal ownership, within the frame of private property rights, but it is a process which involves new acts of dispossession and creates new ‘outsiders’. Allowing a land market to develop may benefit lending agencies and already wealthy property owners, rather more than enfranchising new owners of private property. The loss of informal practices and enclosure of land raises important issues for feminists with respect to its impact on women’s access to land, to which we will return. The patterns developed from the colonial and postcolonial imposition of ‘received’ Western law and legal mechanisms overlaying pre-existing legal relations in developing jurisdictions creates conflicts and confusions, not least about legitimacy, which can have devastating consequences for ordinary people in their everyday lives. They serve also to highlight the very partiality of western legal systems, including that in England and Wales, and the extent to which it not only upholds a regime of private property ownership but inhibits the development of more communal or hybrid means of holding and using land.

It is not surprising to us that there has been a recent resurgence in this country in an interest in holding and using land beyond the confinements of individuated property ownership patterns. It is not only that some, albeit few, individuals wish to purposefully find more communal ways of living and wish that communality to be expressed in law, it is also the pressure on land as a resource and the financial cost of individual units of land as homes has led to the recognition that new forms of joint tenure are preferable to trying to purchase ever smaller scraps of ‘land’ for individual use. However, the means by which this is achieved through a legal

framework focused on individuated property ownership is unwieldy and property academics (with the notable exception of Gray and Gray) have made little attempt to find new facilitative means to accomplish satisfactory forms to hold land more communally or jointly. This is not only to the detriment of those who seek to break the dominant mould, but also to a fuller academic account of 'land law'.

Informal rights and the extent to which they can and should be brought into the 'formal' legal system and emerging communal, joint or hybrid land holding mechanisms are barely visible on the margins of an orthodox map of 'land law'. As Rose describes and analyses in relation to geography, it is on these margins that issues of gender are clearly visible. For instance, it has long been recognised that developments in communal patterns of land use may well benefit women in making possible, through shared space, the breaking down of domestic isolation, the distribution through the community of domestic tasks and childcare, through providing economies of scale and 'blending' the 'public'/'private' spheres. In bringing 'the margins' into account we necessarily challenge a map which has kept them so far from sight. These margins are disruptive because they do not focus on 'land law' as about the private ownership of land and formal rights in land ownership and use. If we reflect back too, for a moment, on our reference to 'loss of rural commons', we might now consider also what some commentators have identified as 'the new enclosures' and 'the loss of urban commons', both in our own jurisdiction and others (Robins, 1993; Marcuse 1995). Again, few 'scholar/explorers' in 'Land Law' have spent much time, if any, on these legal trends, despite the importance of the dispossession of land from common use through the burgeoning of exclusive often gated or 'secured' enclaves designed to protect some (new) city inhabitants from 'others'. Their insistence on the core principles of the subject area renders this terrain to be 'off site'. Once, as feminists, we begin to examine the margins and challenge the paucity of traditional mapping, we render visible this dangerous terrain which not only exposes and challenges 'the law', but equally exposes and challenges the practices of 'mapping law' still dominant within the academy.

To begin walking, then, our contingent map will be one which seeks 'land', taking the risk of the unexpected, even if only as a glimpse from the corner of the eye and refusing the constraints of Land Law. In order to walk, we need to unfold the old map of Land Law with its deeply ingrained creases, refolding its seemingly continuous surface (Pottage 1994: 384) in new ways, in new terrains, making visible the potentials of other multi-dimensional maps, the splinters of possibilities, beyond 'mere tracings'.

## **Women and everyday places**

'But you may say, we asked you to speak about women and fiction – what has that got to do with a room of one's own?' (Woolf 2000:3)<sup>15</sup>

When Virginia Woolf was asked to give a lecture to women undergraduates in Cambridge, she wrote in the 1927 essay which became its record, that she had found it impossible to decide how to weave a simple linkage between 'women' and



'fiction'. She writes of the encounter, when moments assemble in the present, constellations of infinite forces, of our past thoughts and yours in the present, even perhaps the meetings of old cases in new texts. As she contemplated the possible permutations for her lecture by the river Cam:

Thought ... had let its line down into the stream. It swayed, minute after minute,  
hither and thither, among the reflections and the weeds, letting the water lift it and sink it until – you know the little tug – the sudden conglomeration of an idea at the end of one's line: and then the cautious hauling it in, and the careful laying of it out (Woolf 2000:7).<sup>16</sup>

There was an infinite number of possible becomings, like birds flying through the air, or fish glinting silver in the water, so she continued:

... how small, how insignificant this thought of mine looked ... But however small it was, it had, nevertheless the mysterious property of its kind – put back into the mind, it became at once very exciting and important, and as it darted and sank ... set up such a wash and tumult of ideas that it was impossible to sit still. It was thus that I found myself walking with extreme rapidity across a glass plot. Instantly a man's figure rose to intercept me (2000:7).

Her 'small thought', which she told the 'starved but valiant young women' (2000: xix) of Girton, was of the importance to anyone wanting to write of having their own space, by which she meant not only a physical space but also mental space ('freedom of mind'), space to find and give expression to what is 'true'.<sup>17</sup> This is not the place to explore the extent to which Woolf's essay meets the rigours of a 'feminist' critique. It is simply our contention here that her essay importantly recognises the material constraints which impact upon the production of writing – a point with much resonance for those of us writing as feminist scholars in the academy attempting to think the law 'as we know it' differently.

In a similar way to that experienced by Woolf, placing together 'feminism', 'land' and 'law' offers many possible permutations, but it must begin with the material conditions which impact on women's access to land that in turn impacts on women's everyday lives. Woolf famously argued for 'a room of one's own', but within her essay reflects also on access to semi-public space. The 'man's figure who rose to intercept' her was a servant charged with ensuring that only faculty could walk on the grass in the courts of the college, limiting the many others, which significantly at that time included all women, to the paths which bordered them. And for Woolf, we think, there is a further image at play here. The courts are bounded only by the paths, not by any fence or barrier. It is all too easy to trespass onto them if you do not recognise the conventions or are not thinking too carefully about where you are walking. Woolf in her essay was explicitly and implicitly challenging the conventions and restrictions of a social order which privileged men, although perhaps we should add that it privileged white men drawn from particular social and economic classes. To make that challenge she needed to trespass – just as through her novels she wrote into existence new narrative patterns, playing with time/space and refusing distinctions between descriptions of

‘reality out there’ and what was being experienced (thought) through each encounter. And so, modestly, our feminist perambulation must also be, indeed can only be, an act of trespass.

## Footnotes

1. Our title plays with Paul Klee’s description of a line ‘going for a walk’ in his explorations into the construction, and evocation, of movement and rhythm within his art (Kudielka 2002). Klee’s work is used in Dewsbury and Thrift (2005:89) when, considering the effect of a Deleuzean approach on the study of space and the practices of geography, they begin to explore thinking space as a ‘moving concept’, an ‘imminent spatiality’. This sense of movement – of becoming ungrounded from, and of unsettling, what has become sedimented into terrains of ‘naturalness’, ‘inevitability’, ‘common sense’ and ‘good scholarship’ is the vector through which our chapter begins to take form. We walk ‘in’ land, as a recognition that ‘land’, as much as ‘law’, is a construct that, as with the geographers ‘space’, we should think of as a ‘moving concept’. However whilst this chapter has been influenced by this pattern of thinking, we do not here pursue ‘this line’ as far as it clearly could be walked. Rather, we have folded this chapter into an other form of walking which recognizes our feminist materiality, and in this sense we were tempted to talk of walking ‘on’ land to invoke a corporality which we find so significantly lacking in most contemporary scholarship in our field.

2. See Lechte (1995), Part Six of Borden, Miles and Hall (2000). We would draw attention to the work of Iain Borden (Bartlett School of Architecture, UCL), the films of Claire Denis and the instillations of Francis Alys (2004) as particularly pertinent examples of finding patterns for exploring, through the practices of diverse forms of representation, what we have called the ‘deeper geography of place’.

3. The use of the term ‘perambulation’ might recall for some readers the city walking of London ramblers for their visual pleasure (Rendell 1996) or later Parisian ‘flaneurs’ in the tradition of Baudelaire et al (Wilson 1995), or even the expeditions of white Victorian lady travellers (Domosh & Seager 2001: 143-146), but it should be clear from our chapter that we intend much more than an encounter with the ‘everyday’ as spectacle to which we are no more than witnesses and recorders.

4. Attempts have been made (on a regular basis) to deploy the Roman law distinction between rights in rem and rights in personam: whilst this duality has been deployed in specific instances with some success, to try to establish and maintain such a distinction as fundamental in common law has proven impossible as a map of distinctive and non-interpenetrable ‘oppositions’. However, reference to the typology can sometimes be useful when trying to tease out the complex interrelations and patterns of development in specific sites, for instance in trusts and estoppel (Bottomley 2001, 2006).

5. Land law is a ‘core’ subject for students who wish to use their degrees to qualify for exemption from the first stage of professional examinations. Many courses now

present themselves as ‘property courses’, but in our experience they remain primarily concerned with ‘Land Law’.

6. Law of Property Act 1925, section 205(1)(ix); Land Registration Act 2002, section 132.

7. Two important steps in the process were the cases of Williams & Glyn's Bank v Boland [1981] AC 487 and City of London Building Society v Flegg [1988] AC 54, which were concerned with the nature of the beneficiary's interest under s70(1)(g) of the Land Registration Act 1925. The Trusts of Land and Appointment of Trustees Act 1996, section 3, replaced the trust for sale and the full operation of the doctrine of conversion which had rendered beneficial rights as only money rights, with a ‘trust of land’. However, it maintained one element of the doctrine of conversion in still allowing the beneficial interest to be ‘overreached’.

8. Section 1(1)(b) of the Law of Property Act 1925, section 205(1)(xxvii); Land Registration Act 2002, section 132(1)

9. There is, of course, an impact from such approaches, not only upon seemingly progressive claims to extend ‘property’ use to enhance visibility and value (Radin:1993 and 1996), but also on feminist work which remains fixed on object/subject relations with reference to ‘subjectivity’ or what Radin and others have called self-hood. As if the ability to ‘own’ more will somehow build and sustain ‘self’ - a curiously nineteenth century fixation in the modern world.

10. We had originally written here ‘influencing the law’, but that would be to retain the model of the ‘scholar/explorer’ as outsider. What we want to convey is that to maintain a sharp distinction between law-out-there and academy is often as tenuous as other binary constructions.

11. ‘Precedent, principle, policy, and pragmatism are blended subtly in the mind of the judge. Nevertheless, the task of students in this, as indeed in any area of law, [is] to attempt to discern the true basis of decisions and to distil from the subtle blend the fractions of precedent, principles, policy, and pragmatism in the purest form they can. It is the task of the textbook writer to help in this distillation process ... We will discover that decisions that seem to be unprecedented and to make no principled sense can sometimes make sense ...’ (Watt 2003:40).

12. Sparkes perhaps more than other textbook writers embraces registration and the imperatives of conveyancing, with an opening chapter on it, in which he makes the grand claim that ‘land was made to be registered’ (2003:1). He likens registration to the grey squirrel which has placed the red squirrel (unregistered land) on the endangered list. However, even here the ‘graft’ of registration onto the Land Law tree appears to us to be clearly visible and incomplete, an intruder upon well-established terrain. His second chapter is a more conventional tour of ‘land’ and ‘law’, including what he describes as the ‘Informal not-land’ and ‘Land and not-land borderline’ (2003:15-20), as well as the traditional ‘land or property’ debate.

13. See Part 9 and Schedule 6 of the Land Registration Act 2002.

14. Section 116 of the Land Registration Act 2002 addresses the status of an estoppel interest, which is to be treated as a proprietary right capable of binding third party purchasers of the registered land.

15. Our decision to include Virginia Woolf's essay is primarily for its content, but more broadly it is also a gesture of recognition of the importance given to her work by Deleuze and Guattari ( eg 1987: esp. 276-28, 1994). 'To be fully a part of the crowd and at the same time completely outside it, removed from it: to be on the edge, to take a walk like Virginia Woolf ...' (Deleuze and Guattari 1987: 29). 'Virginia Woolf's walk through the crowd, among the taxis. Taking a walk is a haecceity ...' (Deleuze and Guattari 1987: 263).

16. 'Time is the time of change – not localised change but the change of transition and the transitory ... the River is the symbol in which reality and dream are one and which is without form ... Time – the time of the narrative, flowing, uninterrupted slow, full of surprises and sighs, strife and silence, rich, monotonous and varied ... The history of a single day includes the history of the world ... its source unrevealed, is symbolised over and over again in womanhood and in the river ... ' Lefebvre writing of Bloom's perambulations in Dublin in James Joyce's *Ulysses* (Lefebvre: 1971:4). As with Deleuze and Guattari (above) the multiple sense of duration is important here. See further Johnson (2000) on Woolf and Joyce 'walking in the city'.

17. This is not the place to explore the extent to which Woolf's essay meets the rigours of 'a' 'feminist' critique or to ponder on the seeming coldness of her diary entry: it is simply our contention here that her essay importantly recognises the material constraints which impact upon the production of writing – a point with much resonance for those of us writing 'as feminist scholars' in the academy. In this sense we think her reference to 'freedom of mind', as the circumstances which allow us to explore in writing what is important to us, is particularly pertinent. We are reminded of Sartre's notion of 'bad faith' when we think of the contortions that some of our sisters have felt necessary to enact in order to make their 'feminist' work palatable within the academy.

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