

OYSTER WARS AND THE PUBLIC TRUST: PROPERTY, LAW AND ECOLOGY IN NEW JERSEY HISTORY by Bonnie McCay, University of Arizona Press, Tuscan, 1998, pp: xxxi + 246

Who owns tidal waters?

This book is an enlightening unravelling of the intricate web of legal institutions and the doctrine of public trust

This painstakingly researched book by anthropologist Bonnie McCay is about the fascinating realm of the evolution of law and the manner in which it is fashioned and utilized by individuals and social groups. It is a story of how New Jersey, once a major centre for oystering, lost that pride of place. The commonplace explanation for this unfortunate history puts population growth, industrialization, the technical and economic dimensions of microbiology, and sanitation high on the agenda. For McCay these are but proximate reasons. To her, the ultimate reasons revolve around a cultural problem about property and the moral dilemma, even in a market-driven economy, over the question of making nature a commodity.

The book is divided into five parts, each beginning with an introduction and composed of two or three chapters interspersed with legal cases to develop the argument of each part. The titles of the parts provide an insight into the basic structure of the book.

Part I is about Common, Private and States' Rights in New Jersey Oystering. It traces the early history from the 18th century. Part II is about The Public Trust Doctrine, which is the most important and far-reaching concept, central to the theme of the book. Part III is on the Local Customs and Enclosure of the Commons, which describes the manner in which the oystering commons was enclosed. Part IV is titled Riparian Rights and Oyster Wars and Part V brings us from Past to Present.

By examining court cases—mostly about the nature of rights to 'planting' oysters and clams or taking them 'in the

wild'—the study moves into the realms of legal anthropology, legal history and environmental law, as it relates to an understanding of the doctrine of public trust. This doctrine took shape in the 19th century, based on Roman law, natural law and English common law, but was a specifically American creation. Its interpretation was, however, not unproblematic. The analysis in the book clearly shows that this doctrine could be reinterpreted and contorted to favour privatization and also to support the idea that the State 'owns' and holds certain resources in trust for all its citizens to enjoy. Basically, the doctrine is an interesting cultural entity that has three 'meanings' which McCay tries to establish in the book: common-use rights; the notion of State ownership combined with an inalienability of public rights; and an expanded use of the doctrine for public advocacy and environmental law.

The distinctiveness of McCay's analysis is that it deals with the evolution of institutions not merely as a background to the main analysis but rather as the central dynamic theme. It provides a detailed perspective about how institutions are created, challenged, maintained and altered in human encounters and deliberations. All this happens not only by class conflict and long-drawn social processes alone, but by bold individual action at opportune moments as well.

Meaningful study

McCay's study breathes meaning into the current struggles of the small-scale fishworkers in developing countries as they say "No!" to the many ill-effects of the globalization process which is bent upon the privatization of the coastal waters, often with the sanction to the State.

As in India, the Philippines, Senegal and Chile, the variety of actions by fishworkers to protect the “blessing of their commons” illustrates how they have pushed the State to take seriously its role as the ultimate custodian of coastal resources which must be given in trust to labouring coastal communities to enjoy and safeguard as their property.

We have heard and read so much about common property rights in fisheries that we often fail to draw the distinction between common property which can effectively become the private property of a small group and common property which can truly become the property of the community as a whole.

In the context of a developing country, particularly from the point of view of the millions of labouring fishworkers in coastal marine fishing communities, it is this latter understanding of common property which needs to be stressed. Perhaps we need to “try the right” to establish its validity in the coastal waters.

Bonnie McCay’s efforts to unravel the specific reality of New Jersey thus give some general directions to the way fishworkers in developing countries can act to craft institutional arrangements to ensure a secure property right to the resources needed for their livelihood. Basically, this is a challenge to the State to use the autonomy of law to stand by the

poor and the powerless coastal commoners. At least in India, we have seen how the judiciary, an arm of the State, has ensured this by prioritizing fundamental rights: giving the right to livelihood (of coastal fishworkers) priority over the right of any citizen (to own fishing assets and fish) for *profit*.

It took me a while to get into’ the book. But once I situated its contents within the backdrop of my own reality, it revealed itself as immensely instructive. McCay’s ability to use delightful prose for complex issues of legal history only added to the satisfaction of my endeavour to understand who owns tidal waters in the US. For those who espouse the cause of fishworkers, reading McCay will be both invigorating and intellectually stimulating. 🍷

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