HOW PROPERTY LAW SHAPES OUR LANDSCAPES

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This article considers John Orth's 'generalisations/reappraisals' in the law of property, offering an addition to that list concerning the way in which the historical development of the law of property provides a tool for the shaping of the physical world in which we live. Having reviewed Orth's approach, the article contains three parts. The first, entitled 'History Shapes Law', examines the historical development of the modern Anglo-American easement. The second, 'Law Shapes Landscape', explores how it is that property law shapes our landscapes. The third, 'Landscape Shapes Law', concludes by noting that our modern landscapes themselves create a new set of social, political and economic circumstances, the very sort of catalysts for shifts in context that previously drove, drive, and will drive in the future, the development of the easement (and property law generally), allowing for further shaping of the physical world.

I INTRODUCTION

Recent books reveal the interest people have in the ways that we order our surroundings — our homes,[1] neighbourhoods,[2] cities,[3] and nations.[4] But while many seem genuinely interested in our impact — our 'footprint'— on the world, few seem to understand — and even fewer attempt to explore — property law, the 'tool' that allows us the power and choice to have that impact on our surroundings. And why should people be interested in property law? This is an area rife with conceptual and doctrinal complexity, perceived by many as impenetrable. As any property law lawyer will happily tell you — and most property law students will tell you unhappily! — rules such as that against perpetuities,[5] or that in *Purefoy v Rogers*,[6] or that in *Shelley's* case,[7] to list but the better-known and most notorious,

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1 Bill Bryson, *At Home: A Short History of Private Life* (Anchor, 2011).

2 Michael Rawson, *Eden on the Charles: The Making of Boston* (Harvard University Press, 2010).

3 Dominic A Pacyga, *Chicago: A Biography* (University of Chicago Press, 2011); Rebecca Solnit, *Infinite City: A San Francisco Atlas* (University of California Press, 2010); Eric W Sanderson, *Mannahatta: A Natural History of New York City* (Abrams, 2009).

4 Francis Pryor, *The Making of the British Landscape: How We Have Transformed the Land, from Prehistory to Today* (Allen Lane, 2011) 4–5.

5 See John V Orth, *Reappraisals in the Law of Property* (Ashgate, 2010) 17, n 8, citing *Scatterwood v Edge* (1699) 1 Salk 229; 91 ER 203; *Thellusson v Woodford* (1805) 11 Ves 112; 32 ER 1030; *Jee v Audley* (1787) 1 Cox 324; 29 ER 1186; *Cadell v Palmer* (1832, 1833) 1 Cl & Fin 372; 6 ER 956; *Re Villar* [1929] 1 Ch 243.

6 (1671) 2 Wms Saund 380; 83 ER 443.

7 *Wolfe v Shelley* (1581) 1 Co Rep 93b; 76 ER 199 ('*Shelley's case*').

can be enough to glaze the eyes of even the most committed aficionado of the common law, let alone those looking for a good read. Yet, in a deft handling of history and law, John Orth turns an amazing trick: in a series of 'reappraisals' of diverse aspects of the law of property, Orth brings to life some of its arcana.

Orth's book appears in the *Law, Property and Society Series*, a compilation of monographs examining property not simply in terms of its importance as a doctrinal area of law but, more importantly, in 'terms of its ability to foster democratic forms of governance, and to advance social justice.'[8] As such, Orth's book is not one that simply rehashes the rules, explaining their operation with perhaps a few updates as to their contemporary operation. Rather, as the title accurately suggests, it is truly a *reappraisal*, not *of*, but *in* the law of property. By that Orth means that this book is one that aims to think critically, not about the whole of the law of property, but about a number of representative topics drawn from the whole that demonstrate 'property law [to be a] fascinating ... mixture of history, economics, language, logic, politics, and sheer self-interest.'[9] Rather than being a systematic treatment of the entirety of the law of property, Orth presents a set of 'reappraisals of parts of the whole.'[10]

A *Orth's Reappraisals*

Rather than identifying a unifying theme, Orth reveals two unifying *questions*: 'How did this hodgepodge of ancient rules and modern conveniences that make up the "American law of property" come to be assembled? And how well does this contraption work to serve the needs of contemporary society?'[11] In short, this volume makes no pretence to comprehensiveness or to a unifying theory[12] in looking at a wide range of property rules and the forces that shaped them. However it nonetheless suggests how property law plays a role in shaping the world in which we live and allows for the development of skills useful for other projects, and suggests new approaches to the larger subject.[13]

Part I, 'Getting Down to the Cases',[14] offers an exploration of the case law that underpins the most familiar categories of property law: finders, estates, concurrent estates, landlord and tenant, servitudes or easements, conveyancing and escheat. Each of these chapters, as Orth says, 'are meant as examples illustrating the forces that made and continue to make the law of property.'[15] Part II, 'Driving Forces' looks 'close[ly] and critical[ly]' at the forces that affect broad areas of property law.[16]

8 *Law, Property and Society* Endpaper in Orth, above n 5, ii.
9 Orth, above n 5, vii.
10 Ibid 1.
11 Ibid.
12 Ibid.
13 Ibid 1, vii.
14 Ibid 1.
15 Ibid.
16 Ibid.

All of this is entirely familiar to any student of property law the common law world over, be they American, Canadian, South African, Australian or English. This means that the entire volume will hold the attention of those familiar with the English common law of property and its transportation around the globe. As Orth says:

> If there is any unifying theme, it is that property law today is no more than a collection of legal rules accumulated over many centuries. ... The only constant is the need to resolve the seemingly endless parade of disputes, petty as well as grand, brought to the judges for final resolution.[17]

In other words,

> it is impossible … to conclude that property law is a coherent whole. In its state at any given time, it could never have been the product of a single mind or institution. What we call property law is, instead, a collection of originally ad hoc solutions to specific problems, ossified or adapted over time, and imperfectly associated with solutions to other specific problems, all united only by their general concern with the eternal problem of *meum et tuum*, mine and thine.[18]

And yet it is this ad hoc, hodgepodge approach to the development of property law that makes it interesting, intriguing, exciting and, frankly, eminently human. No property law project ever began with a structure from the outset. Rather, the development of the law is shown by Orth to be organic, responding to the vicissitudes of life. If you want politics, history, geography, social relations, economics, philology, philosophy, religion, psychology — simply, whatever it is that makes humans and their living together interesting, intriguing, yes, *exciting*, then property law has it.

Moreover, Orth's approach to these reappraisals permits the reader to move from place to place within the book and dive into a topic that is of legal and historical interest,[19] and to identify and examine points of similarity and difference between American and other English common law-based systems, including the Australian system. Perhaps that in itself best serves to demonstrate the great value of this 'hit-or-miss approach',[20] not only of the book, but also of property law itself. This article follows Orth's approach: having looked generally at the whole, I moved quickly to an area of current interest — easements and restrictive covenants — and used that as an opening to consider another important aspect of property law. All of this is aided by three generalisations drawn by Orth.

17 Ibid 1–2.

18 Ibid 139.

19 This is far from a weakness, as some might suggest. See, eg, Catrin Fflur Huws, 'Book Review: Orth, V, *Reappraisals in the Law of Property*' (2010) 41 *Cambrian Law Review* 139.

20 Orth, above n 5, vii.

B *Orth's Generalisations*

Most significantly for the student of comparative property law though, Orth offers three generalisations about the 'reappraisals', extending their applicability to the whole of the law of property.

The first generalisation posits that, as a by-product of the common law itself, each of the reappraisals demonstrates that the role of the legislature has been tangential to that of the judiciary.[21] Historically, common law judges resolved disputes brought to them, meaning that the law was built upon solutions to specific problems rather than according to a legislative master plan. Over time, solutions to specific problems developed into general rules, taking on lives of their own, periodically restated to respond to changing circumstances, or affiliated with other rules resulting from solutions to other problems.[22] Still, some obscure doctrines, emerging from the practical and contemporary responses of judges at the time, produced solutions which have enjoyed a long life, sometimes remaining long after the reason that brought them into existence and their practical significance has ceased — indeed, in some cases, *hundreds* of years longer.[23]

Yet, while judges clearly play a central role in the development of property law, one ought not overlook Orth's second generalisation, which is to recognise the modern dynamic relationship between judiciary and legislature: 'The civics-book theory of separation of powers — the legislators make the laws, the judges apply them — is only approximately correct.'[24] This can happen in 'large' ways, such as the law of landlord and tenant, and 'small' ways, such as the implied covenant of habitability.[25] In both cases, though, the separation of powers looms large: while not preventing judicial law-making, the spectre of the legislature does affect the way judges make law. It is rare, therefore, to see judges cut from whole cloth an entirely new rule.[26]

Finally, moving from the dialogue between legislature and judiciary, the third generalisation is that property law interacts with the life of the community within which it functions and, more importantly, with the lives of individuals. Usually, among the many reasons for a change, not least for Orth, is the desire for rules to conform to popular beliefs and practices and to encourage good social customs. On the one hand, this has sometimes led to undue reliance on the careless belief that judges will 'do the right thing', which has left intact such perennially perplexing rules as that in *Shelley's* case or that against perpetuities.[27] On the other hand,

21 Perhaps this is not surprising; see Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999) 7–35. Although, the history of the English land law is, in many ways, nonetheless bound up in legislative reforms: see J Stuart Anderson, *Lawyers and the Making of English Land Law 1832–1940* (Oxford University Press, 1992).

22 Orth, above n 5, 137.

23 Ibid.

24 Ibid 138.

25 Ibid.

26 Ibid.

27 Ibid 139.

quite apart from questions of social policy, jurisdictional competition between different legal systems — Roman civil and English common law — and among legal systems — one US state versus another — has also driven change. As Orth says, '[t]he resulting legal marketplace may be no more than a racecourse for those seeking the least restrictive alternative, whether it is in the public interest or not, or it may be a laboratory for those striving to develop more serviceable rules.'[28]

The primary theme that emerges from Orth's generalisations/reappraisals is that they are non-jurisdictional, allowing for their further generalisation from the Anglo-American law of property to any other property law systems having their origins in English common law. It also demonstrates how the origins of property law have shaped both the history and law of those jurisdictions whose genesis lies in England.

C *Adding a Generalisation/Reappraisal: How Property Law Shapes Our Landscapes*

A further generalisation/reappraisal, however, lurks constantly below the surface of Orth's account of property law: the history and law of property have shaped, and continue to shape, the physical world, or the landscapes, in which we live. The remainder of this article sketches an outline of this fourth generalisation/reappraisal. As with Orth's approach to the generalisations/reappraisals, this article makes no attempt at comprehensiveness. Rather, it takes up one of Orth's reappraisals — easements and restrictive covenants — in order to demonstrate the broader generalisation. Specifically, this fourth generalisation/reappraisal is a formative stage of what Francis Pryor calls 'landscape history', the study of physical landscapes in order to understand how a succession of people and cultures have fashioned them, to work out how the current landscape came into existence, how it developed and how it appears today.[29]

In short, landscape history seeks to understand how our modern landscapes, the places and spaces in which we live, are in fact the product of the human effort of our ancestors, who used a multiplicity of tools, both physical and metaphysical, to do that shaping. Property law constitutes one of the tools humans use to shape our landscapes. This article seeks to explore, in no more than an introductory way, how. It contains three parts which, together, comprise the components of the reappraisal which the article adds to Orth's list of eight. The three components are working ideas offering an introductory opportunity, by no means fully developed, but rather pointing the direction to a full assessment, to think more deeply about how English and American law interact in the historical development of the law of property and how that law in turn provides a tool for the shaping of the physical world, which will, over time, lead again to the development of new forms of property law.

28 Ibid.

29 Pryor, above n 4, 4–5.

Part II, 'History Shapes Law', examines the historical development of the modern Anglo-American easement, paying close attention to the American antecedents. As Orth makes very clear, the history of property law is really history itself, which is really another way of referring to the socio-political-economic underpinnings of a society.

Part III, 'Law Shapes Landscape', explores how it is that property law shapes our landscapes. To show how the whole of property law does that would be a vast undertaking. Still, we know that the history of tenure and estates contributed to the landscapes that we know today. This Part focuses on one aspect of property law, the modern easement and restrictive covenant, to show how it has shaped our world, creating the modern urban city-scapes in which over half of the world's population live today.

Part IV, 'Landscape Shapes Law' (which starts the whole process, beginning with 'History Shapes Law' over again), concludes by noting that our modern landscapes themselves create a new set of social, political and economic circumstances, the very sort of catalysts for shifts in context that previously drove, drive, and will drive in the future, the development of the easement and the restrictive covenant (and property law generally), allowing further shaping of the physical world. Finally, Part V offers a brief concluding reflection.

II HISTORY SHAPES LAW: THE MODERN ANGLO-AMERICAN EASEMENT

John Baker traces the earliest origins of the easement in English law to the action on the case for nuisance and the older assize.[30] Meanwhile, A W B Simpson has written that the law of easements taken as axiomatic today was developed largely in the 19th century in response to the Industrial Revolution, the progressive urbanisation of England and the process of enclosure 'which made it necessary to define more closely the reciprocal rights and duties of owners of separate holdings of lands.'[31] It was not until this dual enclosure and urbanisation, though, that there was any need to elucidate the substance of the easement as a proprietary interest. Orth reminds us that in this search for principle,[32] the Anglo-American easement has its origins in the Roman law of servitudes.[33]

The process of looking back to Rome began with Charles J Gale, the first to publish a treatise on the law of easements, in 1839.[34] Gale's book was influenced by Roman and Continental law, both through borrowings from that system in

30 J H Baker, *An Introduction to English Legal History* (Butterworths, 3rd ed, 1990) 484–6.

31 A W B Simpson, *A History of the Land Law* (Oxford University Press, 2nd ed, 1986) 261.

32 Orth, above n 5, 57–8.

33 Simpson, above n 31, 261–4; Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press, 1962) 148.

34 C J Gale and T D Whatley, *A Treatise on the Law of Easements* (S Sweet and Hodges and Smith, 1st ed, 1839).

Bracton,[35] as well as the direct recourse that Gale had[36] to Justinian's Digest.[37] Nicholas concludes therefore that 'English law here reveals an obvious debt, the law of easements being perhaps the most Roman part of English law'.[38] Orth however, citing William Holdsworth, adds that Gale '"had recourse to Roman law, continental writers and *American decisions*" because of the scarcity of English decisions. … Nonetheless, "though Roman rules have been used to develop the law as to easements, that law rests at bottom upon native foundations."'[39] Thus, Orth reminds us that Roman history shaped the easement of the industrial revolution.

Yet, Orth's passing statement reminds us of another shaping of the law of property by history, in this case American history. Orth likely would not have considered this to be the significant part of the story. But for those who share the inheritance of the Anglo-American easement it is important, for it represents a second way in which history shapes the law of property. Neither Simpson nor Nicholas make reference to the American case law that played a role in the development of the English law of easements, and especially through the medium of Gale's seminal text. On that basis, greater depth and colour are added to our understanding of this 'most Roman' aspect of Anglo-Australian law by showing that American law seems to hide in the interstices of this Roman adoption. Moreover, if the American law lies in some small way behind the development of the Anglo-Australian easement, then what Orth tells us about the American development can also tell us something about the origins of Australian law; they lie not only in Rome, but also in America. While an exploration of the American origins of the Anglo-Australian easement will not specifically be taken up in this article,[40] it remains the case that by simply raising it as a possible direction for future historical research, Orth's account deserves attention among Australian scholars, lawyers, and students.

In recounting the American story, Orth focuses on the meaning of 'burden' in the legal definition of an easement, which refers to the '"restriction on the use or value of land" and is interchangeable with "encumbrance"'.[41] The American law refers to the burdened land as servient and the benefited land as dominant,[42] using the terms 'burden', and the corresponding abuse of an easement, or 'overburden', principally to resolve two sorts of cases: an unauthorised use of the burdened land by the easement owner; or use of the burdened land by the easement owner in

35 Henry de Bracton (GE Woodbine (ed)), *De Legibus et Consuetudinibus Angliae* (SE Thorne trans and revised, Harvard University Press, 1968–77 ed) [first published 1569].

36 Simpson, above n 31, 261; Nicholas, above n 33, 148.

37 Alan Watson (ed), *The Digest of Justinian* (University of Pennsylvania Press, 1998) vols 1–4.

38 Nicholas, above n 33, 149.

39 Orth, above n 5, 58 n 7, citing William Holdsworth, *A History of English Law* (Sweet & Maxwell, 1966) 295, 318 (emphasis added).

40 The specifics of the American origins of the Anglo-Australian easement will not be discussed here. For the Anglo-Australian law of easements, see Adrian J Bradbrook et al, *Australian Real Property Law* (Thomson Reuters, 5th ed, 2011) 819–79; Sir Robert Megarry and H W R Wade, *The Law of Real Property* (Stevens & Sons, 5th ed, 1984) 834–912. See also Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, 2011).

41 Orth, above n 5, 57–8.

42 Ibid 58 (footnote omitted).

connection with land other than the benefited land. Less often, the law uses these terms to resolve cases where the burdened land is used by the easement owner in excess of the authorised use.

These definitions provide the structure of the law in two ways. First, they allow for a determination of the scope of use of the easement. The terms of the instrument creating an easement by express grant or express reservation define the scope of its use. Thus, based upon the terms of the instrument, an easement owner may not make an unauthorised use of the burdened land. In the case of implied easements, the scope of use depends upon what 'might reasonably have been contemplated' by the parties or 'the use as it existed at the time of the conveyance.'[43]

Second, the concept of burden and overburden allow one to identify the land benefitted by an appurtenant easement. Thus, to allow the use of an easement in connection with land other than the dominant tenement represents an overburden of the already burdened land to the benefit of another dominant estate. In this case, the law has no recourse to the amount of use — it is irrelevant when overburden of this kind occurs. Orth notes that the American common law has been restated on this point in the latest *American Restatement of the Law of Servitudes* (perhaps one of the few instances in American law of an attempt at uniformity across all American jurisdictions), as follows: 'Unless the terms of the servitude … provide otherwise, an appurtenant easement or profit may not be used for the benefit of property other than the dominant estate.'[44] In short, when strictly applied 'for a right-of-way easement the issue is not how much traffic passes over the easement, but where the traffic is heading.'[45] Of interest in a comparative context, Orth provides examples of courts that do not apply the rule strictly, using equitable factors such as acquiescence and clean hands and even, controversially, of balancing the burden imposed on the servient tenement if extension is allowed against the hardship to the easement owner if it is denied.[46]

The interesting point Orth identifies here is

> an old-fashioned play on words. The additional use is an added burden (an overburden), but it is permissible because there is no additional burden (at least not very much). The burden of an easement is a legal burden, which exists regardless of the amount of actual use made of the easement or whether any use at all is made of it. … Because of its tangible connotations … the word burden can also refer to the load carried by the servient land, in the sense of actual use of the easement. When a court says there is an added burden but there is no added burden, it means that although the legal restriction on the use of the land increases, the increase in actual use is nonexistent, trivial, or reasonable.[47]

43 Ibid 58.

44 Ibid 59, citing *Restatement (3d) Prop*: Servitudes § 4.11 (2000).

45 Ibid 59.

46 Ibid 59–60.

47 Ibid 60–1.

The American law also reveals instances where the alleged use of the burdened land by the easement owner in excess of the authorised use leads courts to 'invoke burden and overburden even if there is no attempt to extend the benefit to a non-dominant parcel.'[48] The *Restatement* attempts to codify this, to take account of situations where an infrequently used right-of-way easement begins to be used more intensively as patterns change on the dominant estate.[49] Under the American law, this causes no difficulty as no additional burden was thought to be imposed so long as it was used as a right-of-way easement — provided its use does not change, the easement accommodates the additional burden.[50] However, relying on the English common law, the American law still adheres to the principle 'laid down in the nineteenth century that, if the dominant owner so used his rights as to cause a nuisance to the servient owner, he [is] liable.'[51] Indeed, 'today [American] courts treat an easement owner who exceeds the scope of the easement as a trespasser.'[52]

Orth concludes his review of the concepts of burden and overburden by arguing for a retention of the traditional rules concerning easements, simply, that there should be no use other than the authorised use and no use in connection with the land other than the benefitted land.[53] To allow more would overburden the servient estate. Yet, Orth allows that changes within the frequency or intensity of use, so long as they remain within the authorised use, are permissible.[54]

Yet, in telling this story about easements, and indeed, in telling a similar story about the whole of property law, what emerges is an interesting picture, one not often recognised, but which lies just below the surface of the story. It is that easements made it possible to place a burden on land, provided it was within the traditional common law rules relating to the law of easements, which itself contained an internal flexibility allowing the law of property to change and adapt, accommodating changing social, political and economic circumstances. This in turn made it possible for people to change and adapt the physical world, to accommodate it to those very same social, political and economic needs. Orth's account of easements leads us to think more deeply about the fascinating way that property law can shape our world. The next Part turns to this aspect of the story.

48 Ibid 61.

49 Ibid, citing *Restatement (3d) Prop*: Servitudes § 4.10.

50 Orth, above n 5, 61–2.

51 Ibid 62, citing Holdsworth, above n 39, 345.

52 Orth, above n 5, 62 (footnotes omitted).

53 Ibid.

54 Ibid.

III LAW SHAPES LANDSCAPE: THE EASEMENT AND THE MODERN CITY

Few people, perhaps even those with legal training, understand just how much simple legal tools shape the world in which we live. From earliest childhood,[55] property acts as a socio-cultural symbol,[56] maintaining a central, powerful, rhetorical,[57] mythological and emotional hold on our imagination,[58] defining the control that we have over our own bodies,[59] structuring our relationships with others,[60] and going to the core of what is necessary to achieve proper self-development.[61] Every aspect of our lives — and the physical and non-physical world around us — from where we live and work, to what we wear,[62] what we listen to and how,[63] the way we interact with others,[64] to the very space occupied by our bodies,[65] is touched by the concept of property and the legal rules deployed to give it effect. In short, property and its legal invocation are ubiquitous, an

55 Laura S Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford University Press, 2003) 1; see also C B Macpherson, 'The Meaning of Property' in C B Macpherson (ed), *Property: Mainstream and Critical Positions* (University of Toronto Press, 1978) 1–13.

56 J W Harris, *Property and Justice* (Oxford University Press, 1996) 8–13.

57 On 'property-talk', both lay and legal, see ibid.

58 Laura S Underkuffler, 'On Property: An Essay' (1990) 100 *Yale Law Journal* 127–8, 147.

59 Alan Ryan, 'Self-Ownership, Autonomy, and Property Rights' in Ellen Frankel Paul, Fred D Miller Jr, and Jeffrey Paul (eds), *Property Rights* (Cambridge University Press, 1994) 241–58; Stephen R Munzer, 'An Uneasy Case against Property Rights in Body Parts' in Frankel Paul, Fred D Miller and Jeffrey Paul (eds), *Property Rights* (Cambridge University Press, 1994) 259–86; Margaret Jane Radin, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts, and Other Things* (Harvard University Press, 1996).

60 Joseph William Singer and Jack M Beermann, 'The Social Origins of Property' (1993) 6(2) *Canadian Journal of Law and Jurisprudence* 217, 228; C Edwin Baker, 'Property and its Relation to Constitutionally Protected Liberty' (1986) 134 *University of Pennsylvania Law Review* 741.

61 Margaret Jane Radin, 'Property and Personhood' in Margaret Jane Radin (ed), *Reinterpreting Property* (University of Chicago Press, 1993) 35–71. See generally the essays collected in John Brewer and Susan Staves (eds), *Early Modern Conceptions of Property* (Routledge, 1996).

62 See 'Lay Off My Red-Soled Shoes', *The Economist* (online), 20 August 2011 <http://www.economist.com/node/21526357>.

63 'Spotting the Pirates', *The Economist* (online), 20 August 2011 <http://www.economist.com/node/21526299>; 'Inventive Warfare', *The Economist* (online), 20 August 2011 <http://www.economist.com/node/21526385>.

64 See Andreas Philippopoulos-Mihalopoulos (ed), *Law and the City* (Routledge-Cavendish, 2007); Nicholas K Blomley, *Law, Space, and the Geographies of Power* (Guildford Press, 1994); Nicholas Blomley, David Delaney and Richard T Ford (eds), *The Legal Geographies Reader* (Blackwell, 2001).

65 See *Association for Molecular Pathology v US Patent and Trademark Office*, 669 F Supp 2d 365 (SDNY 2009) and *Association for Molecular Pathology v US Patent and Trademark Office*, 702 F Supp 2d 181 (SDNY 2010), overturned by *Association for Molecular Pathology v US Patent and Trademark Office*, No 2010-1406 (USCA, Fed Cir, 2011), which upheld patents of human genes. It is estimated that about 20 per cent of human genes are owned pursuant to patents, held largely by pharmaceutical companies: Emily Singer, 'Gene Patents Ruled Invalid: In a Surprise Ruling, Myriad's Controversial Patents on Breast and Ovarian Cancer Susceptibility Genes are Struck Down', *Technology Review (MIT)* (online), 30 March 2010 <http://www.technologyreview.com/blog/editors/24986/>.

undeniable part of life.[66] Using the easement as an example, this Part briefly explores how property law shapes the landscapes on which we live.

Landscapes are not created or changed overnight — rather, they are the product of long-term processes, through a complex succession of people and cultures that fashion them, providing a yard-stick against which to measure the present.[67] While it would be an enormous task to trace the interaction of property law and people in these complex and long-term processes over the course of the history of Anglo-Australian law, readily accessible glimpses are available. We know, for instance, that the 'modern industrial urban landscape was a concept whose origins lay in the 18th and 19th centuries.'[68] The changing social circumstances wrought in those origins shaped the law of easements:

> The industrial revolution, which caused the growth of large towns and manufacturing industries, naturally brought into prominence such easements as ways, water-courses, light, and support; and so Gale's book became the starting point of the modern law, which rests largely upon comparatively recent decisions.[69]

Once shaped by the new circumstances brought about by the industrial revolution and enclosure, the easement — and other property law tools like it, including the restrictive covenant — in turn shaped the very physical space in which we live. This transformed the English and American rural landscapes into the modern city, which a century and a half ago had yet to be invented,[70] but in which over half the world's population now live.[71] Today's landscapes were shaped by the law and in turn shaped and shape how people live and work. Three recent books offer concrete examples of this in England and America: Francis Pryor's, *The Making of the British Landscape*,[72] Michael Rawson's, *Eden on the Charles*,[73] and Eric W Sanderson's, *Mannahatta*.[74]

Francis Pryor explores the ways in which people have transformed the British landscape from prehistory to the present. We know that the easement emerged in its modern form during the industrial revolution in response to the social and economic necessity of moving things from one place to another, usually the growing town, which brought people into closer contact with one another. Adding

66 See Stephen R Munzer, *A Theory of Property* (Cambridge University Press, 1990) 1–3; Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000) 1–18; Joseph William Singer, *The Edges of the Field: Lessons on the Obligations of Ownership* (Beacon Press, 2000) 1–6; Harris, above n 56, 3–6 offers an excellent and succinct outline of property as both a legal and a social institution; Richard Pipes, *Property & Freedom* (Harvill Press, 1999) xii–xiv; Underkuffler, *The Idea of Property*, above n 55, 1–2, 11.

67 Pryor, above n 4, 4.

68 Ibid.

69 William Holdsworth, *An Historical Introduction to the Land Law* (Oxford University Press, 1927) 266.

70 *The Victorians: Painting the Town* (Directed by Kate Misrahi, BBC Knowledge, 2011) <http://www.bbcknowledge.com/australia/programmes/the-victorians/episodes/>; see also Edward Glaeser, *Triumph of the City: How Our Greatest Invention Makes Us Richer, Smarter, Greener, Healthier, and Happier* (Penguin, 2011).

71 'Greening the Concrete Jungle', The Economist (online), 3 September 2011 <http://www.economist.com/node/21528272>.

72 Pryor, above n 4.

73 Rawson, above n 2.

74 Sanderson, above n 3.

to this history, Pryor shows the effect that the use of this simple legal tool had on the landscape — how canals and turnpikes, enclosure and railways transformed the countryside into something that had never been seen before.[75]

Consider railways.[76] During the 18th and 19th centuries the increasing demands of industry necessitated good communication; without the ability to transport people and things, towns simply failed to prosper. The classic example identified by Pryor is the town of Stamford, in southern Lincolnshire. Stamford did well during the Middle Ages because it was on the crossing of the North Road over the River Welland, and it continued to grow from the medieval centuries through to the 18th. In 1846 though, Lord Exeter refused to have the Great Northern railway line routed across his land. Instead, the contractor shifted the route further east, through a part of Earl Fitzwilliam's Milton Park estate, in Peterborough.[77] Pryor concludes that '[t]he result was that Stamford remained a pleasing market town, whereas Peterborough developed into a major railway centre and industrial city.'[78] Pryor goes on to recount how the railways, the canals, and the turnpikes, all dependent on easements for their transit across the enclosed land of freeholders, shaped the English countryside, levelling hills and raising valleys and making use of natural vantages.[79] And so, through the application of the easement, towns like Peterborough thrived, becoming cities, which in turn required greater use of the easement to mediate the closer proximity of people to one another, ultimately transforming the landscape from rural to urban.

In the US too, the use of new property law tools shaped the physical shape of large cities. As Rawson explains of 19th century America (not unlike 19th century England):

> Chicagoans reversed the flow of their city's river so that it ran away from, rather than toward, Lake Michigan; the residents of Pittsburgh raised parts of their city by as much as ten feet to improve drainage; and the citizens of New Orleans surrounded their city with miles of earthen levies to hold back the waters of the Mississippi River and Lake Pontchartrain. Such changes might seem extraordinary when considered one city at a time, but taken as a whole they were routine. Across America, the building of cities promoted a complete restructuring of the natural world to accommodate larger populations and to fulfill new social and economic goals.[80]

Rawson's primary focus is Boston, connected to the mainland in the early 19th century by the 'Boston Neck' which was a narrow strip of land. By 1893 however, the Neck was gone.[81] In case after case, Rawson notes, property law was used to effect the changes producing a new landscape. As with England, transportation drove the need to connect the city of Boston to its mainland surroundings and

75 Pryor, above n 4, 463–571.

76 On the role of railways in transforming English law, see R W Kostal, *Law and English Railway Capitalism 1825–1875* (Oxford University Press, 1998).

77 Pryor, above n 4, 512.

78 Ibid.

79 Ibid 512–3.

80 Rawson, above n 2, 1–2.

81 Ibid 1, 4–7.

the rest of the country. Railways were a major part of this transformation,[82] although before railways could run, new land had to be created by levelling hills and filling in parts of the Bay and its flats with the soil. In conjunction with this, an Ordinance of 1641-1647 extended the land of riparian landowners from the high to low tide mark, thus reversing the common law position.[83] This allowed landholders to convert what was otherwise water between the high and low tide marks into land, reclaiming an enormous area for transportation purposes.

Public parkways or roads were made possible by the restrictive covenant, a property law tool held by private landowners,[84] itself a recent legal innovation in both England and America.[85] As Boston grew, so did the need to get people and services, such as sewerage and streets, to new neighbourhoods. Without these things, obviously, a new development could fail (just as the towns or rural England could wither without connecting railways). Rawson points out that:

> savvy builders divided their land into generous lots and sold them with restrictive covenants that required large setbacks and residential use. Such plans quickly won approval. In contrast, one builder who insisted on producing cheaper housing on smaller lots was denied services by the town, and his development scheme failed.[86]

And so grew the surrounding suburbs of modern Boston, still to be seen today, permanently transforming a rural to an urban landscape, and calling forth greater reliance on the property law tools that emerged in the 18th and 19th centuries.

One finds perhaps the most dramatic representation of the way in which the various property law tools such as easements and restrictive covenants shaped the English and American landscapes in Sanderson's *Mannahatta*, a study of the transformation of Mannahatta, the 'Island of Many Hills' into modern New York City. The island that Henry Hudson found on sailing into what is today the Estuarine River that bears his name was unlike what we know today, filled with an abundance of natural wealth; '[i]f Mannahatta existed today as it did then, it would be a national park — it would be the crowning glory of American national parks.'[87] It had more ecological communities per square acre than Yellowstone Park, more native plant species per acre than Yosemite, and more birds than the Great Smoky Mountains National Park. Living there were the Lenape, the 'Ancient Ones', of Northeast Algonquin culture, there for more than 400 generations before Hudson's arrival, and who lived a mobile and productive life.[88]

Sanderson recounts how the Lenape

> shaped the landscape with fire; grew mixed fields of corn, beans, and squash; gathered abundant wild foods from the productive waters and

82 Ibid 196–7.

83 Ibid 200. See also A S Wisdom, *The Law of Rivers and Watercourses* (Shaw & Sons, 1st ed, 1962).

84 Rawson, above n 2, 274–6.

85 See Joseph William Singer, *Property* (Aspen, 3rd ed, 2010) 223–95; Megarry and Wade, above n 40, 739–97.

86 Rawson, above n 2, 165.

87 Sanderson, above n 3, 10.

88 Ibid.

> abundant woods; and conceived their relationship to the environment and each other in ways that emphasized respect, community, and balance.[89]

The same cannot be said for the Europeans who followed Hudson, although they would do some shaping of their own.

While Europeans began arriving shortly after Hudson, it was not until the 18th and 19th centuries that they and their descendants began to transform the landscape at the same time and in the same ways as we have seen in Peterborough and Boston. The same property law tools lay behind the transformation, with the natural environment covered over by a spider's web of canals, roads, railways, subways and electrical and telecommunications networks, made easier by fill and excavation reclaiming land from the riparian environment. Sanderson paints a vivid picture of the product of this transformation, not only for New Amsterdam and Manhattan, which Mannahatta became in successive stages, but also for the world which we all inhabit:

> It is a conceit of New York City — the concrete city, the steel metropolis, Batman's Gotham — to think it is a place outside of nature, a place where humanity has completely triumphed over the forces of the natural world, where a person can do and be anything without limit or consequence. Yet this conceit is not unique to the city; it is shared by a globalized twenty-first-century human culture, which posits that through technology and economic development we can escape the shackles that bind us to our earthly selves, including our dependence on the earth's bounty and the confines of our native place. As such the story of Mannahatta's transformation to Manhattan isn't localized to one island; it is a coming-of-age story that literally embraces the entire world and is relevant to all of the 6.7 billion human beings who share it.[90]

Perhaps what is most remarkable about Sanderson's book though, and which makes it very pertinent for the point this article makes, is the visual representation of the 'before and after' of Mannahatta. In a series of stunning computer generated images of Mannahatta as Hudson would have seen it, Sanderson compares that to the transformed cityscape that we recognise today as New York City. If it is true that 18th and 19th century property law tools like the easement and the restrictive covenant made possible a large concentration of people and then structured their relationship to one another once there, thus creating cities where once there had been countryside, then there can be no more startlingly poignant representation of the transformation made possible by property law than Sanderson's images. Just one of those is reproduced here to make the point, that of a 'split image' shot looking north from the tip of Manhattan, showing on the western side Mannahatta as it likely looked in 1609 and on the eastern side Manhattan as it looked in 2009 (figure 1).

What these three recent examples of the ways in which humans have shaped their physical surroundings tell us is much the same thing: that the 18th and 19th centuries left us with the modern urban city, 'conurbation' or, more pejoratively, 'urban sprawl', the oozing out of the city (itself a product of the process started in

89 Ibid 13.

90 Ibid.

the 18th and 19th centuries) like a giant jellyfish across rural landscapes.[91] Whatever we choose to call it and however we describe its effect on the rural landscape, law, and specifically property law, played its part in allowing and facilitating the choices about land and its use made by people like Lord Exeter, Earl Fitzwilliam, the property developers of Boston and New York, and countless others like them. Those choices transformed Britain and Mannahatta, and made Boston. There is a lesson in this for the future: just as the changing ways that humans interacted with others and with the landscapes around them produced new property law vehicles to make that interaction possible, the process did not stop with the modern urban cityscapes that we now inhabit. It is ongoing, and we can expect that law will continue to play its role in what our future landscapes will look like. The next section considers some future possibilities for the development of the easement and the restrictive covenant.

Figure 1

Manhattan: Then and Now[92]

91 Pryor, above n 4, 4. See also Thomas S Barrett and Putnam Livermore, *The Conservation Easement in California* (Island Press, 1983) 1–8.

92 Sanderson, above n 3, 208 (image (left) Copyright ©MarkleyBoyer/The Mannahatta Project/Wildlife Conservation Society; (right) Copyright ©Yann Arthus-Bertrand/CORBIS. Composite image by Markley Boyer).

IV LANDSCAPE SHAPES LAW: THE CITY AND THE FUTURE OF PROPERTY LAW[93]

The concentration of people and resources in one place, the modern city, in turn produced new forms of property. In the US, where property as a concept enjoys a central place in the structure of society in a way seen perhaps nowhere else,[94] these new forms proliferated, indeed they were required if the modern city and its way of life was to survive, in one form or another.[95] Stuart Banner, in a fascinating study of property in America,[96] demonstrates just some of the ways in which the complex society made possible by a patch-work quilt of easements and rights of way across the English and American countryside, now urban scapes, required an ever greater proliferation of property law tools in order to adapt to the very physical space property itself had wrought.

A *Twentieth Century: Innovations in Response to the City*

The ownership of news, the ownership of sound in music and performance and the wavelength used to broadcast it, the ownership of fame, and of our very selves; the creation of condominiums, or strata titles for ever closer proximity in living; using the property concept to control natural resources like water, to zone land, to market pollution rights; the use of governmental intervention to make possible commerce, to regulate what people could do with all of these forms of property, and to create what Charles Reich called the 'new property',[97] systems of social support and entitlement to protect those who might otherwise fall by the wayside in a world running wild on the wealth that protection of the property concept makes possible — all of these emerged from the ever tightening concentration of people in urban environments, and Banner explains how all of these forms spread rapidly in the US during the 19th and 20th centuries.[98] More importantly though, as social and economic circumstances and, as we have seen, our landscape changes, all simultaneously in response to and as a result of changes in property, we find those who:

> have made, and still make, claims about property — about its origins, about its attributes, about its purposes, and about its outer limits. Almost all of our discourse about property has consisted, and still consists, of such claims. The 'property' we talk about now, however, is not the same as the property of 1900, which was not the same as the property of 1800, and so on. Our conceptions of property have changed over time, to match

93 I am most grateful to Adrian J Bradbrook for a helpful conversation that contributed greatly to the ideas expressed in this section.

94 *Civilization: Is the West History? Property* (Directed by Adrian Pennink, BBC Knowledge, 2011).

95 Stuart Banner, *American Property: A History of How, Why, and What We Own* (Harvard University Press, 2011) 1–3.

96 Ibid.

97 Charles Reich, 'The New Property' (1964) 73 *Yale Law Journal* 733.

98 Banner, above n 95, 73–275.

> the changes in the goals we think are worth pursuing. Those changes have been contested at each step along the way, but the debates have never been about the nature of property in the abstract. Property has always been a means rather than an end.[99]

If the law shaped, created, the modern urban places we inhabit today, and if those spaces in turn shaped and formed new applications of the property concept, then we are justified in asking how the spaces shaped by law might again shape the physical world in which we live and how, in turn, the physical world might be re-shaped in the future by what the law has already wrought. An answer to such crystal-ball gazing questions begins with the realisation that

> [w]e are living twenty-first century lives through environmental relationships that were designed around nineteenth-century conditions. Many of these relationships fail to recognize limits, and as a result they are failing us today.[100]

In other words, the concentrations of people made possible by the industrialisation of western society in the 18th and 19th centuries and its demand for new forms of property to accommodate the closer physical and social relationships that followed, created problems that could never have been foreseen. Climate change is one example of this process.

B *Twenty-First Century: The Challenge of Climate Change*

While by no means the worst contributors on a per capita basis,[101] cities — the very concentrations of people that emerged from the 18th and 19th centuries — contribute significantly as a proportion of the human population to the emission of the greenhouse gasses that drive anthropogenic or human-caused climate change.[102] For that reason, many major cities are looking at ways in which they can reduce their emissions.[103] One possible solution may involve re-thinking energy sources, turning to sustainable forms.[104] It is important to recognise though, that the very solutions we are looking to now are to problems whose seeds were sown in the 18th and 19th century industrial origins of cities. In those origins lies property law. And whatever changes we make today will once again be made possible by property law and will once again transform the face of the landscape we have come to recognise, in much the same way that the city itself transformed the rural landscape known by those in 18th and 19th century England and America.

Sanderson's final chapter, entitled 'Manhattan 2409', previews a vision of what our future cities might look like, once we have responded to challenges like

99 Ibid 291.

100 Rawson, above n 2, 281.

101 Glaeser, above n 70.

102 'Greening the Concrete Jungle', above n 71.

103 Ibid.

104 Anna Kapnoullas, 'The Ideal Model for Solar Access Rights' (2011) 28(6) *Environmental and Planning Law Journal* 416, 416.

climate change. As with the composite split image photo comparing Mannahatta of 1609 with New York of 2009, Sanderson presents a number of similar photos showing New York in 2009 contrasted with images of how it might look like in 2409. Two striking sets of aerial photos reveal similar urban concentrations,[105] but upon further inspection reveal much more green space; the rooftops of current buildings are 'layered with gardens and designed to passively collect sunlight and passively shed excesses of it and to breathe deeply of the quiet, smog-free air.'[106] The much 'greener' 2409 images begin to look very much like the landscapes of Mannahatta of 1609, or the prairies and rural pastures and agricultural landscapes of early 18th century America and England, save for the fact that the 'prairies' and 'pastures' of 2409 appear on city rooftops. Green roofs are no utopian dream. In fact, they are already sprouting up all over Chicago, as well as other American cities.[107]

What will such green roofs require? Perhaps a re-thinking or a re-appraisal of the easement or the restrictive covenant, the very property forms that helped to produce the cities that today contribute to climate change and require the physical transformation foreshadowed by 'Manhattan 2409'. The easement of light represents the classic form of easement to which one might turn to accommodate green roofs and green spaces. Along with a wide variety of novel forms of easement,[108] these easements have long been recognised in English, American and Australian law.[109] In *Commonwealth v Registrar of Titles (Vic)*, for instance, Griffith CJ noted that it might be possible to create an ever more fascinating array of easements, demonstrating the changes wrought by the closer concentration of people in cities, as well as the means of supporting them: for the passage of aircraft, for the passage of electricity through wires over servient land and for the sun's rays.[110]

Of course, it is the free access to the sun's rays that is of greatest importance in the search for alternative sustainable energy solutions for use in solar water and space heating systems for homes and factories. Yet, while it has been extensively canvassed,[111] the existence of easements or restrictive covenants of solar access is not yet settled in any common law jurisdiction.[112] In one of the few judgments on the issue, Goff and Orr JJ left open the question of the appropriateness of creating

105 Sanderson, above n 3, 239–41.

106 Ibid 242.

107 'Greening the Concrete Jungle', above n 71.

108 Many novel easements designed to accommodate novel social and physical circumstances have been recognised in various jurisdictions: see Bradbrook et al, above n 40, 839–40.

109 See Singer, above n 85, 207; Megarry and Wade, above n 40, 903–6; ibid 837–8.

110 (1918) 24 CLR 348, 354.

111 Adrian J Bradbrook, 'The Development of an Easement of Solar Access' (1982) 5 *University of New South Wales Law Journal* 229; J Goudkamp, 'Securing Access to Sunlight: The Role of Planning Law in New South Wales' (2004) 9 *Australasian Journal of Natural Resources Law & Policy* 59; T Alvarez, 'Don't Take My Sunshine Away: Right to Light and Solar Energy in the Twenty-First Century' (2008) 28 *Pace Law Review* 535.

112 Bradbrook et al, above n 40, 840; Adrian J Bradbrook, 'The Role of the Common Law in Promoting Sustainable Energy Development in the Property Sector' in Aileen McHarg et al (eds), *Property and the Law in Energy and Natural Resources* (Cambridge, 2010) 391, 397.

a new type of easement for this purpose.[113] Such an easement could be used to guarantee solar access by entering into an agreement with a neighbour so that the neighbour would not shade a particular area of the solar user's roof or other areas of the block of land during certain times of the day. A restrictive covenant might have the same effect, where the neighbour agrees to protect from shading a designated area of the solar user's land or airspace above the land.[114]

While it seems easy enough in practice, difficulties arise in creating such easements and restrictive covenants. Drawing upon Orth's generalisations about the history of property law, these can be divided into two categories: (i) those that emerge from the attempt to use the common law to craft solutions to new problems, and (ii) the role played by the legislature in attempting to craft comprehensive solutions.

The piece-meal, ad hoc, hodgepodge approach to the development of legal principle, while making property law exciting, means that the common law has long been recognised as rendering it powerless to deal effectively with large-scale problems. Its response to environmental problems is ineffectual at best; climate change and the demand for sustainable clean energy solutions pose just such a challenge for the common law. While Australian Torrens legislation would certainly allow for the registration of such easements and restrictive covenants — rendering them enforceable against all future holders of servient land — the difficulty is actually getting the easement or restrictive covenant in the first place. That requires an agreement with the initial neighbour, which may not be forthcoming and, even if it is, may cost a substantial price to secure. In short, '[n]eighbours cannot be forced at common law to enter into such agreements.'[115] It is unlikely that many neighbouring landowners will enter voluntarily into such agreements given the impact on re-sale value of their land. Moreover, where there are legislative interventions to allow easements to be imposed where it is shown to be in the public interest, the courts seem very unlikely to use such provisions to create solar access easements.[116] All of this presupposes overcoming the lingering doubts as to whether a solar access easement would even be recognised in Australian law; assuming that such doubts are considered insurmountable 'render[s] the use of common law property rights to protect solar access as theoretical rather than practical.'[117]

Which leaves the legislature. In fact, given the weaknesses of the common law approach, perhaps the only solution is full-scale legislative re-deployment of the property concept, along the same lines recognised by Banner in his history of US property law. In some jurisdictions, particularly the US, for instance,

113 *Allen v Greenwood* [1980] Ch 119, 828. See also *Clos Farming Estates v Easton* (2002) 11 BPR 20. A similar uncertainty surrounds the possibility of easements for wind access for wind generators: see Adrian J Bradbrook, 'Access of Wind to Wind Generators' [1984] *AMPLA Yearbook* 433.

114 Adrian J Bradbrook, 'Solar Access Law: 30 Years On' (2010) 27(1) *Environmental and Planning Law Journal* 5, 6.

115 Ibid.

116 Ibid.

117 Ibid 7.

legislatures have created the necessary protection for solar users in the form of new property rights for the solar user.[118] In New Mexico, Wyoming and California, for instance, legislation 'declares that the right to use solar energy is a property right and provides that principles developed in the western United States governing water law [beneficial use and prior appropriation] shall be applied to define the solar right.'[119] The Californian legislation defines a solar easement as a 'right of receiving sunlight across real property of another for use by any solar energy system.'[120] Solar access property rights under the New Mexico legislation allows the user to collect solar energy, a beneficial use, and can protect that right against any interference by preventing development on neighbouring land unless compensation is paid pursuant to a transferability clause.[121]

Legislative intervention of the kind found in Wyoming and New Mexico constitutes a further development of the easement and the restrictive covenant which shaped the landscapes we inhabit today. Indeed, in the case of water allocation, legislative modification has drawn directly upon the common law through adoption and modification. Such intervention has also shaped the world in ways which allow us to produce greenhouse gasses; this in turn requires us to think of alternative energy sources, and ways that they can be accommodated within the physical and legal landscapes available to us.

Yet, as Orth has shown, even legislative intervention is not without its difficulties. Adrian Bradbrook suggests that at the very least there are conceptual and practical difficulties in treating solar energy and water the same way, not least being that a right to prevent obstruction of solar access prevents development of neighbouring land to a much greater extent than the right to appropriate water, not to mention the thorny issue of defining 'beneficial use' for the purposes of the solar access property right.[122] Thus, for instance, the installation of a small solar hot water heater could prevent significant development on neighbouring land. How might such restrictions produce a new urban cityscape of the future? While the answer is anyone's guess, the landscape itself that requires such energy solutions, and thus new forms of easements, is the product of, the shape created by, the easement and the restrictive covenant that emerged from the demands of the industrial revolution in the 18th and 19th centuries. At the very least, the world we live in today, shaped by the easement of the past, is about to enter yet another phase of the re-shaping, both driven by and productive of new forms of easement and restrictive covenant.

118 Bradbrook, 'The Role of the Common Law in Promoting Sustainable Energy Development in the Property Sector', above n 112, 397, citing *Solar Rights Act (New Mexico)*, NMSA § 47–3–4 (1978). For an excellent review of the American legislation, and the history of solar access rights, see Kapnoullas, above n 104, 419–31, 435–6; see also Bradbrook, 'Access of Wind to Wind Generators', above n 113.

119 Bradbrook, 'Access of Wind to Wind Generators', above n 113, 18–9; see *Solar Rights Act (New Mexico)*, NMSA § 47–3–4 (1978). See also Kapnoullas, above n 104, 429–31.

120 *California Civil Code*, § 801.5. See also *Iowa Code*, § 564A.5.

121 Bradbrook, 'Access of Wind to Wind Generators', above n 113, 18–9; see *Solar Rights Act (New Mexico)*, NMSA § 47-3-4 (1978).

122 Bradbrook, 'Access of Wind to Wind Generators', above n 113, 19; Kapnoullas, above n 104, 430–1.

C *The Future: A Foreign Country or Going Back?*

Just as they did in the past, the easement and the restrictive covenant may yet undergo further adaptation to make way for changes related to solar energy, and many other changes in the way we live that cannot now be foreseen. If anything, what we have learned from Orth is that such developments will become necessary to accommodate a future quite unlike what we know today. What might that future look like? We might at first be attracted to Griffith CJ's obiter dicta in *Commonwealth v Registrar of Titles (Vic)* about the range of easements that might exist in the future, and try to speculate about them.[123] Yet the truth, as we know both from Orth's careful reappraisals and generalisations and from experience itself is simply that we do not know what the future will look like. Few in 16th century England would have been able to predict the role of Roman law in the 19th century development of easements because no one could have foreseen the changes that would be wrought by the industrial revolution. Few could have seen, even in the mid-19th century, the changes that the motor car would bring, necessitating new vehicles of property to accommodate the proliferation of roads and highways and ultimately freeways that sit on public rights of way.

In truth, we can only know once we know what new easements and restrictive covenants may emerge to respond to the demands of modern living in highly urbanised environments such as Australia's. Looking back, we can see how we have shaped our physical world to produce what we know today by looking at the novel easements recognised in modern times by Australian and English courts, rights: for windbreaks of natural timber located on servient land; to create noise over adjoining land; to pollute water and cast noxious matter upon adjoining land; to discharge surplus water from dominant land when reasonably necessary; to use an area alongside a wharf for the loading and unloading of vessels; to enter servient land to repair and maintain the walls of a house and clean out the gutters; to park vehicles; to use an airfield for testing planes; to use a lavatory on the servient land; to place rocks, stones and piles on servient land to protect a building on dominant land from the sea; to extend an existing party wall and to use that extension; for the passage, but not the supply, of water or electricity through pipes or wires located on neighbouring land; to bring goods into a shop through the main door of an adjoining shop on servient land; to install rock anchors as part of the work needed in the construction of a freeway; and for the use of cattle yards.[124]

While the list of those novel easements recognised in Anglo-Australian law reads like a litany of how we live today, some proposed easements have also been rejected by the courts, including rights: of prospect; of recreation; of protection from the weather; to ground a barge on the bed of navigable river; to allow trees to overhang neighbouring property; to hit cricket balls into neighbouring property; to spread noxious wastes in indeterminate quantities generally over servient land; for a vineyard; and to use a nearby block of land as a dog exercise area.[125]

123 *Commonwealth v Registrar of Titles (Vic)* (1918) 24 CLR 348, 354.

124 This list is taken from Bradbrook et al, above n 40, 839–40 (footnotes omitted).

125 Ibid 841 (footnotes omitted).

On the one hand, in this story of easements accepted and rejected, we clearly see the ways in which we have shaped our world to suit how we live today in concentrated, urbanised cityscapes; on the other hand, reading some parts of it causes pain, when we consider how we have treated others and the environment. In both ways, we see that we will only know what we have wrought once we are living in it. So, what does the future portend? There are two possible answers: it may look like a 'foreign country',[126] or we may find ourselves going 'back to the future'.[127]

In attempting to predict the future property law forms that may emerge in response to that landscape, the future may look a lot like a foreign country, where things are done differently.[128] Indeed, we cannot even know yet how differently those things may be. How will we shape the physical world of the future and how will easements and restrictive covenants play a role in that shaping, and themselves be shaped by it? Will novel easements emerge around the increasing use of and role played by digital technology, such as iPhones and related innovations, or new means of transport, or new work patterns, or new means of producing the things that we consume, or even new means of identifying who we are and monitoring where we are. No one can know because it is simply impossible to predict how we will live in the future and how we will adapt our physical world to suit that lifestyle.

Still, that said, perhaps it is possible to name at least two possibilities for the development of the easement that urban life may produce: first, the conservation easement or restrictive covenant may protect our remaining open landscapes in the face of the ceaseless advance of urban centres; secondly, the easement for wind power may be called into play in mediating the place and role of sustainable alternative energy forms in those expanding urban cityscapes themselves. For lack of a better phrase, we might call these two possibilities examples of a broader category of 'easements for modern day living'.

The first example, the conservation easement, is best known in the US, finding greatest use by private parties and governmental agencies throughout the 20th century. The servient landholder grants the dominant holder a right which limits by its terms the right of the servient holder to develop that land. The grantee assumes responsibility for assuring that the terms of the easement are honoured.[129] In other words, '[i]t is a transfer of development rights not for the purpose of using them elsewhere, but rather for the purpose of not using them at all.'[130] These easements now protect against the advance of major urban centres in California, such as Los Angeles and San Diego.[131] The technique has been codified in the

126 This is a play on the opening lines of L P Hartley, *The Go-Between*, which famously declares that 'The past is a foreign country: they do things differently there.' See L P Hartley, *The Go-Between* (Penguin, 1970) 17.

127 Also a play, on the title of the classic 1985 movie, *Back to the Future* (Directed by Robert Zemeckis, NBC Universal, 1985).

128 Hartley, above n 126, 17.

129 Barrett and Livermore, above n 91, 1–6.

130 Ibid 4.

131 Ibid 6.

California *Open-Space Easement Act of 1974*[132] and the *Conservation Easements Act of 1979*.[133]

The second example, the wind power easement, may serve both rural settings for commercial generation of electricity to supply large urban areas,[134] and residential dwellings in densely populated urban areas where sustainable energy sources are in high demand.[135] In Australian law, while a restrictive covenant to protect access to wind is possible, and has been used, the possibility of easements for that purpose has yet to be legally confirmed, either at common law or legislatively.[136] The US law seems more favourable, certainly in the case of a legislative creation of a novel wind power easement which declares, in much the same way as US state legislation in relation to solar access, that wind access is capable of forming the subject matter of an easement. Among other states, this has been successfully accomplished in Oregon[137] and Wisconsin.[138]

We may, though, find that we are going back to the future. In other words, we may see a proliferation of entirely new types of property, just as we have in the past. For that, the past may be the best guide to what we may see in the future, at least in relation to the sorts of human activities around and in response to which we may see new property forms emerge. The list outlined above[139] provides a good roll-call of the areas where new property forms may emerge: news, music and other performances, fame and the nature of our very person; new modes of living and dwelling; accessing natural resources; the place of pollution; trade and commerce; and the 'new property' of systems of social support and entitlement. All of these aspects of modern living are not so unlike the ways that humans have always interacted with one another and with their environment. We may therefore find that in the emergence of any new property forms, both common law and legislative, to accommodate modern living, we are really just going back to the future.[140]

But whatever we say about the future — drawing upon Orth's generalisations about property law, and this very brief review of the modern development of easements and restrictive covenants — will at best be speculative and, at worst, completely wrong. We will only know once we know.

132 Cal Gov Code §§ 51070-51097. For a discussion of this legislation see ibid 20–7.

133 Cal Civ Code, §§ 815-816. For a discussion of this legislation see Barrett and Livermore, above n 91, 27–34.

134 See Government of South Australia, *Wind Energy in South Australia* <http://www.sa.gov.au/subject/Water,+energy+and+environment/Energy/Renewable+energy/Wind+energy/Wind+energy+in+South+Australia>.

135 See, eg, Energy Trust, *Wind Turbines* <http://www.energysavingtrust.org.uk/Generate-your-own-energy/Wind-turbines>.

136 Bradbrook, 'The Role of the Common Law in Promoting Sustainable Energy Development in the Property Sector', above n 112, 442–7.

137 See Legislative Counsel Committee, *Oregon Revised Statutes — 2011 Edition*, (2011) Oregon State Legislature, vol 3, ch 105 <http://www.leg.state.or.us/ors/>.

138 *Wisconsin Statute and Annotations*, § 700.35.

139 See Part IV(A) above.

140 *Back to the Future*, above n 127.

V CONCLUSION

Orth sends us on a fascinating journey, and one which ultimately returns to where it began, in the mists of history, and which will continue, recursively, so long as the 'general concern with the eternal problem of *meum et tuum*, mine and thine' endures.[141] Any reader can find in it something which shows both the 'humanness' and the power of property law. This article finds that property law's shaping of our landscapes has created, and will create, new political, economic and social circumstances to which the law of property will need to adapt to yet again, just as Orth tells us it always has and always will. All of which leaves behind 'a collection of … ad hoc solutions to specific problems, ossified or adapted over time, and imperfectly associated with solutions to other specific problems',[142] adding new layers, new strata, to the landscapes on which we have lived, live, and will live.

141 Orth, above n 5, 139.

142 Ibid.