

CHAPTER EIGHT

PROPERTY AND THE ENVIRONMENT

WE COULD NOT adequately treat the problems of property rights in land without considering some of the environmental issues raised by any form of property rights. Since land is the basis for the whole environment, property rights in land necessarily affect environmental issues. Sometimes it is pointed out that strictly speaking the environment consists of all the influences—cultural, political, social, as well as physical—that surround mankind and his society. This is, of course, true, but for present purposes, we must limit our discussion to the physical, and to a certain extent social, aspects of environmental concern.

Access to land provides a sure way in which man may interact with the environment. For better or worse, those who hold property rights to land will affect and be affected by the environment. As we have pointed out already, the distinct advantages that different sites enjoy are often directly related to environmental factors, and, if they are not directly related, they are certainly indirectly related, for urban land must have specific features in order to support a large population. Everyone knows that Manhattan is built on granite bedrock, is located in a good harbor, has a moderate climate, enjoys access to water supplies, and is surrounded by good farmland. It is really not too difficult to understand, just on the basis

of these environmental factors, why New York City is the preeminent city on the United States.

We do not want to go over ground (!) covered in Chapter Five on 'The Special Significance of Land.' What we are concerned with here is the question of environmental ethics in relation to ownership of land. Though there have been some recent work and suggestions on this aspect of property rights, it still remains an area much neglected in law and philosophy. Indeed it seems that only a few voices have been raised in defense of the environment within the professional community. Things are changing, but not too rapidly.¹

A number of people have remarked that the present generation seems bent upon proving that it is within its power to leave the earth a barren, uninhabitable place even without the occurrence of nuclear warfare. So voraciously do we devour the earth and its treasures that within a not-too-distant future extreme scarcity of primary resources will be a fundamental problem. Even now forests are being defoliated, soil is being eroded, seas

¹See, Herman E. Daly, ed. Economics, Ecology, Ethics: Essays Toward a Steady-State Economy (San Francisco: W. H. Freeman and Co., 1980); Warren A. Johnson and John Hardesty, eds. Economic Growth vs. the Environment (Belmont Calif.: Wadsworth Publishing Co., 1971); Richard G. Wilkinson, Poverty and Progress: An Ecological Perspective on Economic Development (New York: Praeger, 1975); William Ophuls, Ecology and the Politics of Scarcity: Prologue to a Political Theory of the Steady State (San Francisco: W. H. Freeman and Co., 1977).

are being fished out, yet the general response is much lamentation, pointed accusations and direful predictions, but very little in the way of resourceful restrictions or regulations. Part of the problem can be traced to the lack of legal jurisdiction—both on a national and on an international scale—, but much of it comes from the difficulty of overcoming the inertia created by the tremendous speed in which the industrial world has been moving against conservation and rational utilization of natural resources. This is particularly, and almost criminally, the case with the United States. To cite one comment, almost at random:

No other country in the history of the world has devoured inorganic resources, so voraciously and developed an economy which seems so dependent on the continuous enlargement of its own appetite. It is difficult to view the present trends and the continuing expectations of the large urban populations of this wealthy country with anything but alarm.²

When something like 6 percent of the world's population consumes close to 30 percent of the world's resources, there is grave cause for alarm. If others were to imitate the American lifestyle (and of course they are being encouraged to do so), there is not much chance that the planet could sustain civilization for more than a score of years or more. Even the most optimistic economists and agricultural experts note that the earth could support about 47 billion people at American standards of consumption

²S. R. Eyre, The Real Wealth of Nations, p. 131.

or 157 billion if we all lived like the Japanese.³ And these figures make the untenable assumption that other resources—water, oil, minerals, etc.—would be available in sufficient quantities. The most important point that needs repeating is simply that the world is a place of finite resources, of diminishing returns. Even with the most efficient utilization of the earth and its fruits, we live in a time when conservation is an economic, as well as an ethical, imperative.

Concern for the environment is not a new development.⁴ Though in the first half of the twentieth century, it suffered a marked decline in support, it can be traced back to Jefferson and certainly through Theodore Roosevelt. Consider the contemporaneous sound of this Declaration from a Conference of United States Governors prepared in 1880:

We agree that the land should be so used that erosion and soil wash shall cease; and that there should be reclamation of arid and semi-arid regions by means of irrigation, and of swamp and overflowed regions by means of drainage; that the waters should be so conserved and used as to promote navigation, to enable the arid regions to be reclaimed by irrigation, and to develop power in the interests of the people; that the forests which regulate our rivers, support our

³Ibid., p. 131

⁴C. J. Glacken, Traces on the Rhodian Shore (Berkeley: University of California Press, 1967) is perhaps the most interesting study of man's ambivalent attitude towards his environment.

industries, and promote the fertility and productiveness of the soil should be preserved and perpetuated; that the minerals found so abundantly beneath the surface should be so used as to prolong their utility; that the beauty, healthfulness, and habitability of our country should be preserved and increased; that sources of national wealth exist for the benefit of the people, and that monopoly thereof should not be tolerated.⁵

What went wrong? Clearly much of the problem can be traced to the lack of carefully monitored land use regulations.

And this, of course, can be at least partially blamed upon an ill-conceived conception of property rights in land.

What we need to do is see whether or not we can outline a reasonable and environmentally sound notion of property rights that will reflect both economic and ethical requirements.⁶

Immediately we are confronted with several obstacles:

(1) entrenched attitudes toward property rights; (2) competing conceptions of economic efficiency; (3) fundamental disagreement about what responsibility is owed to future generations; and (4) the problem of 'social costs'. We shall give our attention to each of these in turn.

⁵The Declaration of Governors for Conservation of Natural Resources, pp. 186-8 in I. Burton and R. W. Kates, eds., Readings in Resource Management and Conservation. (Chicago: University of Chicago Press, 1965).

⁶See, especially, Yannacone, "Property and Stewardship—Private Property Plus Public Interest Equals Social Property;" Caldwell, "Rights of Ownership or Rights of Use?—The Need for a New Conceptual Basis for Land Use Policy;" and Large, "This Land is Whose Land? Changing Concepts of Land as Property."

(1) Entrenched attitudes towards property

As this study has attempted to show so far, the divergence between popular conceptions of the rights to property and legal and philosophical notions of property rights is often great. But this does not mean that increased understanding is impossible or unlikely. As with all legal rights, public awareness comes from experience. The strict enforcement of rights and duties makes people conscious of their prerogatives and responsibilities better than abstract discussions or philosophical debates. So long as the courts ground their decisions upon reasonable premisses, they need not worry about public reaction. To see this we need only witness the changes wrought in the area of civil rights in the last twenty-five years. Of course, in a democracy, there is always the problem of minority versus majority rights, but when the issue of property and the environment is objectively considered, it is hard to see how anyone can rationally oppose greater vigilance in enforcing environmental controls.

Private property rights need not, indeed cannot, be absolute. They are just as open to regulation and limitation as any other form of rights when they conflict with other rights. Moreover, the traditional arguments for property in land adequately fail to demonstrate the reasonableness or necessity of transferring what is a common heritage of all mankind into the hands of individuals

without restriction.⁷ Even those who urge the private distribution of land titles, do so with an awareness of the need for careful stewardship on the part of owners. The right to 'destroy' one's property may apply to chattel, but it cannot apply to land. Unfortunately, though there is an increasing awareness of the permanence of some forms of pollution, the right to use land in whatever fashion the owner deems desirable is still widely professed. Especially when it has been argued that a particular use would be economically beneficial to the owner, prohibition of such use has been rare or coupled with compensation. The constitutional provision against 'takings' as found in the Fifth and Fourteenth Amendments has often been interpreted in a manner detrimental to the public interest and unjustified in terms of individual rights.⁸ Sometimes there are greater responsibilities of the law than seeing that every owner of land can reap as much profit from his site without worrying about the longterm consequences to society as a whole.

But if there is constitutional protection against unjust 'takings', there is also constitutional provision for regulation of land use. The difficulty arises in judging when a regulation becomes a 'taking' and when it is the

⁷See, Chapter Six, "Traditional Arguments for Property Rights," above.

⁸See, Chapter Seven, "Site Value Taxation," p. 166, footnote 8.

rightful exercise of the police power of the state. Since in its regulation of land use, the state is not liable for compensation, it is very important to the individual property owner and to society itself who shall bear the burden of the 'social costs'. We shall deal with this issue below, however there must be no doubt about the reasonableness of balancing public and private interests in the use of land. Moreover, it must be recognized that to date the tendency has been to give the benefit to the private party and place the burden on the public.⁹ To quote Paul W. Gates, one of the outstanding historians of American land policy:

While the management of our remaining public domain is still a most serious and important problem, the management of that portion of our territory that has become private property is a more serious problem. In fact, the old distinction between public and private property is losing its sharpness, or is being eroded away, and for the sake of later generations it should be. Has a man a right to destroy good irreplaceable agricultural land by covering it up with cement or by strip-mining it? Can a man do what is most profitable for him with his own? But is it his own in an unlimited sense? Rather has he not received from society a bundle of rights which society protects but which society may also limit or modify or even take over? Is not the public land that has passed into private hands a trust? Older and more crowded societies than ours have long since been obligated to take this stand,

⁹See, Besselman, Colliers and Banton, The Taking Issue.

and we should come to this point of view also and soon.¹⁰

What is definitely needed is clear, unambiguous promulgation of the rights and duties necessary for the just distribution of property in land. Included in the statement must be prohibitions against environmentally unsound exploitation of the earth and its resources. This will have to cover both the issues of conservation and pollution.¹¹ As ecologists like to say, varying Lord Acton's more famous maxim—Power corrupts, and absolute power corrupts absolutely—, power pollutes, and unregulated power pollutes permanently. Property rights are a species of power; unregulated property rights both corrupt and pollute.

(2) Competing conceptions of economic efficiency

Since this is a study of property rights from the viewpoint of philosophy and not from the viewpoint of economics, we will content ourselves with only a few words on this issue, as important as it may be. Behind many arguments about land use are different ideas as to what constitutes economic efficiency. In discussing the

¹⁰Paul W. Gates, "An Overview of American Land Policy," Agricultural History, 50 (1976): 229.

¹¹John Passmore, Man's Responsibility for Nature (New York: Scribners, 1974) distinguishes between these two problems: 'Pollution,' pp. 43-72 and 'Conservation,' pp. 73-100. He also discusses 'Preservation,' pp. 101-126. His tendency is to give more credit to technology and worry less about future possibilities than we would here, but the book is informative and philosophic.

justification of property rights on the basis of economic utility, it was noted that social utility is not always advanced by increased productivity or greater efficiency when measured by standard economic indicators. The competing slogans, such as "Big is Better" or "Small is Beautiful," really do not help matters very much. Big is big, and small is small. What is needed is an economics of scale.¹² And we must keep in mind that man is a middle-sized creature; neither too little nor too big for his environment. Moderate means and moderate ends are as economically sensible as they are ethical commendable. John Ruskin was not being sentimental or unrealistic when he wrote:

A nation which desires true wealth, desires it moderately, and can, therefore, distribute it with kindness, and possess it with pleasure; but one which desires false wealth, desires it immoderately, and can neither dispense it with justice, nor enjoy it in peace.¹³

There are those who think the problem is big business, and there are those who are equally convinced that it is big government. Unfortunately, neither group tends to see that the real common enemy is bigness itself. Both misunderstand the real role of scale in economic and social

¹²E. F. Schumacher is perhaps the best known spokesman for this view. See, his Small Is Beautiful (New York: Harper & Row, 1973) and Good Work (New York: Harper & Row, 1979).

¹³John Ruskin, "Munera Pulveris," in Works of Ruskin, edited by E. T. Cook and Alexander Wedderburn (London: G. Allen, 1903-12), 17:144

efficiency. Everything must be kept in proportion to its function, otherwise waste and/or inefficiency creep into the system. The only way in which we can combat pollution and further conservation is through moderate use and allocation of resources. This means that property rights must be checked by social obligations. For some this will seem like a direct limitation being imposed upon their right to accumulate property, but in fact it is only the minimum necessary means whereby the social whole can look after its interests.

This does not mean that private property rights need to be eliminated or that the free market economy shall be by-passed in favor of a socially orchestrated regime. Too often economic and political arrangements are painted in black and white, as if there were no other colors, not to mention grey. Men need access to land. That is, all men need access. And it is this fundamental factor that must lie at the basis of distribution of property in land. There is a world of difference in seeing land as an indispensable resource and seeing it as an easily exchanged commodity. Too often property rights encourage the latter view without considering the correctness of the former.

Promoting the 'highest and best use' for land must include the environmental impact as part of determining what is the optimal economic utility of the site. Just as all wealth can be traced back to land and its resources, so all waste and pollution must eventually settle on the

land or mix with the air and water. Costs of production, therefore, must include the expense necessary to keep the land in good condition. By taxing land according to its full market value, society insures that sites will either be used efficiently or allowed to lie fallow unexploited—since there will be no possibility of reaping an unearned benefit or speculating on future uses. This will limit the environmentally destructive practice of utilizing submarginal lands because more suitable sites are being held out of use for speculative purposes. One of the reasons for the present use of many destructive technological methods is simply that the best sites are underdeveloped.

(3) Man's responsibility to future generations

As much as the present world population is a source for some concern, the impact of current environmental practices upon the future generations of mankind is even more critical.¹⁴ We must remember that mankind includes, at once, all men that are, have been, and are yet to be. Some would immediately counter with the argument that non-existent persons have no rights and hence we have no obligations toward them. But this is too facile, for the future generation of mankind is now being born. One

¹⁴See R. I. Sikora and Brian Barry, eds., Obligations to Future Generations, (Philadelphia: Temple University Press, 1976) for a variety of views and suggestions.

generation is of necessity continuous with the next. Unless we were to halt reproduction immediately and universally, we cannot avoid considering those who will undoubtedly inherit the earth.

The question is, then, what is owed to our offspring? How much of the resources of the earth must we conserve for them? Obviously, since they are all finite in extent, we cannot give them more, or even the same amount, than we enjoy. It must be somewhat less, somewhat diminished. The hard choices come in determining how much less and in which areas. Fortunately, we cannot diminish the land space itself. That remains constant, but it is entirely possible that certain portions of the globe could be made uninhabitable, just as some have recently been made inhabitable. And it does seem that a primary responsibility is to conserve, at the very least, the present inhabitable space upon which man may live. Rapid exploitation or poorly conceived development of the surface of the earth will have greater and more farreaching effects than practically any other form of environmental disaster with the possible exception of nuclear war or accident.

Directly allied to this are the issues of air and water pollution. They must be seen as equally detrimental to future generations as soil or mineral depletion. In addition, it is clear that they are—especially in the present levels practiced in most industrial nations—unnecessary. It is simply not essential for a reasonable

standard of living to emit hydrocarbons into the atmosphere or dump toxic wastes into the waterways in the quantities currently allowed. Even the most ancient rules of the common law forbid creating a nuisance through sights, sounds, smells, or other means.¹⁵ It is, therefore, merely a matter of enforcing the traditional limitations upon quiet enjoyment of the land when that interferes with the health and safety of present and future populations.

More difficult problems and more technical issues arise when we turn to the area of actual conservation. Pollution in the strong meaning of the term is simply not acceptable. Some things may simply run out before we can find alternatives. Yet this cannot justify a selfish consumption on

¹⁵Ronald Coase points out that creating a nuisance is often a relative question in the law measured by economic utility. He cites W. L. Prosser, The Law of Torts (ed. 1955) where he argues that a person may "make use of his own property or . . . conduct his own affairs at the expense of some harm to his neighbors. He may operate a factory whose noise and smoke cause some discomfort to others, so long as he keeps within reasonable bounds. It is only when his conduct is unreasonable, in the light of its utility and the harm which results, that it becomes a nuisance . . . As it was said in an ancient case in regard to candle-making in a town, 'le utility del chose excusera le noisomesess del stink.' The world must have factories, smelters, oil refineries, noisy machinery and blasting, even at the expense of some inconvenience to those in the vicinity and the plaintiff may be required to accept some not unreasonable discomfort for the general good." in "The Problem of Social Costs," The Journal of Law and Economics, 3 (1960):1-44. However, Coase's citation does not really deal with the social costs involved in much modern pollution which is a direct threat to the environment and the health of the population. Discomfort and inconvenience are one thing; endangering man's delicate ecological support system is quite another.

the part of everyone now. Indeed it would seem to imply the careful use, even saving, of limited or scarce materials. It is striking to think that while nuclear energy had not been dreamt of one hundred years ago, people were under the assumption that oil and coal deposits were in a real sense being newly created under the earth.¹⁶ In other words, while new sources of energy may be hidden from us now, presently imagined possibilities may equally be illusory. We cannot be too prudent.

Thomas Jefferson was one who took his responsibility toward future generations quite seriously.¹⁷ In a long letter from Paris to James Madison he laid out his ideas regarding the sweeping social and political reforms necessary to give every man his due. "The question, whether one generation of men has a right to bind another, seems never to have been started on this or our side of the water," he wrote. "Yet it is a question of such consequences as not only to merit decision, but also to place among the fundamental principles of every government." Then he set out the basic proposition: "that the earth belongs in usufruct to the living: that the dead have neither powers nor rights over it." Judging upon the basis of Buffon's mortality tables that each generation

¹⁶John Passmore, Man's Responsibility for Nature, p. 77.

¹⁷See, Merrill D. Peterson, "Mr. Jefferson's 'Sovereignty Of the Living Generation,'" The Virginia Quarterly Review, 52 (1976): 437-447.

was expected to live approximately 19 years during its time of majority, he applied this to three areas. First, as to landed property, every generation had the right to labor the earth. No one should be able to deny another man his right to employment by extensive holdings in land. Second, as to public debts, every generation should pay its own way. One generation should not be allowed to burden the next with its profligacy. Third, as to the rule of law, he argued that each generation should have the right to establish its own constitution, for that right would free men from the agreements or contracts of the past in which they had no part.¹⁸

We are not able to explore Jefferson's ideas in any detail: but we must note that he wishes at once to give every generation the chance to fashion its own future, and at the same because he reminds us of the need to consider those to come (for theoretically every generation will have descendants), we must not exploit or waste what is given lest others are harmed. Rights to property must be contingent upon recognition of the duty to future generations.

(4) The problem of social costs

With the problem of social costs our discussion could become more technical, for there are many aspects of this

¹⁸Letter dated September 6, 1789, pp. 488-493 in The Life and Writings of Thomas Jefferson, edited by Adrienne Koch and William Peden, (New York: The Modern Library, 1944). On the question of whether the dead have rights

issue that require detailed facts and figures. However, without being too superficial, we can consider the question broadly.

Ronald Coase outlined this problem, and indeed he gave it its title, in an essay published just two decades ago.¹⁹ However, it is something which economists have been dealing with, albeit somewhat unwittingly, for a long time. The issue centers on how to deal effectively and economically with the side-effects of production, especially those which are disturbing, harmful, or polluting. Basically there are two ways of countering these side-effects and limiting their influence upon society as a whole. First, there is the possibility of government regulation. Through fines, restrictions and/or taxes an industry might be forced to pay for the harmful effects of its productivity. Second, there is the traditional pricing mechanism conditioned by the legal liability of the manufacturer to pay for damages caused by his activities. It is the second approach that Coase supports, for he believes that the market place price mechanism by-passes unnecessary inefficient bureaucratic elements but still arrives ^{at} desired results.

Insofar as Coase's solution would eliminate the need for bureaucratic structures to police the environment,

or the interests against the living, see, Ernest Partridge, "Posthumous Interests and Posthumous Respect," Ethics, 91 (1981): 243-264

¹⁹Coase, "The Problem of Social Cost."

there can be no faulting his position. As in metaphysics, so also in politics, there is no need to multiply entities beyond necessity. We must always endeavor to keep things, and most importantly institutions, simple. But this requires careful consideration of rights and responsibilities. Property owners are not likely to restrain themselves voluntarily, if there is an opportunity for greater benefit to themselves or their interests. Hence, the problem of social costs becomes the problem of legal liability.

E. J. Mishan has understood this well. He wrote:

The competitive market has long been recognized by economists as an inexpensive mechanism for allocating goods and services with tolerable efficiency. Once it is observed that the production of 'bads', or noxious spillover effects, have begun, increasingly, to accompany the production of goods, one might be excused for talking about a serious failure of the market mechanism. In fact the failure is not to be attributed to the market itself, but to the legal framework within which it operates. In particular, we must remind ourselves that what constitutes a cost to commercial enterprise depends upon the existing law. If the law recognized slavery the costs of labour would be no greater than the costs involved in capturing a man and maintaining his thereafter at subsistence level.
(emphasis added)²⁰

Hence, we are brought back to the old problem of property rights and their restrictions. If the state licenses a corporation to operate a radio or television network, it

²⁰E. J. Mishan, Technology and Growth: The Price We Pay (New York: Praeger, 1969), p. 56.

clearly creates vested interests, both on the part of the corporation and on the part of the state. Generally speaking, so long as those interests are met satisfactorily, each party goes its own way and enjoys the benefits derived from its particular interest. But once either party feels that it is not receiving sufficient reward for its contribution, trouble begins. If the dissatisfaction comes from the state, the corporation is likely to contest the complaint and argue in favor of 'free enterprise' or 'freedom of the press'. But that very same corporation is more than likely, in fact it is certainly, going to introduce proceedings if it feels that its privileges have been infringed upon by any other party. Of course, it will cite its license and the prerogatives that it entails, and it will proclaim its public-minded spirit, and finally it will talk about its investment of capital, genius and sheer hard work in building its reputation. What it will undoubtedly fail to mention is the fact that its entire existence is owed neither to the state nor to its own contribution but ultimately to the existence of the electromagnetic spectrum. Without that fundamental fact of existence, there could be no radio or television. In the same way, rights to property in land are the result of the existence, and importance, of land. If environmental factors force society to make utilization of land more expensive, then so be it. The social cost is not such a problem after all. Only when owners can pass along the costs of production to the public

and at the same time benefit from increased land values because of low taxation does the problem become serious.

In an extremely influential article Garrett Hardin outlined what he termed "The Tragedy of the Commons."²¹ Basically the thesis of his essay was that since every man will seek to maximize his gain and minimize his loss when engaging in economic activity, communally owned property will be over-grazed, or over-fished, since the individual will not have to pay the expenses for his exploitation alone but rather in common with all the others using the property. Therefore, the tendency will be to try to get as much for as little as possible. As a consequence, the commons will be overutilized quickly. Only by allocating specific portions of the commons to private parties will each party attempt to conserve and protect the property entrusted to him. Hardin argues that private property is the only way in which to protect the environment from being completely depleted or ruined.

Combined with Coase's ideas, Hardin's make sense; however, both men leave out one vital factor. Neither the commons nor any other site is identical in quality or productivity. Moreover, as we have seen in the chapters on the "Special Importance of Land" and "Site Value Taxation," if those who hold the rights to better sites do not

²¹Garrett Hardin, "The Tragedy of the Commons," Science, 162 (1968): 1243-1248.

return to the community the economic advantages (the economic rent) which those rights bestow,²² not only will they enjoy unfair competition, but less favored sites will pay an even greater disproportion of the burden of taxation and thereby place upon them undue pressure which will create less concern for environmental quality and encourage greater productivity without proper safeguards.

In conclusion, it is fair to say that only if property rights are so construed that both the payment of the economic rent to the community and the maintenance of environmental quality are insisted upon can justice be done. If it is possible to pass the costs of production along to others, it will inevitably happen. And if it is possible to keep the benefits that others have created for

²² See, J. E. Dales, "Land, Water, and Ownership" pp. 171-188 in Economics of the Environment, edited by Robert Dorfman and Nancy S. Dorfman (New York: W. W. Norton Co., 1972). Dales recognizes the role of rent in indicating land values, but he fails to see that it should not go into the pockets of individual landholders but back into the treasury of the community which created the increased land values to start. Consider, further, the following observation about the way in which increased environmental quality is captured through higher rents by landlords who, of course, have done nothing to create the increased site values themselves. "Property value changes measure benefits accurately only when some mechanism exists to insure that all potential surpluses are eliminated by higher land rents. If potential land users are forced to bid against each other for the use of a parcel of land with improved air quality, rents and property values will rise until land users are indifferent between improved parcels at higher rents and more polluted parcels at lower rents. Then, land users' willingness to pay for cleaner air is completely captured by land owners as rent." A. Myrick Freeman III, The Benefits of Environmental Improvement (Baltimore: John Hopkins University Press, 1979), pp. 111-112.

oneself, that too will occur. Finally, if men are allowed to be short-sighted, they will not look into the distance, and the future will be dim. Property rights demand obligations, both for their protection and for their justification.