Ethics, Community, and Private Land

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INTRODUCTION

A good deal of talk has come to focus recently on the subject of land ethics—on the norms that we might use to distinguish between morally good and morally bad land uses. The chief impetus for this talk has been the realization that much of our land is in poor health ecologically, largely because we have misused it. Among environmentalists the term "land ethic" is closely associated with Aldo Leopold, a forester and wildlife researcher whose career spanned the first half of this century.[1] In his many essays and ultimately in his posthumous

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1. The leading scholar of Leopold's work is J. Baird Callicott, who assesses Leopold and adds his own useful thought in J. BAIRD CALLICOTT, IN DEFENSE OF THE LAND ETHIC: ESSAYS IN ENVIRONMENTAL PHILOSOPHY (1989). The evolution of Leopold's thought is well considered in SUSAN FLADER, THINKING LIKE A MOUNTAIN: ALDO LEOPOLD AND THE EVOLUTION OF AN ECOLOGICAL ATTITUDE TOWARD DEER, WOLVES, AND FORESTS (1974). Leopold's story is ably told in CURT MEINE, ALDO LEOPOLD: HIS LIFE AND WORK (1988). Considered in Eric T. Freyfogle, *The Land Ethic and Pilgrim Leopold*, 61 U. COLO. L. REV. 217 (1990), are the principal critiques of Leopold's work. Leopold's ethical views are assessed, in the context of contemporary competing paradigms, in Fred Bosselmen, *Four Land Ethics: Order, Reform, Responsibility, Opportunity*, 24 ENVTL. L. 1439 (1994). Another assessment, focused on contemporary land use law, is James P. Karp, *Aldo Leopold's Land Ethic: Is an Ecological Conscience Evolving in Land Development Law?*, 19 ENVTL. L. 737 (1989).

book, *A Sand County Almanac*,[2] Leopold urged his readers to consider land use as an issue of ethics as well as economics. People could use the land to sustain themselves, Leopold wrote, but they ought to do so only in ways that keep the land healthy, in ways, as he phrased it, that preserved the "integrity, stability, and beauty" of "the biotic community."[3]

Leopold was no lawyer and he gave little thought to how his land ethic, or any ecologically informed land ethic, might fit together with the legal elements of private property rights. But as versions of his ethic have gained support, the issue has inevitably arisen. Is it possible, consistent with existing landed property rights, to push landowners to use their land more ethically? Is it possible to take the institution of private property, which has to do with private rights and economic freedom, and somehow combine it with an ecologically sound land ethic? Implicit in all of this speculation is the assumption that private property and land ethics are different animals, and not all that closely related. One has to do with private rights, the other with public responsibilities. One deals with legal entitlements, the other with moral suasion. Bringing together these beasts would seem to require a form of wizardry that defies nature. It would appear to entail what breeders term a "wide cross," a biological gamble tried, if at all, with only slight hopes of fertile yield.

But is this necessarily so? Is it right to assume, as a point of beginning, such a wide divergence between private property and land ethics? Perhaps they are more alike than we realize. Perhaps a certain kinship between them is hidden somewhere in the continuing reality of the community and in the still-lively value that we attach to community well-being—a kinship that, once understood, might help us find our way toward a private property regime that is ecologically, as well as economically, sound.

I
THE ORIGINS OF PROPERTY

Not many generations ago, historians believed they knew where private property came from. It arose in an era, they proclaimed, when people began to run up against resource scarcities, when they came to think about and then to want what we now call economic development. Before then, there was no such thing as private property, or at least no individual property. People simply owned things in common and used them as needed, with little sense of mine and yours. As

2. ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE (1949).

3. *Id.* at 224-25.

human numbers grew, people began asserting private property rights, and the old communal world slowly crumbled. According to the nineteenth-century historians who embraced this view—historians like Sir Henry Maine—the coming of private property was as inevitable as it was beneficial.[4] Shared ownership, Maine opined, was the primitive form of property; individual private property was the advanced form. As a given civilization progressed, property norms moved from shared rights to individual ownership, with the entitlements of owning becoming ever more precisely defined and concentrated.

As it happened, Maine's empirical claims fit reasonably well with the theories of John Locke, the influential seventeenth-century philosopher.[5] In Locke's view, the earliest humans owned all land in common and used it as they saw fit.[6] So long as human numbers remained low, people had little reason to assert ownership of the land itself; they needed to protect only what they gathered or produced. But as populations increased, people began asserting private claims to the land. Their right to ownership, Locke theorized, came not from social convention but from the law of nature, put in place by God and understandable through the exercise of human reason.[7] Under nature's

4. Maine's principal works are SIR HENRY MAINE, ANCIENT LAW (1936); SIR HENRY MAINE, VILLAGE-COMMUNITIES IN THE EAST AND WEST (1974); SIR HENRY MAINE, LECTURES ON THE EARLY HISTORY OF INSTITUTIONS (7th ed. 1966). His views on property regimes are considered in RICHARD SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 265-69 (Russell & Russell 1973). A brief general assessment, focusing on Maine's better known evolutionary dichotomy (from status to contract), is E. Adamson Hoebel, *Maine, Henry Sumner*, *in* 9 INT'L ENCYCLOPEDIA OF THE SOC. SCI. 530-533 (David L. Sills ed. 1968).

5. Locke's ideas of property are expressed principally in Chapter V of his Second Treatise of Government. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 303-20 (Peter Laslett ed., 1988) [hereinafter TWO TREATISES]. These ideas, including some of their vagaries and inconsistencies, are ably assessed in LAWRENCE G. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS, 32-56 (1977); ALAN RYAN, PROPERTY AND POLITICAL THEORY, 14-48 (1977); and SCHLATTER, *supra* note 4, at 151-161.

Despite the consistency of views mentioned in the text, Maine and Locke differed on many points. Unlike Locke, Maine viewed individual private property as a rather late creation—not something that began at the earliest stages of communal life—and he did not embrace natural rights thinking. Maine was an historian, not a philosopher. True to his profession, he believed that property was best understood in historical terms, as a gradual creation that arose as a society became more civilized. SCHLATTER, *supra* note 4, at 265-69.

6. TWO TREATISES, *supra* note 5, at 304 ("[G]od . . . has given the earth . . . to Mankind in common."). So long as humans do not enclose the land and assert ownership of it, each "is still a tenant in common." Henry George (among others) drew upon the idea of early communal sharing to conclude that "[h]istorically, as ethically, private property in land is robbery." HENRY GEORGE, PROGRESS AND POVERTY 370 (15th Anniversary ed. 1929) (citing Sir Henry Maine on the issue of early communalism).

7. Locke commonly equated natural law with reason. *See, e.g.*, TWO TREATISES, *supra* note 5, at 289 ("The *State of Nature* has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it . . . .") (emphasis in original). "In transgressing the law of nature, the Offender declares

law, Locke explained, each person had the right to mix his labor with the land, thereby adding value to it and becoming its lawful owner.[8] Property, accordingly, was an individual right, something that arose out of the natural order of the world, independently of any community action.[9]

As the twentieth century ends, the ideas of Maine and Locke have enjoyed a modest resurgence, chiefly among people who dislike

himself to live by another rule, than that of *reason* and common Equity, which is that measure God has set to the actions of Men, for their mutual security . . . ."). *Id.* at 290 (emphasis in original). Nonetheless, Locke was inconsistent on this point, aware of the criticisms leveled against earlier natural law theorists who had claimed that reason yielded a single natural law.

> Locke wavered in his conviction that the laws of morality were plain and simple and obvious to all mankind who would but consult their reason. At one extreme he claimed that when they were not carried away by partiality and blinded by greed, men would acknowledge the same rules of conduct at all times and places; . . . At the opposite extreme, he held that there is almost nothing which has been held to be a vice in one place which has not been held to be the height of virtue somewhere else.

RYAN, *supra* note 5, at 23.

8. Locke's labor theory is most concisely stated in TWO TREATISES, *supra* note 5, at 305 ("[E]very man has a *Property* in his own *Person* . . . .") (emphasis in original).

Locke developed his ideas on private property in the course of refuting the claim that the English Monarch held absolute sovereignty over the nation's lands and people. The dominant argument supporting the monarchy began with the claim that God gave the Earth to specific individuals (Adam, Noah, and Noah's sons), rather than to humankind in general. These individuals held their property as absolute sovereigns, and they passed down their entitlements to the then-reigning royal rulers. Locke countered this reasoning with the claim that God gave the land to humankind in common. Locke argued in a series of logical steps that God also put into place the labor theory of acquiring private property. Thus, private ownership, to the extent justified by the labor theory, arose out of the divine plan, not by human convention. Because Locke was concerned chiefly with limiting the monarchy, he seemed little concerned in his discussion of property (that is, in Chapter V of Second Treatise) with the regulatory power of Parliament, granted it by the consent of the governed. Indeed, by the end of Chapter V, Locke seemed to come around to the claim that property, although formerly a natural right, had become a conventional institution, created by humans. *See* SCHLATTER, *supra* note 4, at 157-59. Both sections 38 and 45 suggest that modern property exists by consent or compact. Later parts of the Second Treatise assume that ownership rights are natural ones, not human creations; this is the point for which Locke became known. *Id.*

9. Although Locke is clear in saying that a laborer becomes the owner of the thing with which she has mixed her labor, he glosses over the rights that are thereby acquired. RYAN, *supra* note 5, at 17 ("Locke is unexplicit about quite what rights people thereby get; nor does he say anything about their duration or their bequeathability. Nor, for that matter, does he discuss what exactly is to count as labour, save that he seems to take it for granted that I can acquire property through the doings of my servant or my horse.").

As Ryan also notes, Locke's labor theory is easily turned into a challenge to the right of landowners and factory owners to control the produce of their workers. "Locke's account of title to property by labor suggests that laborers have a better title than their masters, and opens the way for a labor theory of value into the bargain." *Id.* at 25, (citing JAMES TULLY, A DISCOURSE ON PROPERTY (1980)). It was for this reason (in part) that Locke's theory fell so far out of favor after enjoying great acceptance. *See* SCHLATTER, *supra* note 4, at 161 ("But the Lockean theory was accepted by most thinking people and remained the orthodox doctrine until, in the nineteenth century, the socialists appropriated it and the utilitarians found a substitute for it.").

what their governments have been doing. The collapse of the Soviet Union, some say, proves Maine's claim that private ownership is naturally dominant over collective or socialist forms, though Maine is rarely cited in support. John Locke's spirit, it seems, is equally at large, inspiring the burgeoning property rights critique of federal power.[10] For centuries, natural law theories of property have appealed to people—usually wealthy people—who wanted to restrain government power. Locke himself used his ideas to question the Monarch's authority in Restoration England; other natural law theorists, to this day, have pressed similar claims.[11]

Outside the political realm, however, among scholars who study the matter more soberly, neither Maine's nor Locke's ideas have fared well, empirically or logically. Private ownership, it turns out, has always existed. Virtually every culture has recognized some type of private ownership, if only in personal tools and cooking pots.[12] From their studies of property regimes, historians have also found that Maine erred in his Darwinian theory of how property regimes evolve. Property rights do not inexorably shift from communal to individual ownership.[13] Many societies were able to mix the communal and the private in imaginative, lasting ways, allocating distinct use rights to individual owners and defining those rights in ways peculiarly suited to the needs of the community.[14] The advent of vast public land holdings has further undercut Maine's historical determinism, as has the popularity in twentieth-century America of land development

10. *See generally* John T. Sanders, *Justice and the Initial Acquisition of Property*, 10 HARV. J.L. & PUB. POL'Y 367, 380 (1987), (arguing that the Lockean Proviso, suggesting that initial acquisition of property is justified only where it does not limit similar opportunities for others, is self-defeating because "if the Proviso were dropped, there would effectively be more and better resources for others").

11. The perennial use of natural law justifications is considered in SCHLATTER, *supra* note 4, at 151-61. A modern assessment is Douglas Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367 (1991).

12. Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 363 (1996) ("Virtually all peoples of whom we have any knowledge have invented property regimes for themselves in order to manage the resources they find important." (citations omitted)); Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 692 (1938) ("Wherever man is found, we find both individual ownership and ownership by family groups, large or small, and other associations; with rarer instances of what appears to be true community ownership of particular things.").

13. SCHLATTER, *supra* note 4, at 267 ("[T]he bewildering variety of ancient and primitive custom has convinced modern students of the impossibility of establishing a general pattern of development. No universal law of progress, apparently, forces human societies to adopt the same institutions of property at parallel stages of their history."). A useful study of long-term communal ownership arrangements is ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION xi (1990).

14. One example of this kind of mixing of private and communal property rights (by the Algonquins of seventeenth-century New England) is described in WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 61-64 (1983).

projects, such as condominiums, cooperatives, and planned unit developments, that include significant amounts of group-owned land.[15] To the extent there is movement today, it is from individual to group-owned property, and from rights aggregated in a single landowner to disaggregated rights that are separately held.[16] By Maine's Victorian gauge, we have become less civilized.

Locke's natural law arguments for private property have also suffered over the years, although less because of conflicting empirical data (as in Maine's case) than from the cold probe of philosophic rigor and from the disappearance of the land-rich frontier.[17] Locke's labor theory made sense only in a world where land and other raw materials were abundant. Locke himself recognized this limitation in his much-discussed Proviso, where he admitted that labor created a thing's value only if the raw material was so plentiful as to have little or no value in the market.[18] In the real world of scarcity, the labor theory

15. Probably the largest category of group-owned property comprises the assets of corporations and other businesses, which hold title on behalf of their shareholders and other owners. These are private property rights, as opposed to public ones, in the terminology of modern times, but the public versus private distinction is confusing and unhelpful when comparing property regimes in widely differing cultures. When Sir Henry Maine spoke of early communal land ownership he meant ownership by the small group—the tribe or village—not by a large state. Because the modern homeowners association is similar in size to the old village, it is more an example of shared or communal ownership than individual private ownership. In the case of condominiums, private and group-owned property are both present: individual living spaces are typically owned as individual property, while common areas, including hallways, shared walls, roofs, and exterior walls, are jointly owned.

16. Shared ownership and disaggregated property rights are present whenever land is subject to easements, covenants, zoning restrictions, environmental limitations, and other restrictions on use. By all appearances, instances like these are becoming more common, if they have not already become the norm for landed property rights.

17. *See* SCHLATTER, *supra* note 4, at 160 ("The logical obscurities of the Lockean theory and the futility of attempting to use it as a justification of modern property relations have been clearly exposed in the last hundred years."). "That the Lockean theory of property was in fact ambiguous, that it might easily be used to condemn much property that the middle class regarded as legitimate, and that it would not account for the origin of actual property rights even if the privileged orders and their property were liquidated, is obvious enough now." *Id.* at 156. *See also* David Schmidtz, *The Institution of Property*, *in* PROPERTY RIGHTS 42, 44-45 (Ellen Frankel Paul et al. eds., 1994) ("Philosophers . . . generally conclude that the Lockean Proviso is logically impossible to satisfy."); A. John Simmons, *Original-Acquisition Justifications of Private Property*, *in* PROPERTY RIGHTS, *supra*, at 63, 65 ("There is a solid consensus among philosophers and legal and political theorists that attempted [Original Acquisition] justifications of private property, when presented in any remotely plausible form, in fact have little or no interesting justificatory force."). One of the more recent critiques is JOHN CHRISTMAN, THE MYTH OF PROPERTY: TOWARD AN EGALITARIAN THEORY OF OWNERSHIP (1994). A critique that focuses on the landowner's right to exclude and finds no natural law justification for it is William N.R. Lucy & Francois R. Barker, *Justifying Property and Justifying Access*, 6 CANADIAN J.L. & JURIS. 287 (1993).

18. The Proviso that Locke added was his important qualification that a laborer became the owner of a thing with which he mixed his labor only "where there is enough, and as good left in common for others." TWO TREATISES, *supra* note 5, at 306. The Proviso is a key element to the fairness of Locke's claim, not simply a minor limitation on it. Locke

justified only a more modest property claim. At most the laborer owned the value added by her efforts: she owned the crops that she planted and tended, not the farm land itself.[19] Natural law arguments, it turns out, simply cannot justify expansive private ownership of land.[20] To justify such rights, one must turn to an entirely different philosophic base, to the sometimes firm but often shifting sands of social utility. Private property is chiefly based on utilitarian arguments, and it is justified only to the extent that its overall consequences are good.[21]

What has become clear to modern scholars is that, far from transcending the human community, private property is very much a product of it.[22] From earliest-known times, human communities found it useful to develop norms authorizing the private control of land and

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repeatedly states, as part of his main argument, that other individuals have no cause to object to a laborer's ownership claims when they can just as easily go out and do the same. This is the central pillar of his fairness claim. *See generally id.* §§ 33-35, 37. The Proviso is attacked in John T. Sanders, *supra* note 10, at 376-387. In a comment on Sanders' article, Professor Geoffrey P. Miller offers a "construction" of the Proviso that draws upon efficiency criteria of late twentieth-century economic theory. Geoffrey P. Miller, *Economic Efficiency and the Lockean Proviso*, 10 HARV. J.L. & PUB. POL'Y 401, 403 (1987). A thoughtful, more historically sensitive consideration is Carol M. Rose, *"Enough, and as Good" of What?*, 81 NW. U. L. REV. 417 (1987).

19. The issue is discussed carefully in BECKER, *supra* note 5, at 32-56. Even if we grant that the laborer gets the value added to the land, not the land itself, there remains the issue as to how one laborer rather than another gains the right to use the land. Given the rental value of land today, it would seem necessary for the laborer at least to pay rent back to the common fund for the time the land is used. Even the payment of rent does not avoid the unfairness of allowing one person to use the land while others cannot do so, nor does it justify any landed property rights that are transferable.

An additional objection to Lockean-type justifications that are not based on mutual consent is that "they involve trying to justify something that none of us on reflection can really regard as justifiable—namely, the deliberate, unilateral imposition by individuals of onerous obligations on all others." Simmons, *supra* note 17, at 81 (citing, among other works that present this view, JEREMY WALDRON, THE RIGHT TO PROPERTY (1988)). *See also* Jeremy Waldron, *Property, Justification, and Need*, 6 CANADIAN J.L. & JURIS. 185 (1993) (arguing that a justification for private property cannot look simply at the benefits it brings to those who own property, or even to society generally; it must account for the plight, and somehow enlist the support, of those without property).

20. More qualified rights in land, or at least in homestead tenancies, receive philosophic support from the so-called personality theory of property, of which Professor Radin is the leading proponent today. MARGARET JANE RADIN, REINTERPRETING PROPERTY (1993). Even the personality theory, however, displays a strongly consequentialist slant.

21. I use the term utility here in a broad sense to include all forms of consequentialist reasoning, not just utilitarianism in the form that dominated early nineteenth-century thought. It is worth noting that even Locke did not fully avoid making what to the modern reader appears as a utilitarian case for private ownership. Private property was good, Locke claimed, in light of the higher standard of living that it brought. TWO TREATISES, *supra* note 5, at 187-189; *Id.* at 314-316. Contemporary attempts to revive Locke also tend to be utilitarian in their arguments, in some cases almost entirely so. *See, e.g.*, Schmidtz, *supra* note 17.

22. The Supreme Court's failure to understand how property rights are socially and politically constructed by private actors and governmental policies is criticized in Joseph

other things. Such norms commonly gave individuals and families the chance to complain and seek redress when other community members interfered with their property; that is, they gave rise to what we call property rights. These rights were created by the community, and they were enforced only when and so long as the community stood behind them. Property norms at any time reflected the circumstances, hopes, and ethical values of their creators. Over time governing norms evolved, as a community's needs changed and as the community came to embrace different ways of life—whether that way of life was a wandering hunter-gatherer economy with substantial social equality; or a social hierarchy with geographic stability and military preparedness; or industrialism with geographic expansion, and the rapid extraction of natural resources. Property ownership was a useful tool, as malleable as any other cultural creation. Shaped and reshaped by a community over time, it could help a people achieve all manner of economic, social, and political ends.[23]

II
OWNING AND RIGHT LIVING

Once one sees how ownership norms arise directly from community goals and values, it becomes easier to spot the similarities between private property and land ethics. That similarity begins, for English speakers, with the very word used to describe what a person owns—one's "property." The cognates of this word are several and revealing: "proper," "appropriate," "propriety."[24] Each refers to cultural norms prescribing how community members ought to live. Implicit in each is the notion of care and responsibility. To do something properly, to act appropriately, to accept or claim something as your property, is to take responsibility for what you do. It is to be a person

William Singer & Jack M. Beerman, *The Social Origins of Property*, 6 CANADIAN J.L. & JURIS. 217 (1993).

Recent works that usefully consider many of the larger issues in private ownership (although without much mention of environmental matters) include RADIN, *supra* note 20; CAROL M. ROSE, PROPERTY & PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP (1994); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993).

23. Even Locke seemed to realize that a gathered community might find itself better off by altering the natural law by which people could acquire property. He noted, for instance, that a community might decide to withdraw some land from individual appropriation and use it as a permanent commons, thereby repealing in part the natural law of land acquisition. TWO TREATISES, *supra* note 5, at 306-7, 310.

24. Wendell Berry draws upon this linguistic overlap in Wendell Berry, *Whose Head is the Farmer Using? Whose Head is Using the Farmer?*, *in* MEETING THE EXPECTATIONS OF THE LAND: ESSAYS IN SUSTAINABLE AGRICULTURE 19-30 (Wes Jackson et al. eds., 1984).

to whom the community can look for compliance with its expectations.[25]

Within this cluster of words one readily senses the longstanding linkage between private property and land ethics. The realm of ethics is the realm of right and wrong living, as defined by the community. *Land* ethics is an indispensable part of that larger realm, dealing with the ways that humans ought to interact with the land. Yet that very subject—the norms governing human life on the land—is precisely the concern of private property. To own land within this linguistic tradition is to be charged the with responsibility for using it within the bounds of community norms governing right and wrong land use. Owning land means managing it appropriately, treating it properly, and abiding by local forms of propriety.[26]

Land ethics and private property, then, are similar not just in that both are evolving expressions of a culture. They are closer kin than that, for both prescribe acceptable ways of using land. Indeed, so fully are the two commonly intertwined in many cultures that they can hardly be distinguished.[27] Property norms, to be sure, are broader in

25. One of the few contemporary legal scholars to make serious use of the connection between property and propriety is Professor Carol M. Rose, in *Property as Wealth, Property as Propriety, in* NOMOS XXXIII: COMPENSATORY JUSTICE 223 (John W. Chapman ed., 1991). Professor Rose draws inspiration from the longstanding view (often associated with the civic republican tradition) that private property plays a vital role in the maintenance of an appropriate social and political order. In this tradition of property as propriety, private ownership, particularly of land, included a responsibility to promote the good order of the community. Although Rose does not specifically consider the environmental implications of this thought, the connection is easily drawn. Professor Gregory Alexander provides a useful comparison of the civic republican (or what he terms communitarian) perspective of property with the dominant, liberal-individualistic understanding, which he terms the self-regarding understanding. *See* Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COMMENTARY 259 (1992).

The terms property and propriety were viewed as synonyms, or something close to it, in Locke's day and for some time thereafter. Both included, as one accepted meaning, a person's rights or entitlements, including the right to life and liberty. The issue is considered in PASCHAL LARKIN, PROPERTY IN THE EIGHTEENTH CENTURY 33-53 (1930). Locke himself seemed to draw upon the two words almost interchangeably. *See* TWO TREATISES, *supra* note 5, 185-86, 188-89; *Id.* at 310-313. According to the editor of the Treatises, Peter Laslett, Locke in later printings of the Treatises changed the word propriety to the word property in some cases (but far from all), including in the title to Chapter VII of the First Treatise. *See* TWO TREATISES, *supra* note 5, at 213 (noting that "it is difficult to see why" Locke made the changes, "unless the language had changed between 1680 and 1700").

26. Contemporary arguments to this effect include Richard F. Babcock & Duane A. Feurer, *Land as a Commodity "Affected with a Public Interest,"* 52 WASH. L. REV. 289 (1977); C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986); Donald W. Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039 (1973). An older, historically based argument is presented in Philbrick, *supra* note 12.

27. This problem arises in part because ownership norms in early cultures were not distinct from other social norms and expectations, and because even privately owned property was subject to various understandings about shared use by communal members. Philbrick, *supra* note 12, at 692-94.

coverage than are ethical norms, given that property norms must attend to such matters as transferability, shared ownership, and remedies.[28] But in the core areas—in the permissible ways of putting up structures and reshaping the land, of using soil, vegetation, water, and minerals—the relevant concerns and coverages are more or less the same.

At first glance one might think that land ethics and property rights differ in that ethics involve negative duties—things one should not do—while private property involves affirmative rights and opportunities, particularly chances for monetary profit. In practice, however, these categories overlap and blur. Ethics encompass not just negative, but affirmative duties—caring for children, spouses, and elderly parents, being helpful neighbors and supportive church members, and participating in local, sustaining economies. An ecologically based land ethic also includes an affirmative component, requiring action by the landowner, not just the avoidance of harm.[29] Ownership norms likewise entail both affirmative and negative obligations, not just opportunities for gain. Landowners have never had the right to use their lands in ways that harm others; land use laws of many types build upon this principle.[30] Ownership norms, moreover, have often required owners to make productive use of their lands or risk losing them to the community. In colonial America, to cite one well-studied example, land ownership meant community membership, entailing duties as well as rights, including the duty to act in ways at least roughly consistent with communal ideas of good land use.[31] Many early New England towns had laws forcing owners of town lots to build on them or lose them.[32] Several colonies required owners of good waterwheel sites to build mills or risk having their lands condemned by someone

28. This is not to suggest that these matters do not also have ethical implications; indeed, the legal rules governing leaseholds and land transfers have undergone considerable change in recent decades to bring them into line with prevailing notions of fairness.

29. *See infra* text accompanying notes 73-82.

30. In the words of the common law, *sic utere tuo ut alienum non laedas*—"use your own [property] so as not to harm another's." This principle and its applications are considered in CHARLES DONAHUE, JR., ET AL., CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION 855 (3d ed. 1993).

31. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1281 (1996) ("The first century and a half of private land ownership in America reveals no sign of the later-imagined right of landowners to be let alone as long as they do not harm others. . . . [T]he landowner's right to control and utilize land remained subject to an obligation to further important community objectives."). The colonial setting is also considered in Eric T. Freyfogle, *Land Use and the Study of Early American History*, 94 YALE L.J. 717 (1985); Elizabeth V. Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFF. L. REV. 635 (1982).

32. Hart, *supra* note 31, at 1259-63.

more willing to do the community's bidding.[33] A recent study of land use regulation in early America offers further examples:

> New York City ordered "that the poysonous and Stincking Weeds . . . before Every ones doore be forth with pluckt up," subject to a fine. . . . A New Hampshire town ordinance required that "every man shall fall such trees as are in his lot being offensive to any other." Pennsylvania required that plants be added: "every owner or inhabitant of any and every house in Philadelphia, Newcastle and Chester" was to plant and maintain "one or more . . . shady and wholesome trees before the door of his, her or their house or houses, not exceeding eight feet from the front of the house . . . to the end that the said towns may be well shaded from the violence of the sun in the heat of summer and thereby be rendered more healthy."[34]

If you did not use the land properly, the colonists claimed, it would no longer be your property. Much the same reasoning was applied against the North American Indians, whose land was taken from them in part because they failed to use it properly—they were not planting oats, grazing cows, or building fences like good Englishmen.[35] Generations later the crafters of Western water law employed the same logic when they required owners of water flows to use their water beneficially or lose it.[36] Homestead and other federal settlement laws imposed similar duties, requiring claimants to build, till, and drain, or risk losing the land they owned. Private ownership, in short, often entailed an obligation to abide by communal views of acceptable land use.

III
PROPERTY IN THE AGE OF INDUSTRY

Given this apparent similarity between land ethics and ownership norms, and given that both are community creations dealing with how one ought to use the land, the question inevitably arises: how is it that, in our seemingly advanced culture, the two have come to seem so separate? How can we think that someone can claim ownership rights, created and enforced by the community, and yet escape the reciprocal obligation to abide by the community's evolving senses of good and bad land use?

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33. *Id.* at 1266-67; John F. Hart, *The Maryland Mill Act, 1669-1766: Economic Policy and the Confiscatory Redistribution of Private Property,* 39 AM. J. LEGAL HIST. 1 (1995).

34. Hart, *supra* note 31, at 1280 (citations omitted).

35. CRONON, *supra* note 14, at 55-58. The point is considered in the broader context of conquest theories in ROBERT A. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990).

36. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES (CBE) § 5.16 (JULY 1996).

The answer, not surprisingly, has much to do with the evolution of American culture since colonial times. Americans entered the twentieth century with far different values than they held in the Revolutionary Era. As our culture changed, property norms, appropriately enough, changed along with it. The trouble is that our evolving ideas of private ownership and economic liberty have led us to a place where it is hard to turn around. Having come to think of property in one particular way, it has become hard to imagine other ways. It has become intellectually difficult to reattach property to its community base, to remember where property came from and why we have it. We have grown confused about the link between private ownership and community ethics, and thus have trouble seeing how private property could be brought in line with a new, ecologically informed land ethic.

One potent influence on American culture, beginning in late colonial times, was the expansive Western frontier. As forcibly as any factor, the frontier pressed its imprint on prevailing senses of good and bad land use, reducing our felt need for ownership norms that promoted sustainable land use practices. The frontier prompted a feeling of vast, inexhaustible riches, a sense of plentitude and opportunity that calmed inbred fears of resource scarcity.[37] The frontier also fueled a sense of mobility and impermanence, a feeling that an owner's ties to the land could be, and one day probably would be, broken, a belief that an owner who degraded the land need merely depart, not despair. As an ethical and ownership norm, land conservation did not disappear, particularly in older, more settled areas, but it certainly fell on rocky times.[38]

Reinforcing this frontier outlook was the idea that man is the rightful measure of all things, an ethical claim that gained ground in the United States during the Revolutionary Era and advanced further

37. *See, e.g.*, HENRY NASH SMITH, VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH (1950) (considering the various ways that Americans understood the frontier, and how those understandings helped shape American culture). The consumptive frontier attitude began early, particularly in the Southern colonies. *See, e.g.*, T. H. BREEN, PURITANS AND ADVENTURERS: CHANGE AND PERSPECTIVE IN EARLY AMERICA 164-96 (1980); KEVIN P. KELLY, "IN DISPERS'D COUNTRY PLANTATIONS": SETTLEMENT PATTERNS IN SEVENTEENTH-CENTURY SURRY COUNTY, VIRGINIA, IN THE CHESAPEAKE IN THE SEVENTEENTH CENTURY: ESSAYS ON ANGLO-AMERICAN SOCIETY AND POLITICS (Thad W. Tate & David L. Ammerman eds., 1979). A good study dealing with the twentieth century is DONALD WORSTER, DUST BOWL: THE SOUTHERN PLAINS IN THE 1930s (1979).

38. Although Canada, like the United States, enjoyed an expansive frontier, it did not develop the same rhetoric of autonomous individual property rights. Richard Risk & Robert C. Vipond, *Rights Talk in Canada in the Late Nineteenth Century: "The Good Sense and Right Feeling of the People,"* 14 L. & HIST. REV. 1 (1996).

The reawakened conservation movement at the national level is considered in SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT 1890-1920 (1980).

in the Age of Jackson.[39] If man was the measure it only made sense, as John Locke had claimed, that nature possessed value only insofar as humans mixed their labor with it. Labor was the key variable, just as in the prevailing moral order humans alone mattered and everything else—animals, plants, soils—existed merely to satisfy human needs.

Closer to the present we can point to our national infatuation with economic growth, measured in a distorted way that looks only at market transactions and therefore ignores degradation of the land.[40] In the quest for endless economic expansion, land became merely another input to the production process, and it was nearly as fungible and consumable as any other input. For too many people, the challenge of ownership became not how to live harmoniously and permanently in a chosen place, but how to exploit the land for its maximum yield, how to maximize the present value of a resource flow, even if doing so exhausted the land in a generation or two.

By the middle of the twentieth century, land value had become equated with market value so thoroughly that other measures of value were rarely mentioned. Constricted by this narrow gauge, people too often assumed that anything lacking market value held no value at all. Plants and animals, rocks and streams—all were viewed as exploitable commodities; a few treated with respect because they held market value, the vast majority pushed aside as worthless clutter. As all of this came about, we lost track of older, more holistic values, the kind of values that people had relied on for millennia—scales of value that judged a land parcel's worth by the depth and fertility of its soil, by the reliability and clarity of its waters, by the diversity and health of its

39. This line of thinking is critically assessed in DAVID EHRENFELD, THE ARROGANCE OF HUMANISM (1981).

40. A solid critique of standard economics, including standard methods of national income accounting, is HERMAN E. DALY & JOHN B. COBB, JR., FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARD COMMUNITY, THE ENVIRONMENT, AND A SUSTAINABLE FUTURE (1989). A further critique, focusing more on microeconomic issues, is MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT (1988). The influence of economic development on property law is considered in MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977). *See also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992); THEODORE STEINBERG, NATURE INCORPORATED: INDUSTRIALIZATION AND THE WATERS OF NEW ENGLAND (1991); William W. Fisher III, The Law of the Land: An Intellectual History of American Property Doctrine, 1776-1880 (1991) (unpublished Ph.D. thesis, Harvard University) (on file with author); Paul M. Kurtz, *Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions—Avoiding the Chancellor*, 17 WM. & MARY L. REV. 621 (1976); Kenneth J. Vandervelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980). The continuing pro-development bias of property law is criticized in John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 520 (1996) (arguing that "the property law system tends to resolve disputes by preferring wilderness destruction to wilderness preservation").

plants and animals; in short, by its suitability as a place for human life.[41] The market, to be sure, did not fully ignore these elements—topsoil quality, for instance, would remain an important determinant of a field's value. But the land was no longer an integrated whole; it was no longer primarily a place where people came to settle for life. The land had become instead a warehouse of discrete resources, each priced by how it could be exploited.

Compounding all of these problems has been the mounting dominance of liberal thought, with its focus on the liberated individual and its view of government as the protector and promoter of each individual's right to pursue self-selected goals. By exalting the individual, liberalism has yielded many benefits: we value people more these days as individuals, try to educate them, help them in times of need, and otherwise treat them with dignity. Too often, however, liberalism degenerates into the claim that individual liberty is the supreme goal, that autonomy is an end rather than a means. The far different reality is that people are social animals, and they thrive best today, as in the past, in group settings—in families, neighborhoods, tribes, clubs, and churches. For groups like these to prosper, they too need the law's respect. They too need protection from the forces pushing so hard against them.[42]

Perhaps as much as any part of our culture, our ideas of private ownership bear the imprint of all these constricting forces: the frontier ethic; the focus on man as the locus and measure of value; the dominance of economic growth based on market transactions; and the ele-

41. I offer further comments on the matter of land valuation in Eric T. Freyfogle, *The Construction of Ownership*, 1996 U. ILL. L. REV. 173, 174 (1996) and Eric T. Freyfogle, *Local Value*, 1 TERRA NOVA: NATURE AND CULTURE, Spring 1996, at 29. It is revealing that John Locke uses the term value largely in this older sense, that of the natural productivity of the land, not its market value. Part of his main support for the labor theory is his observation that land value arises from the labor employed to make it productive; labor, he variously claims, accounts for 90%, 99%, or even 99.9% of the value. TWO TREATISES, *supra* note 5, at 314-16. In each case, plainly, his comparative valuation looks to the physical produce from the land, which is increased by the labor, not to an external measure of value like market value. In section 45, however, he notes that the use of money "had made Land scarce, and so of some Value"; here he seems to refer to market value. *See* TWO TREATISES, *supra* note 5, at 317.

42. The literature critical of this perspective is extensive. *See, e.g.*, ROBERT N. BELLAH, ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985); WILLARD GAYLIN & BRUCE JENNINGS, THE PERVERSION OF AUTONOMY: THE PROPER USES OF COERCION AND CONSTRAINTS IN A LIBERAL SOCIETY (1996); CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS (1979); DAVID RIESMAN, INDIVIDUALISM RECONSIDERED (1954); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF PUBLIC PHILOSOPHY (1996). A particularly good critique of individual-rights discourse is MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991). An attempt at defending liberalism against these charges is WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1989).

vation of the liberated individual over conflicting visions of communal well-being.[43] Open the law books, and it is there to see. How does the law measure harm to the land? Based on the reduction in market value. How does it remedy such harm? By paying cash to the landowner. When does a landowner act wrongfully? Only when he overtly harms another human. What about the landowner who ruins his own land, eroding its soil or polluting its waters? This we ignore; for where, we ask, is the harm?[44] Not many generations ago the answer would have been obvious: the harm is to the landowner's community, to the land itself, and to the future generations that will live there.[45] But so far has community fallen in our thinking, so self-centered have we become, that today this answer is rarely voiced. Perhaps it is rarely imagined.

By the time the modern environmental era began after the Second World War, industrial property had become the dominant cultural paradigm. Land was a commodity, valued by its marketable produce. Individual resources—water, minerals, trees—were discrete pieces, separately valued by the market and hence separately conceived by the owner. To own land was to have the right to put it to its most profitable use, to exploit it fully, and to be protected from public actions that diminished its cash value. This conception of land ownership was never fully incorporated into the common law of property; nuisance law, water-use rules, and a few other corners of the law perpetuated the idea that ownership entailed communal constraints.[46] But the prevailing vision of land ownership was one of barely fettered dominion, particularly in rural areas. Eventually this understanding of ownership became no longer simply *a* form of private property, but *the* form, private ownership distilled to its essence.

Yet even while this ownership paradigm held sway it was slowly being undercut in practice, first by the proliferation of urban zoning and land use restraints and later by new pollution-control laws. What was happening was that ownership norms were continuing to shift, moving beyond the age of industry toward something else, something that valued individual freedom a bit less and communal well-being a

43. American ideas of property ownership are traced in WILLIAM B. SCOTT, IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH CENTURY TO THE TWENTIETH CENTURY (1977). *See also* Philbrick, *supra* note 12.

44. *Cf.* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1025, 1030 (1992) (suggesting that the state's only interest in land use regulation arises when a landowner's action harms *neighboring* land) (emphasis added).

45. One study of contemporary culture that reveals the persistence of such ideas, particularly the view of farmland as a family rather than individual asset, is SONYA SALAMON, PRAIRIE PATRIMONY: FAMILY, FARMING, & COMMUNITY IN THE MIDWEST (1992).

46. In the case of Western water law, however, the retention was more linguistic than real. Eric T. Freyfogle, *Water Rights and the Common Wealth*, 26 ENVTL. L. 27, 42 (1996) [hereinafter *Water Rights*] and sources cited therein.

bit more. But the connection was not apparent. Land use regulation was viewed largely as an exercise of the police power, a regulatory function that limited property rights but did not alter their shape or character.[47] Environmental regulation seemed even less connected to property rights, for property arose under state law, mostly state common law, while pollution-control rules emerged at the federal level. Such rules appeared to be a different animal entirely, far removed from the time-honored rules that vested owners with the right to reshape and consume the land in pursuit of private gain.

So it was, by the late twentieth century, that industrial property remained the ruling paradigm in the popular mind, even as the tentacles of regulation reached out into the countryside. In practice, land use options were far more limited than they had been just a generation before, but the new regulatory structure had not given rise to a new vision of ownership. Indeed, this structure had not even led to a coherent critique of the industrial ownership ideals that had been entrenched for more than a century. Ownership continued to show its frontier heritage and its support for barely restrained geographic and economic expansion.[48] Land still existed, it seemed, so that human owners could put it to "real use," by cutting trees, plowing soils, draining marshes, or reshaping hills. This was what land was for; this was what ownership was all about.

IV
THE ECOLOGICAL CRITIQUE

While we have clung tenaciously to these inherited ideas about land ownership, our understanding of the natural world has matured considerably. With the advent of ecology and its many subfields, we know far more about the land than ever before.[49] We realize better how we have eroded its soils, disturbed its biology, polluted its air and

47. The ideas in this sentence and the next two are considered at more length in Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands,* 43 UCLA L. REV. 77, 103-06 (1995) [hereinafter *Sensitive Lands*]. An earlier assessment is Philbrick, *supra* note 12, at 708-13.

48. Some of the reasons for this stagnation are considered in Freyfogle, *Sensitive Lands*, *supra* note 47, at 94-108.

49. The most prominent recent development is the new field of conservation biology. A useful introduction is GARY K. MEFFE & C. RONALD CARROLL, PRINCIPLES OF CONSERVATION BIOLOGY (1994). Some of the applications and implications for the United States are considered in REED F. NOSS & ALLEN Y. COOPERRIDER, SAVING NATURE'S LEGACY: PROTECTING AND RESTORING BIODIVERSITY (1994). The legal implications of conservation biology are sketched in Robert B. Keiter, *Conservation Biology and the Law: Assessing the Challenge Ahead*, 69 CHI.-KENT L. REV. 911, (1994). Two of the more important contributions to the overall theory of ecology are STUART L. PIMM, THE BALANCE OF NATURE? ECOLOGICAL ISSUES IN THE CONSERVATION OF SPECIES AND COMMUNITIES (1991); and K. S. SHRADER-FRECHETTE & E. D. MCCOY, METHOD IN ECOLOGY: STRATEGIES FOR CONSERVATION (1993).

water, and degraded its riparian corridors and coastlines. We also know more about ecosystems and cumulative impacts. The message from all this is painfully clear: we are pushing the land too hard. We are expecting too much of it. The health of the land is declining and something needs to change.

Aldo Leopold was not the first observer to phrase the issue of land health in ethical terms, but he was surely one of the most penetrating and lyrical.[50] Better than the lawyers, judges, and philosophers of his day, he was able to see how irresponsible, and thus wrong, our behavior toward the land had become. Leopold drew upon his extensive ecological knowledge to suggest new rules for right and wrong land use, new communal norms governing our dealings with the natural order. Since Leopold's day the field of land ethics has expanded exponentially, with the best of that ethical work drawing upon the most sound findings in the biological and chemical sciences.[51] The goal—and we are progressing toward it—is to combine ethics and ecology, to develop scientifically justified indicators of land integrity that we can use in determining whether or not a given land use promotes the long-term well-being of the surrounding natural community.[52]

Yet despite the increasingly sophisticated insights of ethics and ecology, our law of private property has remained stagnant. The teachings of ecologists, the observations of ethicists, the sophisticated discussions about sustainability and ecosystem health—all have fallen on deaf or disinterested ears, as if the matters under discussion had little to do with the established institution of private ownership. Much of the blame here is rightly directed toward lawmakers and legal commentators, who until recently have paid little attention to the urgent issue of ecological well-being.[53] If they had been more alert, they

50. *See* sources cited *supra* notes 1-3.

51. The field of environmental ethics is surveyed in RODERICK NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS (1989).

52. *See, e.g.*, LAURA WESTRA, AN ENVIRONMENTAL PROPOSAL FOR ETHICS: THE PRINCIPLE OF INTEGRITY (1994) (arguing for an ecologically derived notion of integrity as an overriding moral value); ECOSYSTEM HEALTH: NEW GOALS FOR ENVIRONMENTAL MANAGEMENT (Robert Costanza et al. eds., 1992) (exploring the various ways of assessing ecosystem health as a means for determining the well-being of the larger natural community); LYNTON K. CALDWELL & KRISTIN SHRADER-FRECHETTE, POLICY FOR LAND: LAW AND ETHICS (1993) (drawing on ecological theory to construct a land use ethic).

53. The efforts of legal scholars to address this issue are usefully surveyed in Terry W. Frazier, *The Green Alternative to Classical Liberal Property Theory*, 20 VT. L. REV. 299, 302 (1996) (citing sources). Two of the most thoughtful works are Joseph L. Sax., *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993); and David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311 (1988). Key works from outside the legal literature include TIMOTHY BEATLEY, ETHICAL LAND USE: PRINCIPLES OF POLICY AND PLAN-

would have seized this new wisdom decades ago and transformed it into a much-needed critique and revision of private ownership. They would have pointed out the many ways that our ownership norms make little sense in an age of ecological knowledge and ecosystem decline. They would also have pointed out how this new wisdom compels a broader conception of community, one that encompasses people, land, and generations to come.[54]

Our guiding norms of landed property rights incorporate precious little of this ecological knowledge and reflection. The shortcomings lie not in the details of property law; they cut deeper, to the central ideas of what ownership entails.[55] The most obvious defects are several:

1. Property law assumes that people are distinct from the land—that humans are subjects and the land is mere object. Humans possess moral value; the land does not. Harm to humans deserves redress; harm to the land does not. Aldo Leopold emphasized this problem a half-century ago, when he blamed "our Abrahamic concept of land" for our conservation woes. "We abuse land," he wrote, "because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect."[56]

2. Property law assumes that humans can draw lines on the land and thereby divide it meaningfully into discrete pieces. For some purposes, lines between landowners or political jurisdictions do make sense, but in other, readily overlooked, ways, they are pernicious. Nature does not observe our lines, except in the rare cases where we let nature set them for us. Migrating animals do not stop at artificial borders, nor does drifting pollution. If the prime lesson of ecology is that of interconnection, property law has not yet learned it.

NING (1994); CALDWELL & SHRADER-FRECHETTE, *supra* note 52; and Wendell Berry, *People, Land, and Community*, *in* STANDING BY WORDS 64-79 (North Point Press 1983).

54. Perhaps no modern American writer has been more insistent upon the value of community, and more expressive in linking people, land, and remote generations, than the Kentucky farmer and writer, Wendell Berry. His work is assessed in ANDREW J. ANGYAL, WENDELL BERRY (1995); WENDELL BERRY (Paul Merchant ed., 1991); and Eric T. Freyfogle, *The Dilemma of Wendell Berry*, 1994 U. ILL. L. REV. 363 (1994).

55. I consider these five points in more detail in Eric T. Freyfogle, *Ownership and Ecology*, 43 CASE W. RES. L. REV. 1269 (1993). The points that I enumerate here deal chiefly with the ideas of ownership that the law incorporates and helps to perpetuate, more so than with the details of property law. The law's role in supporting public values is considered in Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996). The government's role in changing dominant social norms is explained and defended in Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 947-68 (1996). The differences between private property as cultural image and the operative institution of private ownership, are considered in Laura S. Underkuffler-Freund, *Takings and the Nature of Property*, 9 CANADIAN J.L. & JURIS. 161 (1996).

56. LEOPOLD, *supra* note 2, at viii-ix.

3. Lines drawn on the land usually lead to separate land management regimes. Parcel A is managed by one owner, parcel B by another. Government A has authority over here, government B over there. In nature's scheme, the scheme that ought to influence the ground rules, discrete parcels simply do not exist and fully uncoordinated management by humans rarely promotes community well-being. For private ownership to remedy this shortcoming it needs governing norms that draw upon a shared vision of land health. When owners and managers head out onto the land, they need to sense how their work fits together with the work of others, and how all of it promotes the integrity and bounty of the whole. They need to sense that they are part of a community of responsible neighbors, each guided by a similar vision of sustainable life, each knowing that ownership means duty, that duty means care, and that care, in the end, is our sole source of hope.

4. As does our culture generally, property law places too much weight on market value. When ecologists and ethicists talk of sustaining the land, they mean the land in nature's terms—the land as the source of fertility and locus of life. In landed property lore, however, market definitions rule the roost, as if land health and sickness were simply a matter of credits and debits in a bank book, as if trees grew tall merely because an owner paid good money for the land. When harm does not cost an owner money in the market, the law turns a blind eye. When money is paid, we think all is made right, as if displaced animals could draw on the bank for food and shelter.

5. The most fundamental flaw of property law, and the most evident way in which the law is ecologically ignorant, is the law's inability to see how land parcels differ. Back when Sir Henry Maine spun his evolutionary tales, legal scholars were working just as hard to turn law into a science. They did so largely by abstraction, stripping away factual details and formulating principles that applied broadly to ranges of human conduct. The entitlements of private ownership were determined not by reference to particular parcels of land with particular soils, terrain, vegetation, and animals, but by reference to a hypothetical, featureless land parcel, the parcel that generations of law students have come to know as Blackacre.[57] Because property law dealt with relative rights among people—rights the owner had against the rest of the world—it became easy for lawyers to see only the people and overlook the land itself. The rights of Blackacre's owner would be the

57. A classic enumeration of the full "bundle of sticks"—that is, the rights that are held by the owner of the hypothetical Blackacre—is Anthony Honore, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 147 (A. G. Guest ed., 1961). A detailed critical study of the idea is J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996).

same rights enjoyed by all other landowners, and would not depend on where Blackacre might be and how a person might wisely use it. The details of the place had faded into irrelevance.

V
RECONNECTING

When Leopold penned his land ethic in the 1940s, there was hardly a murmur of interest in reconceiving landed property rights from an ecological perspective. Belatedly, but now in earnest, property scholars have turned to the task, initially to critique inherited ideas, now to propose replacements for them. As property scholars set about constructing an ecologically sound property regime, they face the tandem task of explaining how society might embrace it, and how society might do so without unfairly hurting existing property holders. Much of this latter task will require a communal act of remembering. It will entail reminding the community, repeatedly and forcefully, that private property is a changeable cultural creation, justifiable only so long as it contributes to our overall well-being.[58]

The ecological reconstruction of our ownership norms is likely to draw extensively upon three interconnected strands of thought—ethics, community, and humility—that figure so prominently in the environmental critique of modern culture. It is useful to pause and briefly consider each of these strands before turning to consider more particularly the likely elements of an ecologically-based ownership regime.

Modern environmental thought draws as much upon ethics as upon ecology, challenging our value schemes as profoundly as it does our day-to-day conduct. It calls upon us to broaden our sense of moral worth to include more than just humans, to think about the land in more than just economic terms. The diversity of thought within this ethical strand of environmentalism is vast and confusing,[59] dealing as it does with the varied ways of recognizing moral worth in other species, ecological communities, and future generations of humans. This diversity is compounded by the many overlapping, inconsistent factors involved in making moral judgments, including rights, utility, sentiment, virtues, and religion. Yet amid this vibrant diversity lies a common thread: land use is a public matter as well as a private one; it is an issue of ethics, not just expediency.

Another way to phrase the principal goal of environmental thought is that it seeks to reattach us to each other and to the rest of

58. Francis Philbrick identified this need—to explain the positivist, utilitarian bases of property and to counteract the lingering burdens of natural law reasoning—in his classic 1938 study. Philbrick, *supra* note 12, at 710-11, 728-31.

59. *See* NASH, *supra* note 51.

the natural order. It is, accordingly, a profound challenge to the individualism of the modern age, particularly the individualism so manifest in economic thought.[60] In the ecological world view, humans are part of a larger creation and ultimately depend on its integrity and health. So great are the interdependencies among the parts, so numerous and extensive are the connecting links, that it is misleading and ultimately dangerous to speak of any individual organism as a distinct being—or to speak of the human species as a distinct element of the natural order, or to speak of a tract of land as a discrete part of the Earth. We cannot meaningfully consider the health of humans apart from the health of the land, nor the well-being of one human apart from the well-being of the surrounding human and natural community. Environmentalism perforce compels a communitarian perspective, not to the exclusion of honoring the individual, but as a contextual supplement to it.

So complex are these interdependencies among organisms, species, and geophysical elements—indeed, so complex are the individual pieces of nature studied one by one—that even the most knowledgeable scientists are quickly overwhelmed. The natural order is more intricate than we can hope to understand; its ways and linkages are far beyond our comprehension. The best way to respond to this complexity is to admit our ignorance and develop methods to deal with it. We need to find ways in our decisionmaking processes to make up for the huge gaps in our knowledge—perhaps by drawing on sentiment, as some suggest, perhaps by drawing upon spiritual perspectives, as others recommend.[61] However the gaps are filled, we are wise to act humbly and expect mistakes. We are wise to err on the side of caution so that we do not repeatedly surprise ourselves with grave environmental harms. We are more likely to embrace this kind of humility, and to remain alert to local signs of decline, if we can become more engaged with the places where we live, more aware of their features and more attuned to signs of good and bad health. We are more likely to care for our home if we develop an emotional, even spiritual attachment to it, if we can foster within ourselves, individually and collectively, a sense of permanent belonging to our chosen place.[62]

These three strands of environmental thought, together with the maturing ecological critique of private property, provide us with the raw materials for a new understanding of private land ownership. The

60. The issue is considered in Eric T. Freyfogle, *The Ethical Strands of Environmental Law*, 1994 U. ILL. L. REV. 830, 830-31 (1994).

61. ERIC T. FREYFOGLE, JUSTICE AND THE EARTH: IMAGES FOR OUR PLANETARY SURVIVAL, 133-54 (1993).

62. This point is argued in WES JACKSON, BECOMING NATIVE TO THIS PLACE (1994). *See also* SCOTT RUSSELL SANDERS, STAYING PUT: MAKING A HOME IN A RESTLESS WORLD (1993).

goal is to create a healthy, lasting law of private property rights, one that enables and encourages a rights-holder to live in right relation to the land—not to own the land, in the arrogant way that we too often use the term, nor yet to be owned *by* the land, as if the rights-holder had no legitimate role in plotting its future, but to live in harmonious partnership with it, working to make the land fruitful while respecting its limits and residing always in awe of its inscrutable power. Because such a change will tamper with a vital element of modern life, those who attempt it, legal scholars as much as others, must realize that it is a long-term project. Such a change proposes the work of decades or more and it is certain to encounter the determined resistance of people wedded to the still-common view of land as inert, consumable, and spiritless.

1. *Owning as belonging.* The place to begin in reconceiving land ownership is to realize that land parcels are inherently connected and that each parcel, and hence each owner, belongs to a larger community. A person is unlikely to use land responsibly without an awareness of the seen and unseen links, the inevitable spillovers and externalities. It must become clear that land ownership entails membership in a larger community, creating responsibilities as well as rights.

2. *Promoting land health.* If land ownership is to continue fulfilling its many useful functions, in terms of promoting economic enterprise, fostering family and individual privacy, and the like, it must allow owners to put their land to use. But that use—where it is done and how it is done—must be consistent with the overriding communal goal of sustaining the health and integrity of the larger natural order, an order of which the landowners are a part. Leopold phrased this goal in terms of the well-being of the biotic community.[63] More common phrasings today use terms such as ecosystem health, ecological integrity, and sustainable land use, with frequent reference to the maintenance of biodiversity and the normal functioning of ecosystem processes.[64] However it is phrased—and we can safely assume that

63. *See supra* text accompanying note 3.

64. *See* sources cited *supra* notes 59, 52; Freyfogle, *Sensitive Lands*, *supra* note 47, at 109-14. Professor Terry Frazier has sought to rephrase Leopold's land ethic to take into account new knowledge of the ways in which ecosystems inevitably change in response to disturbance:

> An action is right when it tends to preserve the integrity of a biotic community. An action is wrong when it tends otherwise. An action tends to preserve the integrity of a biotic community when it tends to maintain the ability of each species within that community, as well as the community as a whole, to evolve and change in response to, and to recover from, the necessary and inevitable disturbances that will occur naturally over time.

Frazier, *supra* note 53, at 331 (citations omitted). The legal impacts of the new ecology of disturbance and nonequilibrium are considered in Fred P. Bosselman & A. Dan Tarlock, *The Influence of Ecological Science on American Law: An Introduction*, 69 CHI.-KENT L.

new phrasings will arise—the prime goal is community well-being. The aim is a way of life that sustains the land and the people who live there, while leaving the land productive for generations to come.

A commitment to foster the land's long-term health will seem more sensible if landowners can develop a feeling of settled permanence, an affectionate bond to place that includes a concern for the life that will inhabit the land in the future.[65] This feeling depends largely on the character of the owner, a matter that property law can influence only a bit. But permanence is also aided by a feeling of economic security, for the owner, the family, and the surrounding community. Economic security is a matter that the law can address, as can other mechanisms for implementing public policy. Secure land tenure is part of this security, but the main pressures on landowners today are more market-driven than legal. Such pressures have to do with low incomes, pressures to compete by abusing the land, and the decline of the local community as a center of economic activity.[66] Until these matters are successfully addressed, too many landowners will remain motivated by short-term concerns.

3. *Embracing our ignorance.* In the law of private property, as in environmental thought generally, a prominent place is needed for human ignorance. Land ownership must come to mean a right to use the land humbly, within the limits set by the land—limits that we often see dimly.[67] The correlative rule here is an acceptance of liability for land degradation, and a pledge to do what is possible to restore it. Humble land use will often mean a low burden of proof for claims of unsustainable land use or land degradation. It will mean finding ways to avoid problems before they arise.

4. *Sensitivity to place.* Given the complexity of nature and the paramount need to promote community well-being, land use norms must stimulate an attention to place. They must foster a willingness to tailor land uses to the characteristics and possibilities of each tract.

REV. 847, 863 (1994); Jonathan Baert Wiener, *Law and the New Ecology: Evolution, Categories, and Consequences*, 22 ECOLOGY L.Q. 325 (1995).

65. Lyrical views on the importance of place are offered in JAMES GALVIN, THE MEADOW (1992); JACKSON, *supra* note 62; DAVID KLINE, GREAT POSSESSIONS (1990); GENE LOGSDON, AT NATURE'S PACE: FARMING & THE AMERICAN DREAM (1994); DEBORAH TALL, FROM WHERE WE STAND (1993); and throughout the writings of Wendell Berry, *see* sources cited *supra* note 54.

66. One sobering study of the plight of rural communities is OSHA GRAY DAVIDSON, BROKEN HEARTLAND: THE RISE OF AMERICA'S RURAL GHETTO (1990). A perceptive literary portrayal, focusing (like Davidson's book) on the Midwestern corn-belt, is DON KURTZ, SOUTH OF THE BIG FOUR (1995).

67. An extensive literature now exists on how humans are best guided in their efforts to use the land without degrading it. Various views are offered in WILLIAM S. ALVERSON ET AL., WILD FORESTS, CONSERVATION BIOLOGY AND PUBLIC POLICY (1994); RENE DUBOS, THE WOOING OF THE EARTH: NEW PERSPECTIVES ON MAN'S USE OF NATURE (1980); and WES JACKSON, NEW ROOTS FOR AGRICULTURE (rev. ed. 1985).

Land uses must be set, not just by what is economically and physically possible in a place, but by the role of the tract in the surrounding ecosystem. The owner must begin by asking what land use makes sense in nature's terms, what land use is consistent with the continued health of the community. Ownership entitlements, then, will vary from place to place in terms of the land uses that are permitted and how they are undertaken. What they will share is a commitment to live within nature's limits.

5. *Sharing landscape-scale burdens.* If the larger landscape is to remain healthy, individual landowners must become cognizant of the needs of that landscape, such as wildlife habitat, aquifer protection, and waterway integrity. Good ownership must come to include a fair sharing of these landscape-scale burdens. The Endangered Species Act is sometimes criticized for requiring a few landowners to shoulder a burden—biodiversity protection—that should be spread more widely.[68] Whatever the merits of the complaint, the type of argument is a sound one. The promotion of biodiversity should be a shared obligation that attaches in some way to more or less all land. Every rural landowner, perhaps even some suburban ones, should face an obligation to leave room for wildlife, just as the owner should help maintain hydrological cycles and other ecosystem processes. Nature preserves should still be maintained at public expense, and not become an involuntary private burden. But most plants and animals need more than scattered islands of habitat to sustain healthy populations.[69] They need linkages and corridors in which to travel or spread, if not large patches or landscapes for breeding or defense. In some cases a landowner's particular duty will be to leave strips of land undisturbed; in other cases it might entail a change in land use activities from one that disrupts natural communities to one that is more consistent with them.

6. *Promoting local knowledge.* Good land use is best understood as an art, tailored to the uniqueness of each place and sensitive to the possibilities and limits set by nature. One does not learn this kind of land use from a book or in a school. It arises more often from experience, from the lessons learned over time by attentive land stewards—by farmers, timber owners, golf-course managers, miners, builders, and homeowners' associations, as well as by the managers of communal lands like highway corridors, forest preserves, and parks. Much of this knowledge will be local, tied to the terrain, soils, climate,

68. *See, e.g.*, CHARLES C. MANN & MARK L. PLUMMER, NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES (1995).

69. The chief focus of the new field of conservation biology is the study of imperiled species—how and why their populations decline, and what must be done to improve their plights. Much of the focus is on habitat needs and ways of designing and reconstructing new habitats. *See* sources cited *supra* note 49.

hydrology, biodiversity, and economy of a place, and it will arise by the cautious, trial-and-error method that environmentalists have come to call adaptive management.[70]

Ownership norms need to stimulate local searches for ways to use the land without degrading it. They should encourage inexperienced landowners to draw upon the fund of local knowledge (where it exists) by turning to neighbors who have acquired land and helped preserve it. Norms should also encourage landowners to share what they have learned, and to participate in the process of developing, implementing, and perpetuating local wisdom on how to live successfully in a particular place.

7. *Landscape-level planning.* Good ownership will include the owner's participation in landscape-level planning. Land health cannot revive without plans that cover large areas, such as watersheds, ecosystems, or even bioregions.[71] Owners need to help prepare these plans, both so they can lend their wisdom and skills to the planning process and so they will more readily accept the finished products. The law of private property should encourage this process of shared decisionmaking.[72]

As individual landowners gather to share their knowledge, values, and visions, they are more likely to learn more about the health of their home regions. They are more likely to notice the many signs of landscape decline—eroding soil, declining water quality, stunted trees, disappearing wildlife—and to accept responsibility for the ecological problems they share. They are also more likely to understand the steps that might heal the land, and why these steps are worth taking. Until landowners learn about these problems and see the benefits of addressing them—and until they know that their neighbors, or most of them, will join in addressing them—they are unlikely to perform the needed work.

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70. The idea is developed in KAI N. LEE, COMPASS AND GYROSCOPE: INTEGRATING SCIENCE AND POLITICS FOR THE ENVIRONMENT 51-86 (1993).

71. This point is the chief conclusion of conservation biology. *See* sources cited *supra* note 49. Bioregionalism is considered in KIRKPATRICK SALE, DWELLERS IN THE LAND: THE BIOREGIONAL VISION (1985), and more poetically in GARY SNYDER, THE PRACTICE OF THE WILD 25-47 (1990).

72. A useful guide for the design of political processes is DANIEL KEMMIS, COMMUNITY AND THE POLITICS OF PLACE (1990). An illuminating study of local action, both successful and unsuccessful, is DEWITT JOHN, CIVIC ENVIRONMENTALISM: ALTERNATIVES TO REGULATION IN STATES AND COMMUNITIES (1994). Two illustrations of such local processes are considered in TIMOTHY BEATLEY, HABITAT CONSERVATION PLANNING: ENDANGERED SPECIES AND URBAN GROWTH (1994) (explaining the operation of habitat conservation planning processes under which landowners can jointly develop plans for compliance with the habitat preservation rules of the Endangered Species Act); and John H. Davidson, *Using Special Water Districts to Control Nonpoint Sources of Water Pollution*, 65 CHI.-KENT L. REV. 503 (1989) (discussing how the model of drainage districts might be used to help landowners jointly develop ways to reduce nonpoint-source water pollution).

These seven guiding ideas are not small ideas, and they are sufficiently new to warrant a good deal more reflection. As that task progresses, however, we should continue the hard work of translating these guiding ideas into specific rules and processes, proceeding as always by trial and error. It is hardly possible to list all of the forms that these rules and processes might take, but a few examples can illustrate the likely range:

1. Decades ago the law of public nuisance sought to protect communities from bad land use.[73] Today, nuisance law again can become a useful tool for discouraging environmentally unsound land practices. For this to happen, nuisance law must do more than merely protect identifiable neighbors from immediate harm. The definition of nuisance should be broadened to encompass land uses that sap the health of the natural community. It must include harms that are widespread, such as soil erosion and large-scale clearcutting, as well as harms that are hard to trace or slow to emerge.[74] Land uses that degrade the health of ecological communities are public nuisances in the ordinary sense of the word; they diminish the entire human and natural community.

A revitalized law of public nuisance can push landowners to promote the health of the local land, drawing upon local knowledge and usefully supplementing local landscape-level planning efforts. With its flexible standards that draw upon communally set standards of right and wrong, public nuisance is easily tailored to the peculiarities of a given place and thus can help promote a sensitivity to that place. With an appropriately low burden of proof, it can allow challenges to land use practices that do not cause immediate, traceable harm, and thus can help deal with the considerable limits on human knowledge. Perhaps above all, a revitalized public nuisance doctrine can add back to our land ownership discourse a way of talking meaningfully about land uses that threaten the communal whole. It can give us a way to think and speak more in collective terms, and thus to rise above our individualistic leanings.

2. Western water law requires that water uses be "beneficial," but it retains an antiquated nineteenth-century definition of the term. The time has come for an updated, ecologically sound definition, one that requires owners to use water in ways that promote not just the

73. The law of public nuisance and its possible reform are considered in L. Mark Walker & Dale E. Cottingham, *An Abridged Primer on the Law of Public Nuisance*, 30 TULSA L.J. 355 (1994); and David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizens Suits for Relief from Environmental Harm*, 16 ECOLOGY L.Q. 883 (1989).

74. The issue of standing in such settings is considered in Michael C. Skotnicki, *Private Actions for Damages Resulting from an Environmental Public Nuisance: Overcoming the Barrier to Standing Posed by the "Special Injury" Rule*, 16 AM. J. TRIAL ADVOC. 591, 595-96 (1992).

human economy, but the health of the surrounding land.[75] Irrigation practices need particular attention. Many low-valued irrigation uses, particularly ones that pollute surface waters or deplete aquifers, will likely need to end. As in the case of public nuisance law, a revitalized definition of beneficial use can help promote land health by bringing damaging resource-use practices to an end. With its inherent flexibility, the definition is easily tailored to take into account the ecological peculiarities of a place. Its application can draw upon local knowledge of how best to use water without damaging the surrounding community. As in the case of public nuisance, perhaps the greatest gain can come from a renewed focus on the community impacts of a given water use. When "beneficial" plainly means beneficial to the community, attention is naturally drawn to the community and its needs, and to the ways that particular water uses affect the larger landscape. The issue is no longer gain to the holder of a water right, but rather the effects of a use on the larger whole.

3. Given how extensively we have altered natural drainage patterns and flood regimes over the past three centuries—and the many bad consequences of that manipulation—much future work will no doubt focus on the integrity of hydrological cycles and the natural functioning of waterways. The landowner's right to drain needs serious rethinking, not just in the case of wetlands, but wherever drainage materially disrupts natural water flows. The activities of drainage districts also need reform, particularly where they retain a single-minded focus on dredging and channelling.[76] Much of this work will require local action, bringing landowners together at the watershed level to learn, discuss, and plan.[77]

The reform of drainage law, including the operation of drainage districts, can usefully promote attention to landscape-scale problems. When a landowner's right to drain is linked to the integrity of the local watercourse, and when needed reductions in drainage must somehow be apportioned among neighboring land owners, some degree of cooperation is likely to occur. As landowners learn more about drainage, they will inevitably educate themselves on watershed-level

75. Freyfogle, *Water Rights*, *supra* note 46, at 42.

76. One thoughtful proposal for reform is Davidson, *supra* note 72.

77. The need for wide-area land planning, involving multiple landowners, is considered in BOB DOPPELT ET AL., ENTERING THE WATERSHED: A NEW APPROACH TO SAVE AMERICA'S RIVER ECOSYSTEMS (1993); Robert W. Adler, *Addressing the Barriers to Watershed Protection*, 25 ENVTL. L. 973 (1995); Mike Bader, *The Need for an Ecosystem Approach for Endangered Species Protection*, 13 PUB. LAND L. REV. 137, 142 (1992); Lee P. Breckenridge, *Reweaving the Landscape: The Institutional Challenge of Ecosystem Management for Lands in Private Ownership*, 19 VT. L. REV. 363 (1995); William Goldfarb, *Watershed Management: Slogan or Solution?*, 21 B.C. ENVTL. AFF. L. REV. 483 (1994); Robert Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293 (1994).

problems. They will come to see themselves as parts of a community defined by nature. They will gain, to one degree or another, a greater sensitivity to their chosen place.

4. The protection of biodiversity will entail work at all levels of government, gathering information and developing coordinated land planning strategies.[78] Often, governments will need to purchase lands and interests in lands (such as conservation easements) to help achieve this vast goal. But much of the work will require action by landowners, private and public. Legally structured processes must help bring owners together, push them to find ways to promote wildlife, and encourage them to formulate and shoulder their fair-share burdens. In many parts of the country, no shared undertaking by local landowners is more likely than the protection of biodiversity to succeed in making neighbors aware of the needs of their local land, and to see the interconnections among land uses. Because so many species are sensitive to human activities, the promotion of native species will often nourish the health of the larger natural community. When private ownership comes to include an obligation to leave room for wildlife, it will push owners to move far beyond individual concerns. It will foster an increase in local knowledge. It will necessitate landscape-level action.

VI
PUSHING AHEAD

Progress has already been made in many of these areas, enough to put us on the path toward a more ecologically sound scheme of landed property rights. Resistance, however, remains great, and it stems from sources that loom large in the path ahead.

One obvious hurdle is the simple reality of ecological ignorance, which remains widespread. Though Americans want a healthy environment, we are uncertain what that means. We have trouble recognizing even blatant signs of declining land health. In an urban age, most of us have never intimately known a patch of earth, and so feel little attachment to the land. Too many of us have forgotten that land is our source of fertility, the great connector through which death is transformed into new life.[79]

There is also the daunting reality of our continuing individualism. To promote land health is to promote a mode of thought that joins

78. The possible roles of local governments are considered in A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 U. CHI. L. REV. 555, 574-83 (1993).

79. The writer who is working hardest to remind us of these truths is Wendell Berry. *See, e.g.*, WENDELL BERRY, THE UNSETTLING OF AMERICA: CULTURE & AGRICULTURE (1977); WENDELL BERRY, THE GIFT OF GOOD LAND (1981).

people and land together into a larger, morally vital community. If we are to progress further in restoring land health, we need to reinvigorate our senses of community—particularly local community—always making clear that the land is an essential part of that community. As a people we need to remember what we once knew instinctively and have only recently forgotten: that we are social animals, part of human and natural communities, linked to past and future generations, and dependent for our well-being on the health of the whole.[80]

This way of thinking is gaining strength, but, like other communitarian perspectives, it remains under attack—from libertarian philosophers, free-market traders, and rabidly anti-government politicians, as well as from the community's more familiar opponent, the self-centered individual.[81] So influenced are we these days by liberal thought and market economics that we instinctively raise the individual far above the group and measure all things, people and land alike, by

80. *See* Erazim V. Kohak, *Possessing, Owning, Belonging*, *in* BEYOND THE WELFARE STATE (Irving Howe ed., 1982) (offering a socialist perspective on the need to limit the powers of property owners to foster communal values).

I do not mean to suggest that property should serve solely the community at the expense of individual liberty; my point (I hope plain enough) is that we have tilted too far in the direction of individualism and need to redress the balance by recognizing greater worth in the community. The environmental critique is only one of several forces pushing us in that direction. Private property has long displayed a tension between the promotion of individual autonomy and community well being. This characteristic is considered in Alexander, *supra* note 25; Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 139 (1990). This tension was distinctly present even during the era when natural law reasoning enjoyed considerable support and property rights were gaining protection in the Constitution. Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273 (1991). In the concluding paragraphs of his study, Francis Philbrick called strongly for the recovery of the sense that ownership entailed social responsibility. Philbrick, *supra* note 12, 730 ("[T]he institution of property . . . is a creature of law, only justifiable (like all law) by utilitarian considerations. It follows . . . that social interests must control our choices; the individual interests only so far as they advance the general interest.").

81. *See* SAMUEL BOWLES & HERBERT GINTIS, DEMOCRACY & CAPITALISM: PROPERTY, COMMUNITY, AND THE CONTRADICTIONS OF MODERN SOCIAL THOUGHT (1987) (criticizing modern thought for its excessive focus on the autonomous individual, and proposing an alternative philosophy that promotes democratic communities). A useful collection of essays on ways to promote communitarian thought and institutions is NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES (Amitai Etzione ed., 1995). The most prominent libertarian argument is RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). The anti-government sentiment is assessed in chapter 4 of *Let the People Judge: Wise Use and the Private Property Rights Movement* 11-35 (John Echeverria & Raymond Booth Eby eds., 1995).

In a useful and thoughtful study, Louise Halper explains how the central organizing idea in Justice Scalia's ruling in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), is his denial of any idea of community or public interest that transcends the interests of landowners aggregated as individuals. Louse A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329 (1995).

their market equivalents.[82] What we have yet to grasp is that the market is not a community, at least not a community that values health, long-term or otherwise. In the market's selfish realm, a land use is proper whenever it makes money for the owner, let the community be damned. Limits on private ownership place shackles on individual liberty, and the fewer of them the better.

The human landscape, as Wendell Berry has observed, is usefully divided today into two parties: the party of the global economy and the party of the local community.[83] There is no question which one is now winning, but there is also no question that there remains a resilient minority tradition, a persistent localism that is sustained by shared ties to a place. Characterized and led by thousands of well-settled people, this minority tradition exalts the virtues of staying put and promoting lasting health.[84] It embraces a mode of life centered around face-to-face contacts, in settings of mutual and continuing concern. Its vocabulary includes the words "sharing" and "responsibility." Its definition of "proper" looks first to the well-being of the whole. To own land in such a place is to belong; it is to be a member, a part of something larger, a worker for the common unity.

If property law is ever to embrace an ecologically sound land ethic, it will be due to the work of this pressured but durable minority, to the values that these people promote and to the inspiration that they offer. In these people one finds a love of the land and a passionate concern for its lasting health. In them one finds an attention to the peculiarities of place and an understanding of what it means, in practical terms, to treat the land with respect. In them, and in the tradition they carry on, there lies promise and hope.

CONCLUSION

No matter how successful we are in revitalizing community and promoting ecological literacy, land ethics and private property will never completely merge. Nor should they. Private property law can never be detailed enough to direct owners how to use their particular lands in healthy ways. As wise stewards know from experience, to use a piece of land properly requires intimate knowledge of it and long-

82. I do not mean to suggest that there is a sharp line between liberalism and communitarianism; a recent example of work that transcends the distinction is SANDEL, *supra* note 42.

83. Wendell Berry, *Conserving Communities*, *in* ANOTHER TURN OF THE CRANK 8, 16-21 (1995).

84. Alan B. Durning, *Grass-Roots Groups Are Our Best Hope for Global Prosperity and Ecology*, *in* LEARNING TO LISTEN TO THE LAND (Bill Willers ed., 1991). Other treatments include REBUILDING COMMUNITIES: EXPERIENCES AND EXPERIMENTS IN EUROPE (Vithal Rajan ed., 1993); NATURAL CONNECTIONS: PERSPECTIVES IN COMMUNITY-BASED CONSERVATION (David Western et al. eds., 1994).

term commitment to it—things distant lawmakers can never have. There will thus always be a vital need for responsible, ethical landowners. There will always be a need for people to talk about good land use, to promote local wisdom, and to share that wisdom with their neighbors.

But private ownership norms should provide the structural framework; they should incorporate and proclaim a land ethic and be based on the durable wisdom of ecology. The law plays a central role in dispensing communal wisdom and educating people about right and wrong conduct, a role becoming all the more critical as communal bodies—newspapers, colleges, government offices, and, most of all, corporations—don the mantle of ethical neutrality, as if it were a responsible moral garb. When we look to the law of private property, we need to receive messages that charge us to act ethically. We need to see that private ownership entails responsibility, that it means belonging to a community and abiding by its norms, that it requires us to sustain and improve the health of the land. We need to see, plainly and foremost, that private ownership demands doing what is proper.