

## Critical Legal Studies

### **A bundle of sticks in my garden**

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#### Abstract:

The English law of property is often described as a ‘bundle of sticks’ in which each ‘stick’ represents a particular right. Gardens challenge these rights and wreak havoc on the ‘bundle of sticks’. This paper looks at the twenty-first century manifestations of community engagement with ground and explores how ‘gardening’ is undermining concepts of ownership, possession and management of land and how the fence between what is private and what is public is being encroached and challenged by community and individual initiatives to cultivate. The garden in this paper is therefore a place of questioning and redefining traditional legal concepts, but it also reflects contemporary concerns which go beyond the confines of the garden and the boundaries of the law. At the same time however, the garden represents a continuum between past struggles and ideals and future hopes, and so the cultivators of today are located in a continuing evolution of law, land and people. By considering the various ways in which people are engaging with land outside of the usual private land/person context and their motives for doing so, this paper places present gardening in its historic context and analyses the challenges that various forms of gardening pose for established legal principles. In particular this paper asks if present gardening demands a re-examination of property law and a re-evaluation of what is understood as ‘property’ if the ‘bundle of sticks’ is unpacked.

#### Introduction

In English law traditionally the relationship between people and land is seen as manifesting itself in the form of rights, so that property is not so much about the soil or bricks and mortar, or about personal histories and identities, as about the rights which are appended to these: ownership, possession, use. These rights in turn are shaped by legal frameworks which reflect certain implied or expressed agreed values, for example, the right of a possessor to exclude others, the right of an owner to freely alienate his or her property. Thus legal rights are supported by and in turn support various morally approved claims or forms of conduct. While it is increasingly no longer the case that property rights are absolute (if indeed they ever were), in so far as they are curtailed by public policy, by human rights, by the rights of others,

and by what are increasingly described as the global commons,<sup>1</sup> one approach to property (with which not all academics agree) is the idea of a ‘bundle of rights’ recognised in law. This paper starts by looking at this bundle and the values that appear to underpin it or be premised on it. The paper then considers some twenty-first gardening trends which appear to be challenging traditional notions of property. To conclude the paper considers whether current manifestations of engaging with land demand the cultivation of new legal forms or whether in fact the sticks which comprise the bundle of property rights simply need to be rearranged.

### The bundle of sticks

If we take two concepts ‘property’ and ‘land’ we immediately encounter difficulties. While we may all have a rough idea of what is meant by land in the context of property our understanding is invariably influenced by legal constructs. For example, we understand – at its simplest level perhaps, a sign that says ‘land for sale’ or ‘private land’, but if we dig deeper matters become more complex.

First there are problems of definition. A legal definition may read something like this:

**property** n. anything that is owned by a person or entity. Property is divided into two types: "real property" which is any interest in land, real estate, growing plants or the improvements on it, and "personal property" (sometimes called "personalty") which is everything else. "Common property" is ownership by more than one person of the same possession ... (<http://legal-dictionary.thefreedictionary.com/property>)

So property emerges as an amalgam between ownership and things, and the latter may be land or not land, and ‘real property’ can include growing plants. This is usually understood to mean that plants attached to the soil become part of the land, not that the cultivation of plants confers land rights on the cultivator, but as will become clear during the course of this paper, this might be open to challenge.

A non-legal or layman’s definition offered by the Oxford Dictionary does not advance our understanding very much:

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<sup>1</sup> For example, Antarctica, biodiversity, tropical rain forests, the earth’s atmosphere, space and the world’s oceans are increasingly being claimed as the global commons because their preservation and sustainable management is significant to mankind as a whole.

### ‘Definition of property

noun (plural properties)<sup>1</sup> [mass noun] a thing or things belonging to someone; possessions collectively; ... a building or buildings and the land belonging to it or them’. (<http://oxforddictionaries.com/definition/english/property>)

So here property is thing or things which ‘belong’ to someone or several persons. The key is the link between persons (someone), and the ‘thing’, evidenced by possession or ‘belonging’.

We are told that the origin of the word is: ‘Middle English: from an Anglo-Norman French variant of Old French *propriete*, from Latin *proprietas*, from *proprius* ‘one’s own, particular’ (see [proper](#))’.

So, what is ‘proper’ to someone is what that person can call their own, but it is also possible to have co-owned property or communal property, so the ‘proper-ness’ quality may not necessarily be that of an individual and indeed in many societies, either as a result of custom or political doctrine, property is not held by individuals.<sup>2</sup> If, however, the notion of private property is accepted, then what is ‘proper’ to a person in terms of ‘own’ gives rise to problem of what this ‘own-ness’ means.

This leads to concerns about the meaning and form of ‘ownership’. One explanation popularly adopted to explain ownership in the common law is that ownership is not one right exercisable over the subject matter of ownership (the thing) but a number of rights. It is here that the bundle of sticks, in which the sticks represent various rights, makes an appearance.<sup>3</sup> Two theories may be combined here, the idea that the bundle of sticks represents ownership, and the idea that the bundle of sticks represents property. The first, based on Honoré’s theory of six aspects of ownership,<sup>4</sup> draws on the idea that integral to the concept of owning is the

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<sup>2</sup> For example where property is held by tribes or groups or where the state decrees that property will be held by communes or co-operatives.

<sup>3</sup> Not all writers support this idea. Penner for example describes the bundle of rights concept as ‘little more than a slogan’, J.E. Penner, ‘The “Bundle of rights” Picture of Property’, 43 *UCLA L. Rev.* 711 1995-1996 and A. Bell and G. Parchomovsky ‘A Theory of Property’ 90 *Cornell L. Rev.* 531 2004-2005,

<sup>4</sup> A.M. Honoré, *Ownership*, in A.G. Guest (ed) *Oxford Essays in Jurisprudence*, 1961, 112-24. Honoré stated that ‘Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility

right to exclude others, to differentiate one's property from that of others through exercising powers of management and control, and to have the unfettered right to use the property as one wishes (provided this does not impinge on the property rights of others) and if desired, to waste or destroy the property.

The second, derived from Hohfeld,<sup>5</sup> is based on the idea that property rights are not so much about the property but about the relationship between people in respect of the property. Thus property by itself becomes irrelevant unless and until it is the object of human relations. From this arises the rights of the owner to exclude others (which Hohfeld describes as an incident of ownership), the right of a possessor to exert physical control over a thing and in the case of land to sue trespassers, or the right of the mortgage lender to claim the property and sell it in the case of default of mortgage repayment. The sticks in the bundle represent these interpersonal relations.<sup>6</sup>

This bundle of sticks doctrine becomes especially useful when considering land, because it is in the nature of land that it can support a number of different claims. To a non-lawyer land may be defined as that part of the earth's surface not covered by water,<sup>7</sup> or as ground or soil. The legal definition, found in the Law of Property Act 1925,<sup>8</sup> however, is rather more complicated and to a non-lawyer obscure. Suffice it to state that this legal definition includes corporal (physical) and incorporeal (non-physical) interests which are deemed in law to be part of the land itself just as trees and houses become part of the land itself.

In the context of this paper, the bundle of sticks is useful in so far as

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and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary: this makes eleven leading incidents' p 113.

<sup>5</sup> W. N. Hohfeld, Fundamental Legal Conceptions As Applied In Judicial Reasoning And Other Legal Essays (Walter W. Cook Ed., 1923)

<sup>6</sup> According to this theory, property law is not therefore a law about things – See H.E. Smith 'Property as the Law of things' 125 Harv. L. Rev. 1691 2011-2012, although Smith disagrees.

<sup>7</sup> See e.g. the Oxford dictionary definition: '[*mass noun*] the part of the earth's surface that is not covered by water ... 'an area of ground, especially in terms of its ownership or use' ... and '(**the land**) ground or soil used as a basis for agriculture'  
<http://oxforddictionaries.com/definition/english/land>

<sup>8</sup> S 205(ix) Law of Property Act 1925. This applies to England and Wales.

‘The "bundle of rights" concept of property denies any fixed meaning to the term property and deemphasizes the importance of the thing with regard to which the rights are claimed. In the bundle metaphor, each right, power, privilege, or duty is but one stick in an aggregate bundle that constitutes a property relationship’.<sup>9</sup>

If there is no fixed meaning to the term property, then there is scope to review and change its meaning, as indeed has happened over history. For example, modern perceptions of property in the common law and in much of the western world originate in the seventeenth century with the growth of capitalism and trade. Increasing participation in the market place required legal institutions which facilitated trading activities. Determining ownership of property was – and remains, central to facilitating its marketability. In the absence of documents of title ownership had to be established by objectively perceived evidence, notably possession and the exercise of control over property, which prima facie suggested that the possessor had the right to trade the property. In the case of land documents of title were more common and conferred considerable strength on claims to that land especially in the eyes of the law. Ownership also distinguished things which were scarce, and therefore more valuable, and those that were commonly accessible and therefore less valuable. Clearly trade cannot be sustainably expanded if only produce which occurs naturally is traded and so the construction of property rights supported the expenditure of labour and utilisation of resources to create new forms of tradeable commodities. For some theorists the right to property was seen as a natural right,<sup>10</sup> based on the idea that a person’s labour or creativity naturally conferred property rights on that person. Encouraged by capitalist economies, the purpose and reward of labour was the acquisition and exercise of property rights and the law responded accordingly and created an environment in which private property was the central focus. Although the emergence of the welfare state in the late nineteenth and early twentieth century increased the importance of state property, for example through the provision of social housing, infrastructure and public buildings, most of the incidents of private property also apply to public property, subject only to public/state policy considerations.

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<sup>9</sup> A. Bell and G. Parchomovsky, 90 *Cornell L. Rev.* 531 2004-2005, 545.

<sup>10</sup> John Locke suggested that private property existed without the state or the interference of law, because man was by nature entitled to the outcomes of his labour, and could not or should not be interfered with by the state without the consent of those affected by this interference. *Two Treatise on Government*, Book II, Chapter 5, 1690. This approach finds endorsement in the Declaration of Rights in France 1791, and the Constitution of the United States of America (Fifth Amendment)

It has also been the case that over time different things become recognised as falling within the circumference of property. So for example, whereas in the past some human being could be property: slaves, today, property claims may be in respect of internet domains, inventions, logos and reputations.

#### What values shape/underpin/emanate from this?

The legal endorsement of private property has been justified as a means whereby property is used to its optimal extent, because the conferral of private property rights acts as an incentive to do this (optimal justification theory); or because it is seen as morally right and sanctioned by law even if optimal use is not made of that private property (permissibility justification);<sup>11</sup> or because the right to acquire, use and alienate property is necessary for achieving human happiness, which can only be satisfied by state intervention through rule-making which facilitates this state of affairs (the utilitarian theory supported by Bentham); or because the protection of private property is essential for economic development because it provides incentives and ensures efficient use and distribution of resources (the economic theory of property supported by Posner and Demsetz). While it is not the purpose of this paper to analyse all these theories, it is, as Panesar points out, important to be aware of the ‘theoretical underpinning of property rights’ because ‘(T)he perspectives offered by the various justificatory theories of private property continue to be reflected in the case law, they also influence policy makers and legislators.’(2000: 138). Where contemporary land use presents challenges to these underpinnings then new theories may be needed.

#### Land and the bundle of sticks

The location of land and land rights within this theoretical framework is difficult. The legal approach is that rights to land are ‘real’ rights, that is, rights to the thing itself – the land, and because of this they are enforceable in respect of the thing against anyone without the need for some other legal relationship. There are a number of problems with this. Firstly, enforceable rights in respect of land are not usually about the right to the physical attributes of the land – the soil and so on (although they may include rights to these attributes), but rights to other rights, such as undisturbed possession, the right to manage the land, the right to use it and so on. These lack tangibility but are given substance through legal recognition of

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<sup>11</sup> Panesar 2000: 132

such rights. This recognition is evidenced by the way the law grants remedies for infringements, such as damages for trespass, injunctions for nuisance, rights to redeem the land free of the claims of the mortgagee once a mortgage is repaid. Further, land rights include incorporeal or non-physical rights, such as the right to park on the land of another or to walk across it, the right to take something from the land of another, the right to come on to the land of a neighbour in order to trim your own hedge. It is also the case that a person may have land rights regardless of any labour expended on the land or whether they live on the land or not, or a person may have no land rights despite having expended labour on the land, or being in occupation of the land. The relationship of people with land is therefore usefully conceptualised by imagining the ‘bundle of sticks’ which a person has. So for example, different people may hold different ‘sticks’ – such as management, use, occupation, the right to sell, and so on, or one person may hold all of these.

However, because land is a scarce resource and has to accommodate a range of interests the ‘bundle of sticks’ cannot be too formalistic, absolute or static, if it is too reflect social realities. The composition of the bundle of sticks is therefore significant because inclusion or exclusion will be determined by a set of values informed by the social, political and economic climate. It is in this respect that manifestations of gardening in the twenty-first century raise questions, not least because they suggest that land is being viewed in more diverse ways. For many decades, certainly since the 1980s, the emphasis in the United Kingdom (and especially in England and Wales) has been on land as a commercial commodity. There has been an emphasis on using land as collateral, as an investment, as a means of growing wealth. This has been facilitated by legal reforms directed at facilitating the conveyancing of land,<sup>12</sup> by banking practices which facilitated access to lending in order to acquire land or real estate, and by media focus on ‘getting on the property ladder’. The prime imperative has been economic. The dangers inherent in this approach have belatedly been realised, but even before the economic crash, changes were taking place.

### Challenging the bundle

The absoluteness of property rights has been under siege for some time. To use a variety of mixed legal and non-legal metaphors, an Englishman’s home is no longer his castle and he

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<sup>12</sup> Especially, in 1925 in England and Wales, when a raft of legislation was passed to modernise the law of property.

does not own from the heights of the heavens to the depths of the earth.<sup>13</sup> Indeed, the most likely owner for many is the bank or mortgage lender, and the occupant may not be the owner but a tenant or licensee. While it has long been the case that a land owner could not engage in practices which caused a nuisance to the land of others,<sup>14</sup> during the course of the twentieth century the state has increasingly interfered with land owner autonomy through the use of planning law,<sup>15</sup> and more recently environmental law and human rights. Moreover, while the use and management of land held by public authorities as opposed to private individuals, is tied to considerations of public policy, political agendas, economic capacity and the whims of local and national government, increasingly local lobby groups are voicing concerns and sometimes opposition to land development proposals by local authorities. This may be motivated by environmental concerns (for example opposition to wind farms or road expansion, by NIMBYism (not in my back yard), or because those in opposition feel that they have interests in the land concerned that outweigh the proposals of the local authority, even if those interests are not what the law considers to be ‘real rights’, for example, the preservation of sports playing fields or recreational facilities. Most recently proposals have been made in England and Wales to confer greater participation powers on members of the local community through the Localism Act 2011.<sup>16</sup>

Today, the boundary between public property and private property in England and Wales, is fuzzy at best. An example is the release of public housing stock into the private domain

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<sup>13</sup> Based on a Latin maxim (*Cuius est solum eius est usque ad coelum et ad inferos* (the owner of the land owns

everything up to the sky and down to the centre of the earth) originating with Accursius in thirteenth century, this first found limitation in the case of *Baron Bernstein of Leigh v Skyviews and General Ltd* [1978] QB 479 and was considered more recently in *Bocardo SA v Star Energy Onshore Ltd and Another* [2010] UKSC 35, and limited further in *Lejonvan and Another v Cromwell Mansions Management Co Ltd.* [2011] EWHC 3888(Ch) which restricted the rights of a ground floor leaseholder to excavate into the subsoil below the flat.

<sup>14</sup> See for example in English law the seminal case of that of *Rylands v Fletcher* 1868 UKHL 1.

<sup>15</sup> The earliest national legislation occurring in 1947, prior to which planning control was achieved largely through private agreements imposing covenants on the land.

<sup>16</sup> According to the government information pack ‘The Localism Act sets out a series of measures with the potential to achieve a substantial and lasting shift in power away from central government and towards local people. They include: new freedoms and flexibilities for local government; new rights and powers for communities and individuals; reform to make the planning system more democratic and more effective, and reform to ensure that decisions about housing are taken locally’ p.1, Communities and Local Government <http://www.communities.gov.uk/documents/localgovernment/pdf/1896534.pdf>.



through the rights to buy in the course of the 1980s, and most recently the adoption of Big Society policies which sees local authorities shifting responsibility for various public areas to private or non-state organisations, for example, memorial gardens and public parks.

Straddling both public and private engagement with land are shared and unbounded concerns of sustainability of the environment in the face of global concern. There is also, at least in the United Kingdom, an undermining of the notion of ‘private property’ in favour of public access and public enjoyment of property. Although not an entirely new phenomena,<sup>17</sup> recent legislation has enlarged this form of engagement with land. For example the Countryside and Rights of Way Act 2000, raises the possibility of substantive incursions on the landowner’s right to exclude,<sup>18</sup> while in Scotland the right to roam found in the Land Reform (Scotland) Act 2003, creates an even greater public right to access private land.<sup>19</sup>

This paper, however, is not concerned with these broader movements of engagement with land although clearly these movements are relevant to the general background. The focus here is on localised, small scale engagement with land which manifests itself in a variety of ways. In particular this paper is concerned with how localised gardening challenges a number of assumptions underpinning the definitions of property and land outlined above and the composition of the bundle of sticks used to conceptualise property.

### Land for Gardens

A UK government web site states:<sup>20</sup>

Over recent years there has been a renaissance in grow-your-own gardening as we increasingly appreciate both the health and environmental benefits that come with growing food locally. The burgeoning popularity of ‘grow-your-own’ has meant that waiting lists for allotment plots have soared, leaving local authorities struggling to meet demand. In 1996 there was an average of 4 people waiting for every 100 plots

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<sup>17</sup> Public footpaths arising by implied or express dedication or custom have long been recognised and enjoyed and incursions on these by private landowners have been challenged by various lobby groups such as the Ramblers Association.

<sup>18</sup> See Jerry Anderson, ‘Britain’s Right to Roam: Redefining the Landowner’s Bundle of Sticks’ (2007) 19 (4) *Georgetown International Environmental Law Review* 375.

<sup>19</sup> These rights are further enlarged under the Marine and Coastal Access Act 2009

<sup>20</sup> Department for Communities and Local Government ‘Space for food growing guide’ <http://www.communities.gov.uk/publications/communities/foodgrowingguide>

but today around 87,000 people are on waiting lists for just over 152,000 statutory plots managed by principal local authorities,<sup>21</sup> the equivalent of 57 people waiting for every 100 plots.<sup>22</sup>

While a local organisation seeking to enlist volunteers in a ‘Growing Spaces Project states: Our ultimate goal is to create about 30 spaces by the end of 2013. (These) ... can be public spaces, unused bits of land in your community, college owned spaces, school gardens, rooftops, window boxes, containers, raised beds or any other option we can think of!<sup>23</sup>

What, one might ask, is happening? The last time the UK population was asked to turn every available patch of ground into food production was because in the grip of war, food was scarce and people were being asked to ‘Dig for Victory.’<sup>24</sup> This, however, is not a war effort, or a counter-recession measure, but is perhaps a minor revolution, which has its roots in local initiatives by small groups of individuals or by single individuals, which the government, rather late in the day, has decided to endorse because it satisfies a number of items on the current political agenda, such as the ‘Big Society’<sup>25</sup> and ‘green’ policies.

This gardening takes a number of different forms such as: community gardens, orchards, woodlands and farms; city and school farms; land and crop sharing; allotment gardening; lobbying for new public land areas in the form of commons and village greens, urban guerrilla gardening and community food cultivation. Some of these have long histories of engagement with the land, for example allotment gardening and the enjoyment of village commons. Some build on similar initiatives instigated by philanthropic individuals or

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<sup>21</sup> Excluding allotments run by town and parish councils

<sup>22</sup> See M. Campbell and I. Campbell ‘Allotment waiting lists in England and Wales 2011’ [http://www.transitiontownwestkirby.org.uk/allotment\\_surveys.html](http://www.transitiontownwestkirby.org.uk/allotment_surveys.html)

<sup>23</sup>

<http://www.transitioncambridge.org/thewiki/ttwiki/pmwiki.php?n=TTGrowingSpaces.HomePage>

<sup>24</sup> Launched in 1939 along with rationing and the establishment of the Women’s Land Army, this was a measure to ward off starvation in the face of the redeployment of ships formerly used for carrying imported foodstuffs and the impossibility of continuing the pre-war 55 million tons of imported foodstuffs.

<sup>25</sup> According to the Cabinet Office the ‘Big Society’ – a plank of the conservative party manifesto is ‘about helping people to come together to improve their own lives’.

<http://www.cabinetoffice.gov.uk/content/big-society-overview> (03/09/12).

benevolent associations, such as the creation of garden cities in industrialised England, the use of memorial gardens to commemorate those who died in two world wars, or social experiments in communal farming. Others are more recent in origin.

Even where the gardening has a long history, as in the case of allotments, the patterns are changing. Originally encouraged as a way of providing garden ground for the labouring classes, local authorities now have an obligation to provide allotments if there is demand. The demand nowadays is not necessarily from members of the labouring classes but middle class urban dwellers, ethnic minorities and collectives using allotment ground for communal projects. Moreover allotment gardeners today may not need to grow their own food but choose to do so for a variety of reasons, for example to have access to food not easily available in the supermarket or organic produce, but for many, as in the past, gardening may be to do with health, cultural association, or recreation. So motivation for allotment gardening is being changed by those who garden allotments and this in turn raises questions about the rationale originally underpinned legal regulation of allotments.

Added to this is the increasing control being exerted over the management of allotments by the gardeners. Sometimes this is in default of effective local authority control, sometimes it is with the condonation of the local authority. Either way, the present enthusiasm for allotment gardening in many parts of the country challenges the public/ private paradigm, as do other forms of communal engagement with land.

While some of these engagements with the land are transitory, and some are much more permanent they share the common feature of bringing people together to work on land to which, in most cases, they have little or no legal claim,<sup>26</sup> and those involved are by and large not expending labour with a view to acquiring the usual property rights or to exploit the land commercially or nurture it as a tradable commodity. Further, many of these gardening projects are initiated by individuals or groups in a community. They are not the outcome of deliberate policies of the wealthy benevolent,<sup>27</sup> the town planning entrepreneur or the

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<sup>26</sup> There are some exceptions, for example where gardeners hold formal leases over the land being gardened, or where they have combined together to purchase the land and hold it as members of a co-operative or corporate body of some kind.

<sup>27</sup> Many allotments, for example, were originally initiated by large landowners on their own land, in order to supplement the wages of agricultural workers. When local authorities became involved in the setting aside land for allotments it was often to relieve the burden on

government. Why then, are they expending time and labour on the land? For some projects there is a clear teleological aim, for example providing a way in which school pupils might gain horticultural training and certificates,<sup>28</sup> or to provide an educational facility for school children with little knowledge of farm animals,<sup>29</sup> or food growing.<sup>30</sup> Some projects are a consequence of communities seeking to improve the visual environment and remove unsightly neglected areas on housing estates or within tenancy blocks.<sup>31</sup> Others are to rescue sites of cultural interest or to create heritage sites for present and future generations,<sup>32</sup> while others may be to encourage local food-production or provided leisure space, or simply as a protest against land neglect and inequalities of land distribution.<sup>33</sup> So this gardening movement finds expression in the creation of farms in inner city areas, in the planting of urban roundabouts or wasteland by guerrilla gardeners or community groups, in the adoption of neglected apple and pear orchards or the dedication of land for planting a community wood or a memorial garden. As suggested above, people are taking over spaces, sometimes with permission, sometimes not; sometimes on privately owned land, sometimes on publicly owned land and sometimes on what appears to be no-man's land.

Leaving aside the policy statements of local and national government, the reason why individuals participate in such projects may diverse.<sup>34</sup> For some involvement may be an avenue for exercising leadership and management skills, for others it may be a reaction to landlessness or shortage of space especially in urban housing areas. Some may be active participants, finding satisfaction in the physical acts of gardening and creating, others may be more passive, enjoying the garden being there. The garden may therefore be both a physical space and a spiritual space, and indeed there is some evidence to suggest that gardening offers therapeutic benefits for physical and mental health, and can be a way of addressing

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the parish and also to ensure that the working classes were kept usefully occupied in their leisure time lest they became unruly.

<sup>28</sup> See the case-studies listed in Department for Communities and Local government 'Food Growing Case Studies' 2012

<http://www.communities.gov.uk/documents/communities/pdf/2203627.pdf>

<sup>29</sup> For example, in the case of city farms.

<sup>30</sup> See for example school gardens.

<sup>31</sup> See for example, Edinburgh Community Backgreens Association

<http://www.ecba.org.uk/home.aspx>

<sup>32</sup> See for example, community orchards and woodlands.

<sup>33</sup> See for example, guerrilla gardening.

<sup>34</sup> And needs more research but see H. Quayle 'The true value of community farms and gardens: social, environmental, health and economic.' Federation of City Farms and Community Gardens 2008

problems of social isolation or marginalisation by providing a community space or shared community experience, or an avenue for cultural expression.<sup>35</sup> Gardening can also bring together people of different generations and develop communities where there were formerly none. These benefits may be a consequence of, or a motive for, gardening. What emerges is the fact that these forms of engagement with the land go beyond traditional legal concepts of ownership, possession, use and management, and suggest an engagement with space and place that does not neatly fit into these ‘sticks’.

So what sticks are needed? Many of the projects mentioned above focus on common contemporary themes of sustainability, eco-friendly development, the cultivation of organic food crops, the aesthetic enhancement of spaces, environmental responsibility, building communities and enhancing peoples’ lives. Very few focus on any of the bundle of sticks which have traditionally been seen as comprising property. For example, community projects are rarely seeking to exert exclusive rights to land but are far more likely to be seeking inclusivity in order to build community involvement and engagement. Similarly, the moral value of their creativity might be much more important than any economic value – and here one may draw parallels with artistic endeavour and the law of copyright. It is also a feature of many community projects that they are transient – either because their claim to the land is uncertain or precarious, or by intent. Gardens come and go and so long term investment in the land is not a priority. Conversely, longer term projects, such as the planting of orchards or the creation of community woodland, may be manifestations of a different form of land engagement and one which has perhaps been lost in the course of the twentieth and twenty-first century, and this is the establishment – or sometimes restoration, or heritage. Over the longer term engagement with the land may secure communities and individuals to place, so that the site of gardening is what links people to the land. Land may, therefore, become

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<sup>35</sup> Involvement in food-growing for example, either in community gardens or on allotments enables ethnic groups with strong food cultures to express that cultural connection with the land. See for example comments on the involvement of people from Turkey and Africa in the Wenlock Barn Growing Kitchen p5. Referred to in Department for Communities and Local government ‘Food Growing Case Studies’ 2012 <http://www.communities.gov.uk/documents/communities/pdf/2203627.pdf>. See also the International Garden Project in York <http://www.yumiyork.org/DynamicPage.asp?PageID=10>

defined more by function than space.<sup>36</sup> The landscape is therefore changing and new forms of land engagement challenge the bundle of sticks which make up the legal framework.<sup>37</sup> If these forms of gardening were insignificant, failure to accommodate them within the ‘bundle of sticks’ might not be of great interest. But they are not insignificant and indeed are increasing. There are, for example, 59 registered city farms; 300 registered community orchards; 330,000 allotments; 82 school farms; 1,000 community gardens; 4,500 town and village greens in England and Wales and approximately 25 community forests in England and over 200 community woodland groups in Scotland. A number of gardening participants are becoming organised into legal and quasi legal associations, such as charities, co-operatives, limited liability companies, or a mixture of these. In some cases projects are run in partnership with private land owners or local government offices so that the boundaries between private enterprise and public enterprise are being breached and bridged. In particular the significance of ‘public interest’ in local authority management of land is changing. For example, increasing activity by local groups either independently or as part of larger networks, can mean that local land policy may be influenced by communal efforts. For example, successful lobbying to secure a town or village green prevents development of land for commercial or residential purposes; securing local authority land for a millennium wood or jubilee garden may permanently remove that land from the pool of assets available to the local authority. While local authorities may be interested in ensuring that any rights acquired by communal gardening projects are precarious and easily revoked, these gardening projects are linked to wider public interest concerns, such as protection of the environment, preservation of natural heritage, sustainability of natural resources and worries about climate change, which local and national authorities ignore at their peril. Local gardeners, even if not originally or even primarily, motivated by these wider concerns, can, where necessary, draw on this global agenda.

If, as suggested previously, ‘the "bundle of rights" concept of property denies any fixed meaning to the term property’, the question is then, how do these forms of gardening fit in the bundle of sticks, or are new sticks needed?

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<sup>36</sup> This is suggested by Anderson in respect of increasing public access to private land through the Countryside and Rights of Way Act 2000.

<sup>37</sup> It could also be argued that the very foundations of the bundle of rights theory are undermined, for example Hoheld’s opposites of rights/duties; privileges/no-rights; powers/liabilities.

### Is there a need to cultivate new legal forms?

If a gardener decides to grow potatoes rather than beans then he or she will have to dig differently, but may still use the same implements. It is only if a completely different use is chosen that new implements will be required, for example if a concrete car park is to be constructed then clearly a hoe will be of little use. I would argue that gardening, in whatever its forms, does not radically alter traditional forms of engagement with the land. What it does do is question the value to be given to the sticks. So, while the same sticks may still be relevant some re-bundling may be necessary because, especially if the forms indicated above, are evidence of a different hierarchy of values. It could be argued that the ‘bundle of sticks’ should be discarded either as an anachronism in the twenty-first century or as an anathema to these forms of engagement with the land. However, I would argue that if gardening is left in a legal wasteland then the values represented by twenty-first gardening may be ignored. What is needed is a bundle of sticks that recognises diverse forms of engagement with the land. The question is whether the existing bundle of sticks can be used or whether new sticks are required.

The challenge may be to find a stick which represents the interests of gardeners because it is not clear what if, any, property rights are either desired or acquired through the act of gardening. For example, although English law recognises the possibility of acquisition of ownership through occupation or use over an extended period of time – through the doctrine of adverse possession and the limitations on bringing an action to recover land after the elapse of a certain period of time, and acknowledges that certain use rights may be acquired by prescription, the legal principles which surround these modes of acquisition do not always fit easily with gardening. For instance, one aspect of acquisition by possession is that of control or an act of appropriation – the person in occupation controls the property (in the case of land by fencing or other physical demonstration). But do gardeners control the land? Gardeners may seek to control or harness nature in their battle against weeds and the nurturing of plants, trees and shrubs but their control is transient and while the act of gardening may itself be an act of appropriation of a sort, it might be asked what it is that they seek to appropriate.

Similarly, while the law recognise that one person may manage the land of another, it might be asked to what extent gardeners ‘manage’ the land, especially as management in the traditional sense has connotations of managing for the benefit of the land owner.

The closest that the existing bundle of rights can come to recognising this interest may be a use right but this is inadequate, gardeners do not just ‘use’ the land. What may be required is either a realisation that all the sticks in the bundle are subject to non-specific common rights, or that an additional stick is included: perhaps that of custodianship. Clearly the latter might be more relevant in the case of land in the public domain – whether national parks or local authority land, but it could equally apply to land in the private domain, given that even here public interest cannot be excluded (for example, through planning controls, access to the countryside, stewardship schemes, environment legislation). This might mean that a theoretical compromise has to be reached whereby property is seen as a both natural right common to all mankind (supported by theorists such as Grotius, Pufendorf and Blackstone) and as a positive right recognised by society and sanctioned by law in order to achieve recognised goals, such as economic development (a view supported by Hobbes, Smith, Bentham, Durkenheim and Weber).<sup>38</sup>

Alternatively, it may be necessary to find a new term that encompasses a range of gardening activities: perhaps ‘greening’ rights. This would need to cover physical and spiritual dimensions in order to capture not only cultivation but also the more ephemeral aspects of gardening which might include attachment to place or rootedness, expressions of culture and creativity and sense of identity or being-ness.

On the other hand, although it may be conceded that the law of property can and does change to accommodate changing perceptions of what is of value to people,<sup>39</sup> it might be argued that the garden is the site of aspirations rather than rights, of shared or divergent values rather than legal claims, of personal achievements rather than state-directed goals, and that to constrain the garden with legal sticks would be counter-productive and in the end futile, because the garden will not be constrained.<sup>40</sup> If this is the case the bundle of sticks must be discarded, but there may be adverse consequences because the law cannot operate without conceptual tools.

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<sup>38</sup> See Panesar, 2000,113 quoting Getzler.

<sup>39</sup> For example, through the recognition of new forms of intellectual property and the recognition of property rights in body parts – see Penner above.

<sup>40</sup> Smith in his critique of the bundle of rights approach argues that delineation comes at a cost *op cit* 1698.



The neglected garden is one choked with weeds and rubbish. If this neglect is to be addressed then the legal understanding of the relationship of people with land with land needs to extend beyond ideas of commercialisation and exploitation, to include gardening. Just as each individual garden broaches the boundary between the public and private sphere (for example, the house and the street), between the within and the without, so too do the communal gardening projects outlined above. Through these projects each person is part of a wider community, the fence between what is private and public crumbles, the bright lines between ownership and non-ownership, between possession and exclusion fade and the sticks in my garden lie waiting to be tied. If I am to use these sticks and not abandon them altogether then the challenge is to create a new bundle fit for the next season.