Property seems to be an indispensable condition of the existence, liberty and development of man. Innate sentiments of justice, primitive right and rational right, all seem to agree that Society has an obligation to guarantee to everyone the legitimate property which should belong to them and that Society must be organized to give effect to that obligation. What is the best form for the right of property at any given moment of history, however, can only be determined from the nature of man in society at that point in history.

The rational theories by which mankind has attempted to account for private property as a social and legal institution have been arranged conveniently[42] into six groups, each including many forms. Four of the groups: natural law theories, metaphysical theories, historical theories, and psychological theories seek an absolute universal justification for property as a necessary universal institution. The two remaining groups, positivist theories and sociological theories seek only empirical support to establish property as an institution of time and place.

The fact that the property interest in non-renewable natural resources and the land and landscape is essentially a public trust conditions the fundamental ethical implications of the right of property. There is a constant need to express the laws that sanction the "right" of property in the context of each stage of civilization in every culture in terms of the human values that the right exists to protect.

PROPERTY AND SOVEREIGNTY

It was during the sixteenth century that the concepts of property and sovereignty became hopelessly entangled by those philosophers and writers who supported the idea of absolute monarchy, whether in the person of an individual king or as some personified state. It is in the work of Jean Bodin[43] that the basic errors arise in consideration of sovereignty as a concept.

MANAGEMENT (1933), A. Leopold, *The Conservation Ethic*, 31 JOURNAL OF FORESTRY 634 (1933), and augmented through discussions with several of his children, Dr. Luna Leopold of the United States Geological Survey, and Dr. Estella B. Leopold, also of the United States Geological Survey, the paleontologist who provided the fair preponderance of substantial, credible, scientific evidence necessary to establish that the Florissant fossils were a unique, national, natural resource treasure in imminent danger of serious, permanent and irreparable damage. (*See* note 72, *infra*).

In 1974, Angelo J. Cerchione wrote:

> For years . . . men have known, or with the exercise of reasonable prudence should have known, that at some point in time, all our fossil fuels: coal, oil and natural gas would eventually be consumed. Nevertheless, during those same years, the public has been led to believe that when coal and natural gas were no longer available . . . other sources of cheap, convenient energy would be available. (Plucked from the nether, perhaps, by the nimble technological fingers of our scientists and engineers.) Satisfied, [however,] mankind dozed— -warmed and cozened by the petrochemical fire in the basement and illuminated by the electrical fire in the lamp—fat-headed in fossil fueldom.

A. Cerchione, *The Epilogue*, THE ENERGY CRISIS: DANGER AND OPPORTUNITY (1973).

42. III R. POUND, JURISPRUDENCE (1959).

43. Jean Bodin (1530-1596) was the major continental European political

Recognizing that the right to self-government is naturally possessed by the people, certain medieval theorists in their consideration of the concept of sovereignty substituted for this essentially personal right that of the total power of the commonwealth. Intellectually they accepted the fact that the "prince" received from the people the authority with which he was invested, but in practice they overlooked or forgot that the prince was only the designated representative of the sovereign people and only as such designee the delegate of the power of the people. The vicarious nature of this transfer became obscured and was replaced eventually with a belief that there was a physical transfer and donation of the power of the people, as if it were some kind of good or chattel: a merely physical property that could be the subject of irrevocable transfer from the people to some individual denominated or designated the "prince" or "sovereign."

The source of this confusion about sovereignty was feudalism. About the end of the Second Race of Kings in France, a new kind of lawful possession came into being designated "fief." The governors of cities and provinces usurped with equal impunity the property interest in land and the administration of justice, establishing themselves as proprietary rulers over those places in which they had formerly been only civil magistrates or military officers. By this means, there was introduced into the State a new kind of authority, which eventually came to be called "sovereignty."[44] Over the course of the Middle Ages, the feudal system extended throughout France and almost all the other nations of Europe. Every kindgom became a large feudal fief. The system came to direct the course of real property and estate practice in England through the efforts of William the

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theorist in the immediate post-Reformation period. After studying law at Toulouse and lecturing there on jurisprudence, he settled in Paris as an advocate, but soon turned to literature and political science. He was appointed King's attorney by Henry III in 1576, but fell from favor after successfully opposing the King's attempt to alienate the public lands and royal demesnes. His chief work, the *Six livres de la Republique*, (Paris, 1576), was the first successful modern attempt to construct an elaborate system of political science since Aristotle.

Accepting without question the idea of a law of nature conditioning human activity, Bodin made that law largely ethical in character, a touchstone by which right could be distinguished from wrong. Essentially practical in his consideration of fundamental law, Bodin, like Suarez a little later, did not identify *jus naturale* with *jus gentium*, nor did he concede to the Prince as sovereign the right to violate the *jus naturale*, although he might violate the *jus gentium* with impunity.

44. The concept of sovereignty took definite form at the time when absolute monarchy was becoming the fashion in Europe. No corresponding notion had been used in the Middle Ages with regard to political authority. In feudal times the king was but the Suzerain of Suzerains, each one of whom was possessed of their own rights and powers, and medieval jurists only dealt in a remote way with the modern notion of absolute sovereignty. It was Jean Bodin, *supra*, note 43, who forced the idea of absolute sovereignty associated with the person of a monarch or in the state itself upon the jurists of the Baroque age. It was in the context of the absolute rights of some personal monarch in which the supreme power of the body politic was vested that the word "sovereign" entered the vocabulary of political theory from the Low Latin *superanus*. "*Ex optimatum ordine, princeps*" was long ago employed in the common language to mean any official endowed with superior authority, such as a "superior judge." Du Cange quotes an edict of the French King Charles V, made in 1367, which reads: "*Voulons et ordonons que se . . . le Bailli ou autre leur souverain . . .*"
See, J. MARITAIN, MAN AND THE STATE, at ch. II (1951).

Conqueror who took title to all the land after Hastings and distributed it among his lieutenants in the feudal manner as a means of maintaining fealty among his nobles.[45] From that era probably comes the English concept of the King as the "fountain of justice."

In the case of the King, sovereignty operated to vest the ruler with jurisdiction over others, while at the same time excluding all others from jurisdiction over him. "The law," said Sir William Blackstone,

> ascribes to the King, the attribute of sovereignty; he is sovereign and independent within his own dominions; and owes no kind of subjection to any other potentate upon earth. Hence it is, that no suit or action can be brought against the King, even in civil matters; because no court can have jurisdiction over him, for all jurisdiction implies superiority of power.[46]

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45. W. SWINDLER, MAGNA CARTA: LEGEND AND LEGACY.

46. In 1793 the Supreme Court of the United States was called upon to consider the nature of sovereignty in the United States. Mr. Justice Wilson took the position that the term "sovereign" was unknown to the Constitution of the United States.

> [T]he term sovereign has for its correlative, subject. In this sense, the term can receive no application; for it has no object in the constitution of the United States. Under that constitution, there are citizens, but no subjects. "Citizen of the United States." Article I, section 2. "Citizens of another State." "Citizens of different States." "A State or citizen thereof." Article III, section 3. The term, subject, occurs indeed once in the instrument, but to mark the contrast strongly, the epithet "foreign" (Article III, section 3) is prefixed. . . .

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 456 (1793). Chief Justice Jay recognized that it was the people of the United States, not the federal government, that were sovereign.

> From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion that the unappropriated lands which belonged to that crown, passed not to the people of the colony or States within whose limits they were situated, but to the whole people; . . . It is remarkable that in establishing [the Constitution of the United States], the people exercised their own rights and their own proper sovereignty, and, conscious of the plenitude of it, they declared with becoming dignity, "We, the people of the United States, do ordain and establish this constitution." Here we see the people acting as sovereigns of the whole country, and, in the language of sovereignty, establishing a constitution by which it was their will that the state governments should be bound, and to which the state constitutions should be made to conform. . . . [T]he sovereignties in Europe, and particularly in England, exist on feudal principles. That system considers the prince as the sovereign, and the people as his subjects; it regards his person as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a court of justice or elsewhere. That system contemplates him as being the fountain of honor and authority; and from his grace and grant derives all franchises, immunities and privileges; . . . It was of necessity, therefore, that suability became incompatible with such sovereignty. Besides, the prince having all the executive powers, the judgment of the courts would, in fact, be only monitory, not mandatory to him, and a capacity to be advised, is a distinct thing from a capacity to be sued. The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the prince and the subject. No such ideas obtain here; at the revolution the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects . . . and have none to govern but themselves; the citizens of America are equal as fellow-citizens, and as joint-tenants in the sovereignty.
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> From the differences existing between feudal sovereignties and governments founded on compacts, it necessarily follows that their respective prerogatives must differ. Sovereignty is the right to govern; a nation or state sovereign is the person or persons in whom that resides. In Europe the sovereignty is generally ascribed to the prince, here it rests

Exemplified in its most extreme form by political democracy, the fundamental truth is that authority claimed by the nominal rulers of the people derives from the right of the people to rule themselves, a right which is inherent in human nature and which permanently resides with all the people as individuals whatever the particular expression it may be given in the context of the current structure of the people collectively considered as the body politic. By investing their nominal rulers with authority to govern the body politic, the people in no way lost their basic right to self-government.[47]

Because the philosophers of medieval absolutism failed to recognize that sovereignty was a right which can be possessed by an individual as an essential aspect of human nature, and shared or participated in by another, the *right* of the people to govern themselves is still often confused with the *power* of the people to govern themselves. So confused, the right to self-government which is pos-

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> with the people; there, the sovereign actually administers the government, here, never in a single instance; our governors are the agents of the people, and, at most, stand in the same relation to their sovereign in which regents in Europe stand to their sovereigns. Their princes have personal powers, dignities, and pre-eminences, our rulers have none but official; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens.

Id. at 470-472. There is no mistaking the fact that the majority of the United States Supreme Court, just five years after the Constitution was ratified, rejected the idea that any public official or the United States Government or the government of any State was the "sovereign." The people of the United States were the sovereign!

A century later, in 1882, the Supreme Court again considered the issue of sovereignty; this time in the context of whether "sovereign immunity" could be raised as a defense by the federal government or any of its officers in actions brought against them by citizens of the United States of America.

> Under our system the *people*, who are there called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of the monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered.

United States v. Lee, 106 U.S. 196 (1882).

47. Under this interpretation, the authority to govern derived from the people themselves rises from the base to the summit of whatever structure is assumed by the body politic. The power of the people, however, is exercised by those individuals in whom authority periodically resides through designation by the people, within certain limits fixed by the people themselves collectively as the body politic whether through constitution or other means. The People manage these popular designees through periodic designation of those in whom the power to rule shall be vested by the people. It is this process of periodic designation of their nominal rulers that is the most obvious manifestation of the fact that the People continue to possess the right to govern themselves; whether the right is exercised at the ballot box or in the streets. The periodic exercise of the right to self-government entitles those who have been designated the representatives of the people to command in a political sense, other human beings. In the theological sense of this phenomena, the Supreme Uncreated Reason, the Godhead, or whatever suprahuman entity or power is respected as a First Cause by Society at any particular period of its cultural history, gives force to law, and permits the force of law in terms of the exercise of the power of the People to attach to whatever legislation is necessary for the very existence and common good of that society. It is this theological imperative that permits the power of government to be held *of right* by those individuals the people choose as their rulers; and *in justice* requires obedience to their mandates promulgated within the limits of their delegated power.

These philosophical principles were well-understood by our founding fathers through their familiarity with the political theory contained in the works of Thomas Aquinas, Cajetan, Bellarmine, and Suarez, each of whom clarified the notion of the Prince as "vicar of the multitude."

sessed as a fundamental human right by the people as individuals and possessed by them collectively as the body politic inevitably became considered as some kind of material property which cannot be possessed by more than one individual or entity at the same time.[48]

While some medieval scholars would have submitted their sovereign at least to the law of God, the inner logic of the concept of personal sovereignty made the political sovereign free from even heavenly limitations. From the fact alone that he existed, was not the sovereign always, as Rousseau put it, all that he ought to be? In actual fact this misconstrued sovereignty required that no decision made by the Mortal God of Hobbes,[49] or law established by the

48. It was during the sixteenth century that the concepts of property and sovereignty become hopelessly entangled by those philosophers and writers who supported the idea of an absolute monarch, whether individual king or national state. They discussed sovereignty in terms of the ruling power or in terms of goods and material power held either absolutely as owner or in certain cases, such as the right to navigate, as trustee.

While recognizing that the right to self-government is a right naturally possessed by the people as part of their essential human nature the relentless logic of Aristotle forced them to proceed from the principle that if a material good is owned by one individual or entity, it cannot be owned by another, to the conclusion that determination of sovereignty becomes only a question of transfer of ownership or donation of power.

Although these medieval theorists could intellectually accept the fact that the "prince" receives the authority with which he is invested from the People, they overlooked the character of the Prince as "vicar of the multitude," replacing it with the concept of physical transfer and donation of the power of the people, as if it were some kind of good or chattel, or a merely physical property that could be the subject of irrevocable transfer from the people to some individual denominated or designated the "prince" or "sovereign."

49. THOMAS HOBBES, LEVIATHAN (M. Oakeshott ed. 1957). In this work Hobbes stated:

> [Whereas the agreement of irrational creatures is natural,] that of men, is by covenant only, which is artificial: and therefore it is no wonder if there be somewhat else required, besides covenant, to make their agreement constant and lasting; which is a common power, to keep them in awe, and to direct their actions to the common benefit.
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> The only way to erect such a common power, as may be able to defend them from the invasion of foreigners, and the injuries of one another, and thereby to secure them in such sort, as that by their own industry, and by the fruits of the earth, they may nourish themselves and live contentedly; is, to confer all their power and strength upon one Man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will: which is as much as to say, to appoint one man, or assembly of men, to bear their person; and every one to own, and acknowledge himself to be author of whatsoever he that so beareth their person, shall act, or cause to be acted in those things which concern the common peace and safety; and therein to submit their wills, every one to his will, and their judgments, to his judgment. This is more than consent, or concord; it is a real unity of them all, in one and the same person, made by covenant of every man with every man, in such manner, as if every man should say to every man, *I authorize and give up my right of governing myself, to this man or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner*. This done, the multitude so united in one person, is called a COMMONWEALTH in Latin CIVITAS. This is the generation of the great LEVIATHAN, or rather, to speak more reverently, of that *mortal god*, to which we owe under the *immortal God*, our peace and defense. For by this authority give him by every particular man in the commonwealth, he hath the use of so much power and strength conferred on him, that by terror thereof, he is enabled to form the wills of them all, to peace at home, and mutual aid against their enemies abroad. And in him consisteth the essence of the commonwealth; which, to define it, is *one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves, every one the author, to the end*

General Will of Rousseau,[50] could possibly be resisted by the individual conscience in the name of justice. A law did not need to be just to be enforced!

Although forced to admit that his sovereign was unrestrained by law and not even accountable under the law, Bodin was not willing to permit the sovereign to disregard the divine authority or the Natural Law, and insisted upon recognition of a natural right of property, sharply criticizing the communal theories of Plato and More.[51]

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he may use the strength and means of them all 'as he shall think expedient' for their peace and common defense.

And he that carryeth this person, is called SOVEREIGN, and said to have *sovereign power*; and everyone besides, his SUBJECT.

Id. at 111-112.

50. J. ROUSSEAU, THE SOCIAL CONTRACT (McCranston trans. 2d ed. 1976). There is a temptation, especially in twentieth century America, to understand the term "General Will" as used by Rousseau in terms of the representatives of the sovereign people acting in a legislative capacity. This usually leads to thinking that the General Will can be identified for all intents and purposes with a decision expressed by the majority vote of some representative or delegate assembly. Interpreting Rousseau in this sense, however, misplaces the emphasis in Rousseau's statement, which distinguishes between the General Will (*Volonte Generale*) and the will of all (*Volonte de Tous*),

> There is often a great deal of difference between the Will of All and the General Will. The General Will considers only the common interest, while the Will of All takes private interest into account and does no more than sum the individual Wills.

Id. at 73.

Because the concept that the supreme power of the people resided in the king had been accepted before the Revolution it was simply restated as a return of the supreme power to the People after the French Revolution. It was considered a self-evident principle that the sovereignty of the People was just as monadic and transcendent as the sovereignty of any individual King, and this made the deputies of the people mere instruments without any right or authority to govern.

> Sovereignty cannot be represented for the same reason that it cannot be alienated . . . The deputies of the people, then, are not and can not be its representative; they are only its commissioners and can conclude nothing definitely. Every law which the people in person have not ratified is invalid; it is not a law. The English nation thinks that it is free, but is gravely mistaken; for it is free only during the election of members of Parliament. As soon as they are elected, the English nation is enslaved and counts for nothing. The use which the English nation makes of its brief moment of freedom renders the loss of liberty well-deserved.

Id. at 141.

51. Again, if a man's person is his only private possession, lawsuits and prosecutions will all but vanish, and they will be free of those quarrels that arise from ownership of property and from having family ties, . . . THE REPUBLIC OF PLATO, at XVI, Part II, (Cornfold ed. 1958).

In contrast to the acquisitive society of his times, Sir Thomas More proposed an agricultural society in which the family would be the basic unit. Private property would be abolished and money would cease to be used as a means of exchange. The utopia of More was not a republic of uneducated peasants, however, the means of livelihood would be assured to all and the working hours would be reduced to six a day in order that the citizens may have leisure for cultural pursuits.

> Now I have declared and described unto you as truly as I could, the form and order of that commonwealth, [Utopia] which verily in my judgment is not only the best, but also that which alone of good right may claim and take upon itself the name of commonwealth or public weal. For in other places they speak still of the commonwealth, but every man procures his own private wealth. Here, [in Utopia] where nothing is private, the common interests are earnestly looked to. And truly on both accounts they have good cause to do as they do. For in other countries, who knows that he will not starve for hunger, unless he make some private provision for himself, even though the commonwealth flourish never so much in riches? And, therefore, he is compelled

even of very necessity to pay regard to himself rather than to the people, that is to say, to others. Contrariwise, where all things are common to every man, it is not doubted that no man shall lack anything necessary for his private use, so long as the common storehouses and barns are sufficiently stored. For there nothing is distributed in a niggardly fashion, nor is there any poor man or beggar. And though no man owns anything, yet every man is rich. For what can be more rich than to live joyfully and merrily, without grief and worry, not concerned for his own living, nor vexed and troubled with his wife's importunate complaints, nor dreading poverty for his son, nor sorrowing for his daughter's dowry? Yea, they take no care at all for the living and wealth of themselves and all theirs, their wives, their children, their nephews, their children's children, and all the succession that ever shall follow in their posterity.

And, besides this, there is no less provision for those who were at once laborers and are now weak and impotent than for those who now labor and bear the burden. Here now I would see, if any man dare be so bold as to compare with this equity the justice of other nations; among whom, may I perish utterly if I can find any sign or token of equity and justice! For what justice is this that a rich goldsmith, or usurer, or to be brief, anyone of those who either do nothing at all, or else something that is not very necessary to the commonwealth, should have a pleasant and wealthy living, either in idleness or in unnecessary business, when meanwhile poor laborers, carters, ironsmiths, carpenters, and plowmen, by such great and continual toil, as beasts of burden are scarce able to sustain and again such necessary toil that without it no commonwealth would be able to continue and endure one year, yet get so hard and poor a living and live so wretched and miserable a life that the state and condition of the laboring beasts may seem much better and more comfortable? For they are not put to such continual labor, nor is their living much worse; yea, for them it is much pleasanter, for they take no thought in the meantime for the future. But these ignorant, poor wretches are now tormented with barren and unfruitful labor, and the rememberance of their poor, indigent and beggarly old age kills them off. For their daily wage is so little that it will not suffice for the same day, much less yield any overplus that may daily be laid up for the relief of old age.

Is not this an unjust and an unkind commonwealth, which gives great fees and rewards to gentlemen, as they call them, and to goldsmiths, and to others who are either idle persons, or else only flatterers, and devisors of vain pleasures; and on the other hand, makes no considerate provision for poor plowmen, colliers, laborers, carters, ironsmiths, and carpenters, without whom no commonwealth can continue? But when it has misused the labors of their lusty and flowering age, at the last when they are oppressed with old age, sickness, needy, poor and indigent of all things, then forgetting their many painful watchings, nor remembering their many and great benefits, it recompenses and requites them most unkindly with a miserable death.

[Between the period of the Black Death (1348-49) and the first Statute of Laborers (1351), there had been no fewer than 14 acts of parliament dealing with working men. But like the first one, they were all in the interests of the employer, and those which treated wages set down maximum not minimum wages to be paid. Legislation under Elizabeth was to furnish some protection, but that did not come for many years after More wrote.]

And yet, in addition to this, the rich not only by private fraud, but also by public laws, every day pluck and snatch away from the poor some part of their daily living. So whereas it seemed previously unjust to recompense with unkindness the toils that have been beneficial to the public weal, the rich have now to this their wrong and unjust dealing—which is a much worse act—given the name of justice, yea, and that by force of law. Therefore, when I consider the weigh in my mind all these commonwealths, which nowadays flourish everywhere, so God help me, I can perceive nothing but a certain conspiracy of rich men procuring their own comforts under the name and title of the commonwealth. They invent and devise all means and schemes, first how to keep safely, without fear of losing what they have unjustly gathered together, and next, how to hire and misuse the work and labor of the poor for as little money as may be. When rich men decreed these devices to be kept and observed for the commonwealth's sake, that is to say, for the wealth also of the poor, then they are made laws.

Yet these most wicked and vicious men, when they have by their insatiable covetousness divided among themselves all the things which

The errors arising out of the confusion contained in the theoretical considerations of Bodin worked their insidious way into the political and social systems of medieval Europe and England as the Middle Ages passed into the Renaissance.

It was very easy to proceed from that original error to the transfer of the power of self-government from the people to the modern national state and a short step further from that transfer of the power of the people to the state or nation to totalitarianism. Sovereignty was in the sovereign and the sovereign had a right to be obeyed whatever might be commanded. Sovereignty was above moral law. Once the sovereignty of the state had been confused with the sovereignty of the nation and the sovereignty of the people, the inevitable but logical conclusion was that the totalitarian state became the master of good and evil as well as life and death.[52]

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would have sufficed everyone, still how far are they from the wealth and felicity of the Utopian commonwealth! From which, in that all desire of money and the use thereof are utterly excluded and banished, how great a heap of cares is cut away! How great a cause of wickedness and mischief is plucked up by the roots! For who does not know that fraud, theft, rapine, brawling, quarreling, brabling, strife, chiding, contention, murder, treason, poisoning, which by daily punishments are rather avenged then restrained, die when money dies? And also that fear, grief, care, labors and watchings perish even the very moment that money perishes? Yes, poverty itself, which only seemed to lack money, if money were gone, would also decrease and vanish away.

And that you may perceive this more plainly, consider yourselves some barren and unfruitful year, wherein many thousands of people have starved for hunger. I dare be bold to say that at the end of that penury so much corn and grain would have been found in the rich men's barns, if they had been searched, that if it had been divided among those who famine and pestilence killed, no man at all would have felt that plague and penury. So easily might men get their living, if that same worthy princess, Lady Money, did not alone stop up the way between us and our livelihood, though she in God's name was excellently devised and invented, in order that by her the way thereto should be opened. I am sure the rich perceive this, nor are they ignorant how much better it would be to lack no necessary thing than to abound with overmuch superfluity; to be rid of innumerable cares and troubles than to be beseiged with great riches.

And I doubt not that either respect for every man's private comfort, or else the authority of our saviour Christ (which for his great wisdom could not but know what was best, and for his inestimable goodness could not but counsel that which he knew to be best) would have brought all the world long ago unto the laws of this commonwealth, if it were not that one single beast, the princess and the mother of all mischief, Pride, resists and hinders it. She measures not wealth and prosperity by her own well being, but by the miseries and discomforts of others; she would not of her own will be made a goddess, if there were no wretches left whom she might be lady over to mock and scorn, over whose miseries her felicity might shine, and whose poverty she might vex, torment, and increase by gorgeously vaunting her riches. This hellhound creeps into men's hearts, and plucks them back from entering the right path of life, and is so deeply rooted in men's breasts that she cannot be plucked out.

THE UTOPIA OF SIR THOMAS MORE, at 168-173 (M. Campbell, ed. 1947).

52. Sovereignty is a curious example of one of those concepts that are right in one order of things and wrong in another. Ascribing to the national state (or the transnational or multinational corporations which have usurped the place of national states in many of the functional areas of society) the attributive sovereignty of the people as an independent power, separate and transcendently supreme, which may be exercised upon the body politic from above, leads inevitably to a totalitarian political system. Cosmetically, the image of the absolute or totalitarian state is often improved by personifying the state as the body politic or the people themselves and implying that obedience to the state is

Perhaps the most regrettable effect of the misapprehension of the true nature of sovereignty is that the entity which claims sovereignty, be it state, individual ruler, or corporation, exercises power without accountability. The fact that an absolute sovereign must be separately and transcendently supreme means that the sovereign is not accountable to its subjects other than as a result of revolution. It has been observed that, "the power to do all things without accountability is coincident with the sovereignty of God." This is the concept of sovereignty that represents all that could be wished for by any of the deified potentates, despots, and emperors of ancient times in their most celestial ambitions. In modern times, it has been ascribed to the state on the fictitious ground that the state is the people personified, and the people need not account to anyone for what they do. Most recently, it has been arrogantly assumed by the bureaucracies of industrialized society.[53]

The state as a juristic entity, no less than its agencies and officials, must remain accountable to the people. It is only the inherent *right* of human beings to self-government and spiritual autonomy that need not be accounted for to any tribunal or agency of the body politic. The people, as individuals, always account for their own decisions by their own sweat and blood.

Attributing sovereignty in the absolute sense to the state inevitably leads those individuals who wield the power of the state as sovereign to endeavor perseveringly, in accordance with the principle of non-accountability, to escape the supervision and control of the people.[54] To the extent that those claiming absolute sovereignty as or through the state succeed in avoiding accountability for their decisions, which commit the body politic and all the individual people of the nation, the people will bear the cost of the decisions made

merely obedience to themselves. However, under such a concept of state sovereignty, pluralism cannot be tolerated and centralism is required.

After Bodin, sovereignty eventually rose above moral law. The philosophical trail proceeds by simple substitution of a single word from the principle that an act or institution is *just* which serves the interests of the *sovereign* (Bodin); of the *People* (Rousseau); of the *state* (Hegel); of the *Party* (Lenin).

53. Bureaucracy has been defined as organization incapable of correcting its own course of conduct, and it is now clear that the worst offenders in the process of environmental degradation are not ruthless entrepreneurs dedicated to wanton exploitation of our natural resources—the profiteers and abusers of the public interest in the air, water, land and landscape—but rather shortsighted, mission-oriented, allegedly public interest agencies.

If we have to find a common denominator for the serious, environmental crises facing all technologically developed countries, regardless of their nominal form of government, it would have to be entrenched bureaucracies essentially immune from criticism or public action. These self-perpetuating, self-sufficient, self-serving bureaus are power sources unto themselves, effectively insulated from the people and responsible to no one but themselves

54. One of the strange inconsistencies of bureaucracy is the reluctance of administrative agencies to expose themselves to public scrutiny. A review of the published reports of Nader's Raiders, Bahnzaf's Bandits and similar citizen vigilante investigative groups, chronicle tales of evasion, suppression of information and a general policy of restricting public information. Assuming the best of motives on the part of bureaucrats and politicians, this course of conduct can only be explained by a kind of totalitarian paternalism inconsistent with American constitutional concepts.

in their name. The French have put it well, "*ce sont toujours les memes qui se font tuer*": It is always the same people who are getting killed!

> The woes of the people settle the accounts of the non-accountable supreme persons: State, agencies, ministries, committees, boards, staffs, rulers, law givers, experts, advisors—not to speak of the *intelligentsia*, writers, theorists, scientific utopians, connoisseurs, professors, and newspapermen.[55]

THE LAW OF PROPERTY

Without any necessity to resort to abstract notions of justice, or the obscurity of historical origin, many writers have maintained that property is nothing more than an invention of the law.

> Banish governments . . . and the earth and all its fruits are as much the common property of all mankind as the air and the light. According to primitive natural right, no one has an exclusive right to anything, but everything is a prey for all . . . . Hence . . . the right of property, and, generally speaking, every right must spring from public authority.[56]

> As men have renounced their natural independence to live under political laws, they have also renounced the natural community of goods to live under civil laws. The former laws give them liberty, the latter property.[57]

Much like the problem of which came first, the chicken or the egg, it appears that the notion of property must precede the law which regulates it, yet it is law in some form which gives rise to the notion of property. Legal recognition of individual claims to property ownership, legal definition of those claims, and provision of the legal means to secure private interests, are at the foundation of the economic organization of modern society.

Inquiry into the law of property, however, requires investigation of the fundamental philosophical concepts upon which rest that social instrumentality, the object of which is to protect the application of personal wealth and individual effort to private uses. Property exists to be owned and its significance as a social institution is largely exhausted in the relation of ownership.[58]

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55. J. MARITAIN, MAN AND THE STATE 52 (1951).

56. Jacques Benigne Bossuet (1627-1704), quoted by Louie Victor de Laveleye, *The Theory of Property*, in RATIONAL BASIS OF LEGAL INSTITUTIONS, at 174 (1923).

57. Montesquieu, quoted by Laveleye, *supra* note 56, at 174.

58. The right I have to my property, to my possessions is derived from physical, from natural acts: being derived from natural acts it is a natural right: being derived from nature it is not derived from law: its origin, its existence was antecedent to law: for nature existed before law. Being antecedent to law, it was not created by law: not being created by law it cannot be taken away by law. Law was instituted to protect a man in the enjoyment of such his rights, not to deprive him of them, or of any part of them: these rights like all other natural rights are sacred and indefeasible. So far as it protects him accordingly, it is conformable to natural justice: so far as it deprives him of such his