

Larissa Katz, "Exclusion and Exclusivity in Property Law"

Reading Assignment by Thomas Milne

Katz offers a new theoretical, legal perspective for looking at property she calls the exclusivity-model, that is, 'exclusivity of ownership' rather than an owner's right to exclude. Her perspective is not all that complex but she has some difficulty reconciling it with for example harmless trespasses. Essentially, she is saying that there is two sides to looking at the exclusion-based approach: (1) exclusion as a *right* to exclude others from ones' property whether that be tangible or intangible (although her examples mostly refer to tangible forms), and (2) exclusion as part and parcel of a *position* that includes an agenda-setting authority over one's property. Katz's model is premised on ownership as a exclusive position whereby the owner, as the agenda-setter, compels non-owners in contact with the property to act in accordance with that agenda.

She challenges the concept of property as a 'bundle of rights' and refutes the boundary-approach to the extent that it fails to define '*the owner's special position as an object of analysis that is independent of the right to exclude*'. In other words, the ability of an owner to exclude others should not be the defining factor of ownership because, in Katz's opinion, the power to exclude is merely an effect of ownership - '*it is the agenda for the resource that mediates the relationship between owners and others*'. An owner's agenda-setting authority is derived from the owner's *supremacy* that she analogizes to sovereignty insofar as structure of the right is concerned and argues there is more substance to ownership than a simple notion of the right to exclude.

Katz uses the example of Greenacre (land burdened by restrictive covenants), Pinkacre (aboriginal title) and Blackacre (fee simple title) and a hiker walking by each of these types of property. From the perspective of the innocent hiker, they would have to treat each of these properties in the same manner despite their differences in what type of interest is protected, that is, keep off the property because it does not belong to you. It is not difficult to see the hiker has one single obligation, however the owner, albeit their interest is bound to restrictions just as the hiker is bound not to trespass, under the boundary approach, does not have a correlative duty to that of the hiker. That is, they do not have to explain why the hiker should not be on their property other than to show it is their right to exclude them if they so choose. Katz has a problem with this because it leaves the hiker in no position to determine the limits of the owner's authority other than the right to exclude. Why should not the hiker be able to enjoy the property so long as they do not upset the agenda of that property? In other words, as the hiker is bound to 'keep off' so is one's ownership contoured by certain limits that affect their agenda-setting authority, thus should

this not constitute the substance of the owners interest in that property instead of defining it by the effect of their ownership?

However, harmless trespass seemingly stresses Katz's agenda-setting perspective because there must be some agenda to protect. Admittedly, there are numerous agendas one could use or create but where an owner wishes to exclude another without reason besides simply having the authority to do so, the author finds no justification why an owner should be able to do such a thing. This represents a shortcoming with Katz's exclusivity model because it adds a prerequisite for the use of trespass. Katz states an owners position is '*non-derivative and not subordinate to another's position with respect to the property*', but is this not contradicted by requiring an owner to have some agenda to protect? In other words, does the agenda have to be of some significant importance before the owner can exercise their right to exclude?

Katz's exclusivity-model is concomitant with the notion of communal ownership insofar as that includes public enjoyment of the land regardless of whether it is owned privately. In our day of age where public land is becoming increasingly scarce I find her model somewhat comforting. But, from the perspective of a land owner who wishes nothing other than quiet enjoyment of their land, which may be perceived as an agenda not worth protecting, her theory faces clear adversity.