

use and the exploitation of natural resources, we find the basic legal question: "What are the constitutional limitations on the public control of private property?" We also find the even more fundamental philosophical question: "What is contained in the *ius abutendi*,<sup>17</sup> the 'bundle of rights' associated with nominal title to real property?"

#### PROPERTY AND PROPERTY RIGHTS

While "property" is a right in both the philosophical and juristic sense, "private property" is an institution of society.

One of the most profound influences upon the concept of private property throughout history has been the philosophical acknowledgement that there exist certain human rights which seem to be inalienable since they are part of the essence of humanity. Just because certain fundamental human rights are inalienable, however, does not necessarily mean that such human rights may be freely exercised without limitation. Even absolutely inalienable rights are subject to some limitation upon their exercise, if not their possession, and the distinction between *possession* and *exercise* of a right becomes important since it enables us to explain the limitations that can be justly imposed upon the assertion of certain rights under certain circumstances within the structure of certain societies without denying the existence of such rights.

This distinction between possession and exercise of a fundamental human right makes it possible to accept the fact that, as history advances, it is fitting to forego the exercise of certain rights which human beings nevertheless continue to possess as an essential part of their human nature. This philosophical insight is essential to any

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tent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it. . . . The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered women as little for the juridical conflicts of the courtroom as for the physical conflict of the battlefield. . . ."

*In re Goodell*, 39 Wis. 232, 245 (1875). The court carried its position even further in chastising the male attorney who had the temerity to represent the young lady:

And when counsel was arguing for this lady that the word person . . . [in the statute describing those qualified to practice law] necessarily includes females, her presence [in the courtroom] made it impossible to suggest to him as *reductio ad absurdum* of his position, that the same construction of the same word . . . would subject woman to prosecution for the paternity of a bastard, and . . . prosecution for rape.

*Id.* at 246.

17. *Ius Abutendi* (*jus abutendi*) literally means the right to abuse. By this phrase is understood the right to abuse property, or the state of having full dominion over property; the right to destroy or consume, the right to freely dispose of property. MOREY, ROMAN LAW 383.

*Ius Utendi* (*jus utendi*), on the other hand, referred to the right to use property without destroying its substance; a concept similar to the later idea of "use without waste." It was employed in contradistinction to the "*ius abutendi*." The phrase *ius utendi tantum*, referred to the use of property for the purpose for which it is fitted, without destroying it, and which use can, therefore, be repeated.

consideration of the social problems associated with the forms the right to own property takes in any society that is in the process of economic evolution.

Property as a subjective right is a purely metaphysical concept.<sup>18</sup> The concept of absolute rights associated with private ownership of property, however, reflected the emphasis on individual liberty, which prevailed in society during the period of its ascendancy. The *dominium* of the individual is no more intelligible as such a right than the *imperium*<sup>19</sup> of the government.

In the second part of the *Discourse on Inequality*, Rousseau discussed the transition from the state of nature to organized society, and laid special emphasis on the establishment of private property as an institution of society. Property was introduced, equality disappeared, forests became smiling fields, slavery and misery arose with the crops. Private property was the result of man's departure from a state of primitive simplicity, and it brought untold evils in its wake. Given the insecurity and other vices that attended the development of the institution of private property, Rousseau believed that the establishment of political society, government and law were foregone conclusions.<sup>20</sup>

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18. Metaphysical justification of private property begins with Kant, who assumed the inviolability of the individual human personality and then attempted to justify a law of property in the abstract based upon the idea of a system of "external mine and thine." In order to justify the law of property, Kant went beyond what the Romans call "natural possession," to conclude that, "a thing can only be mine where I will be wronged by another's use when it is not in my actual physical control."

Kant raised the question of how merely juridical or rational possession as distinguished from purely physical possession is possible; and this same fundamental question—the distinction between physical and juristic possession—appears as consideration of the distinction between detention and possession in the Civil Law and between custody and possession at Common Law.

Of course juristic possession is only possible within a civil society in which a declaration by word or act that some object is mine and making that object subject to the exercise of my will is a "juridical act," which imposes upon others a duty to abstain from the use of the object; and admits that the individual is bound in turn to respect the objects that others have made "externally theirs."

Having worked out a theory of *meum* and *tuum* as legal institutions, Kant developed a theory of acquisition, distinguishing original and primary acquisition from derived acquisition, and postulating that nothing is "mine" by original title without a juridical act, that is, an act of right, an ethical transaction, as distinguished from the legal transaction by which derivative title may be acquired.

This metaphysical version of the Roman theory of occupation is evidently the link between the eighteenth century and Savigny's aphorism that all property is founded on adverse possession ripened by prescription: the origin of titles to land in Western Europe founded on the Germanic invasions and physical takeover of the land in the later Middle Ages.

It must be remembered that Kant was writing at the end of the eighteenth century fully aware that Rousseau held the view that the man who first laid out a plot of land and said, "This is mine," should have been lynched; and that vested rights were commonly being disregarded in revolutionary France. Kant was not thinking of how those who *had not* might claim a greater share of what they produced, but rather how those who *had* might claim to hold what they already had!

19. By *dominium* is meant ownership in the sense of personal possession. By *imperium* is meant the power of the sovereign to regulate the use of things.

20. "The first man who, having enclosed a piece of ground, bethought himself of saying, 'This is mine,' and found people simple enough to believe [him] was the real founder of civil society." Metallurgy and agriculture were the

The period from which the doctrine of the absolute nature of private rights in property was inherited differs from today in a number of obvious and significant respects. Before the rise of capital-intensive agriculture, the ownership, or at least the secure and effective occupation of land and possession of tools by those who used them, was a condition precedent to effective work in the field or in the workshop. The forces which threatened such private property at that time, much like today, were the fiscal policy of governments, in particular taxation, and in some countries the decaying legal formalities of feudalism.<sup>21</sup>

two arts which produced this great revolution. "All ran headlong for their chains in hope of securing their liberties; or they had just wit enough to perceive the advantage of political institutions, without sufficient experience to enable them to foresee the dangers." ROUSSEAU, DISCOURSE ON INEQUALITY 221.

One of the characteristics of American jurisprudence has been an uncompromising insistence upon individual rights and private property. Individualism as a philosophical concept emerged at the turn of the seventeenth century from the rise of theories of natural rights from the older theories of natural law. Historically, this period was characterized by the emancipation of the middle class and the rise of Protestantism.

The common law of America prior to the Civil War was generally the law according to the *Institutes* of Sir Edward Coke, and the age of Coke was the age of the Puritan in England. Philosophically, the Puritan proceeded from the fundamental doctrine of a "willing covenant of conscious faith" made by the individual to the proposition that individual conscience and individual judgment were supreme and no authority might rightfully coerce them for every individual must assume the results and accept the consequences of the choices he made. The covenant between God and Abraham which made the Children of Israel the chosen people of God furnished the religious basis of the New England Puritan community, and when applied to civil organization made all legal consequences result from exercise of the individual human will rather than from the existence of some feudal relation. Both Luther and Malanchthon vigorously denounced the Anabaptists and the rebellious peasants on the grounds that submission to civil government was enjoined upon Christians by the Scriptures and no individual claim of right could stand against the State.

The Puritan ideal demanded a fixed, absolute, universal rule which the individual recognized and contracted to respect. In the realm of politics, the conception of the people not as a mass but as an aggregate of individuals led to ascribing rights to each individual. There can be little doubt that the religious phase of the Puritan Revolution contributed to the evolution from the legal rights of individuals to the concept of the natural rights of man. In the administration of justice, however, our Puritan colonists gave us the concept of liberty of contract as an abstract notion which has been the bane of all social legislation, and the basis for objection to equitable application of general legal rules to particular cases.

In the law of property the Puritan influence can still be heard in the argument that whatever the motive or effect of private actions, "the public good [has] in nothing [a] more essential interest than in the protection of every individual's private rights." (Blackstone).

The impact of the Puritan tradition in America on the law can still be observed. Equity helps fools who have made bad bargains, whereas the Puritans believed that fools should be allowed and required to act freely and then held for the consequences of their folly. Equity acts directly upon the person, coercing the individual free will. Equity acts preventively, instead of permitting free action and imposing after the event the penalty assented to in advance. Equity involves discretion in its application to actual cases, and in the Puritan view permitted the magistrate to judge another by a personal standard instead of by an unyielding, impersonal legal rule.

21. Sixteenth century Spain is a prime example:

Spain found herself the first victim of her dazzling newfound wealth that, [having] come so easily, was to go even more easily, much of it [to] . . . service [the] mounting foreign debts that were Charles' nightmare throughout the whole of his reign [Charles V, 1516-1556]. . . . The industrial boom scarcely lasted beyond the middle of the [sixteenth] century. With soaring prices went a dwindling trade with the rest of Europe, [while] gradually increasing self-sufficiency in the colonies . . . lessened reliance on the products of the home country. With easy wealth [came] a contempt for honest labor, and with penal taxation and wrongheaded

The extreme position that the right to own property is absolute led a number of philosophers following the French Revolution to the logical conclusion that those who owned property could, by use or misuse of that property, do injury to others and escape liability by virtue of the absolute character of the rights associated with private ownership of property.<sup>22</sup>

Nevertheless, the power of that fundamental equitable maxim, as old as the Talmud and the Roman Law, which became the cornerstone of Anglo-American Equity Jurisprudence—*sic utere tuo ut alienam non laedas*—so use your own property so as not to injure that of another—led even the French Civilians, imbued as they were with the possessive and individualistic philosophy of the Revolution, to note that "In spite of its absolute character, ownership must still be circumscribed within reasonable limits. The truth is that there is no absolute property right and that the ownership itself is not an absolute right but subject to limitation."<sup>23</sup>

So long as men knew of no means of subsistence but the chase, pasturage or agriculture, the patrimony of human nature was a share

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policies, such as the sacrifice of agriculture to the vested interests of the Mesta [a sheep grazing monopoly], a progressive thwarting of the country's economic development. . . . It was a revealing commentary on the reign of this colossus who bestrode half the western world that [Charles was] unable to abdicate until funds could be had from Spain to pay off his household in the Netherlands. . . . Near bankruptcy had pursued him throughout [his reign]. The true measure of what the crushing of the *Communeros* at Villalar portended lay in the compliance thereafter of the Castilian Cortes, that [for] over forty years approved twenty-one of twenty-two demands for ever more crushing sums in taxation. Their one refusal, in 1527, resting on the fact that the [taxes] previous[ly] vote[d were] still uncollected. Charles got revenues even out of the Church. The nobles proving more difficult, he had [to] resort to . . . selling titles of nobility and thus exempting from the ranks of the taxpayers precisely those best able to pay. . . . The spectacle of a Spain in the process of financial strangulation in spite of all the wealth of the Indies was nothing new. [Phillip II, (1556-1598)] wrote in 1545, "The common people who have to pay taxes are reduced to such extremes of calamity and misery that many go naked and this poverty is even greater on the estates of the nobles, many of whose vassals have not the wherewithal to pay their dues, . . . the prisons are full, and everyone is heading for ruin."

W. ATKINSON, A HISTORY OF SPAIN AND PORTUGAL 144-45, 154 (1967).

Less than a century later in Stuart England, Charles I, eager for fiscal independence from Parliament, sought to expand his personal revenue base by extending the collection of Ship Money, that tax on coastal towns used for support of the Royal Navy, to the interior towns, thus touching the pockets of many budding mercantile metropolises and their inhabitants and stifling economic expansion among the tradesmen and working classes. It was a London merchant who complained, "The merchants are in no part of the world so screwed and wrung as in England." C. HILL, THE CENTURY OF REVOLUTION, 1603-1714, 56 (1966).

One need only consider the fiscal policies of the *Ancien Regime* in eighteenth century France and Stalin's extermination of the Kulak's family farms in Georgian Russian during the 1920's and 1930's to further illustrate the point.

22. BAUDRY-LACANTINERIE, I DROIT CIVIL, no. 10296, at 726 (10th ed., 1908). This statement, however, is not found in BAUDRY-LACANTINERIE & CHENEUX, I.A.C. DROIT CIVIL, no. 10296, at 738 (11th ed. 1912). While Cheneux declares that the owner "enjoys as he pleases, and if he desires, in an abusive manner," Baudry's collaborators have been far less categorical regarding property as an absolute right. L. Duguit, *The Functional Theory of Property*, ch. 25 of RATIONAL BASIS OF LEGAL INSTITUTIONS 315, 318 [hereinafter cited as Duguit]; CHAUVEAU, DES BIENS, no. 215 [hereinafter cited as CHAUVEAU].

23. IV BARDE, DES OBLIGATIONS, no. 2855, at 342, quoted by Duguit, *supra* note 22, at 318.

in the soil;<sup>24</sup> in the Middle Ages, in the towns where commerce and industry were developed, it was a place in the community and a share in the ownership of all that belonged to the community.

In seventeenth century England, the traditional justification for the right to possess private property was the security necessary for individuals to enjoy the fruits of their own labor.<sup>25</sup> By that time, property ownership had become for the majority of mankind the critically important factor determining their actual freedom and the practical prospects of realizing their full human potential. The right to own and possess property was read back into the essential nature of humanity. Individuals, it was thought, are free in as much as they are proprietors of their own capacities and of what they had acquired

24. While Rousseau was primarily concerned with the natural right of all human beings to govern themselves, the natural right to which Locke paid most attention was the right of property. Just as man has both the right and the obligation of self-preservation, he has a right to those things which are required for self-preservation. Relying on Genesis to support the position that God has given to men the earth and all that is in or on it, and conceding that God had not divided up the earth and the things on it, Locke nevertheless claimed that reason shows it is in accordance with God's will that there should be private property not only in the fruits of the earth and the things on and in and under it, but also in the earth itself. In the state of nature, according to Locke, a man's labor is his own and what of the earth and nature he changes from its original condition by the addition of his labor, becomes his. Locke believed that the property interest in land is acquired in the same way.

25. Locke's theory of labor as the primary title to property was eventually to be incorporated in a labor theory of value and come to be used in a way that its author never envisaged. There is no question that much of the mineral law of the United States and the appropriation doctrine applicable to water rights in the Western United States are direct extensions of Locke's theory. Locke himself, however, raises an objection to the proposition that if gathering the fruits of the earth confers a right to them, anyone may amass as much as he likes by answering: "Not so. The same law of nature that doth by this means give us property, does also bound that property, too." As for land, the doctrine that labor gives title to property sets the limit to the amount of property that can be acquired. "For as much land as a man tills, plants, improves, cultivates and can use the product of, so much is his property."

It is clear that Locke presumed a world in which there was a more than enough land for everybody, and his naive shortsightedness is no better illustrated than in this passage:

Nor was this appropriation of any parcel of land by improving it any prejudice to any other man, since there was still enough, and as good left; and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself: For he that leaves as much as another can make use of, does as good as take nothing at all. Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst; and the case of land and water, where there is enough of both is perfectly the same . . . [God] gave [the world] to the use of the industrious and rational (and labour was to be his title to it). . . . [T]he same measure may be allowed still without prejudice to anybody, full as the world seems. . . . We shall find that the possessions he could make himself upon the measure we have given would not be very large, nor, even to this day, prejudice the rest of mankind or give them reason to complain or think themselves injured by this man's encroachment, though the race of men have now spread themselves to all the corners of the world, and do infinitely exceed the small number there was at the beginning.

J. LOCKE, OF CIVIL GOVERNMENT §§ 33-35. However, unlike Hobbes, Locke did not consider the state of nature an ideal condition of affairs. Although according to Locke, "[t]he great and chief end of men's uniting into commonwealths and putting themselves under government is the preservation of their property," we must take the word "Property" as Locke intended. Men join together in society according to Locke, "for the mutual preservation of their lives, liberties and estates, which I call by the general name, property." *Id.* at —.

by the exercise of those capacities. The human essence is independence, freedom from dependence on the will of others. Since freedom was a function of possession, therefore Society must consist of relations involving exchanges between proprietors or owners of material goods, and political society became nothing more than a device for the protection of property and the maintenance of order in the relations of exchange.

While it cannot be said that the seventeenth century concepts of freedom, rights, obligations, and justice were all entirely derived from the concept of possession, they were powerfully shaped by it.<sup>26</sup> Possessive individualism as a philosophical system could be rationally based upon physical possession of property because it substantially corresponded to the actual relations that characterized the emerging market society which existed in Seventeenth Century England.<sup>27</sup>

Possessive assumptions were present not only in the two main systematic political theories, those of Hobbes<sup>28</sup> and Locke,<sup>29</sup> but also where they might be least expected, in the theories of the radical Levelers<sup>30</sup> and the gentry-minded Harrington.<sup>31</sup>

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26. Sir Edward Coke can be numbered among the early proponents of private property and opponents of the feudal system. Coke was also antagonistic to the relatively new (for England at that time) political theory of the Divine Right of Kings, and in asserting the supremacy of the common law against royal prerogatives, lost most of his positions and honors. The legal foundations for a modern free society were established by COKE, *INSTITUTES* (London 1628), in which property was defined as private ownership and rights rather than as loyalty to the King, feudal allegiance and feudal duties. See, W. GOEDECKE, *CHANGE AND THE LAW* 22-23 (1969).

27. Where Coke fought the battle for constitutional freedom, common law, and property rights against the Stuart Dynasty upon the ascension of James I in 1603, John Locke, who held many minor government positions during the reign of Charles II and James II, found himself allied with the first Earl of Shaftesbury against the Stuarts and carried the fight forward even after the abrupt termination of that dynasty in 1688. In 1683, Locke entered self-imposed exile in Holland, eventually returning to England with William of Orange in 1689. By his own statement, Locke wrote his *Two Treatises of Government* "to establish the throne of our great restorer, our present King William [and] to make good his title in the consent of the people," and to provide some philosophical justification for ousting James and placing William on the throne of England by popular acclaim and parliamentary demand.

28. Hobbes begins with an extreme statement of individualism. In the so-called "State of Nature," the state which precedes, logically at least, the formation of political society, each individual strives after self-preservation and the acquisition of power for the better attainment of personal ends. At that time there is no law in existence by which any personal actions can be called unjust. This is the state of the war of every man against every man; the state of atomic individualism.

The possessive quality of Hobbes' political philosophy was rooted in his conception of an individual as proprietor of his own person and human capacities, owing nothing to society for them.

29. While Locke also starts from an individualistic position and makes society depend on a compact or agreement, his individualism is different from that of Hobbes. The state of nature is not necessarily in essence a state of war between each man and his fellows. Even in the state of nature there are natural rights and duties which are antecedent to the State. Chief among these rights is the right of private property. Men form political society for the more secure enjoyment and regulation of these rights.

30. The Levellers became prominent in 1647 during the protracted and unsatisfactory negotiations between the King and the Parliament, while the relations between Parliament and the army were very strained. They became an important political party in England during the period of its Civil War and short-lived Commonwealth. The appellation first appears in a 1647 letter wherein they

For a short period during the struggle for commercial survival which characterized the seventeenth and early eighteenth centuries, the assumptions underlying the theory of possessive individualism served the purpose of maintaining individual personal freedom in society and though appropriate to the age in which they arose, soon suffered the fate of most political theories and were cast aside along the prosaic course of economic evolution.

Unfortunately, the theory of possessive individualism was more suited to protection of corporate persons than individual human beings, and gradually it became the means by which the oligarchy in business and industry was able to radically curtail the individual personal freedom of workers during the nineteenth and early twen-

are referred to as extremists who "have given themselves a new name, *viz.* Levellers, for they intend to sett all things straight, and rayse a parity and community in the kingdom."

Like another republican party, the Agitators, the Levellers were found mainly among soldiers who were opposed to the existence of the monarchy, and feared that Cromwell and the parliamentary leaders were too complaisant in their dealings with Charles. The distinguishing mark of the Leveller was a sea-green ribbon.

Another form of the movement whose members called themselves the "True Levellers" or "Diggers," took possession of some unoccupied ground which they began to cultivate in 1649. They were soon dispersed and their leaders were arrested, at which time they took the opportunity to denounce landowners.

Cromwell attacked the Levellers in his speech to Parliament in September 1654, when he said,

A nobleman, a gentlemen, a yeoman; the distinction of these: that is a good interest of the nation, . . . . The "natural" magistracy of the nation, was it not almost trampled under foot, under despite and contempt, by men of Levelling principles? . . . . For the orders of men and ranks of men, did not that Levelling principle tend to the reducing of all to an equality? . . . [W]hat was the purport of it but to make the Tenant as liberal a fortune as the Landlord? Which, I think, if obtained, would not have lasted long!

#### IV OLIVER CROMWELL'S LETTERS AND SPEECHES 23 (T. Carlyle ed. 1893).

In 1724 there was an uprising against enclosures in Galloway, and a number of the men who took part were called Levellers or Dykebreakers.

31. The political scientist James Harrington (1611-1677), (not to be confused with his cousin Sir James Harrington, a member of the Commission that tried Charles I) is perhaps best known for *Oceana*, a book which apparently incurred the wrath of both Cromwell and King Charles because of its two principal ideas: that the determining element of power in the State is property generally and property in land particularly; and that the executive power of the state ought not be vested for any considerable length of time in the same man or class of men.

Harrington proposed agrarian reforms that would limit the amount of land which could be held in terms of the revenue it produced, and consequently insisted on means to redistribute landed property. Harrington further angered his contemporaries following the Restoration by insisting that public offices should be rotated among many individuals of different classes through ballot. Perhaps the best summary of Harrington's position is found in the anecdote recounted by his biographer Toland, "When roughly asked why he, 'a private man,' had speculated on government, Harrington replied that nobody engaged in public affairs had ever written sensibly on the subject." *Quoted in G. GOOCH, ENGLISH DEMOCRATIC IDEAS IN THE SEVENTEENTH CENTURY* 242 (2d ed. 1967). While it may be difficult to prove any direct connection between Harrington's ideas and the constitutions of colonial America, certain broad similarities cannot be overlooked. *Oceana* is built upon the basic principles of a written constitution, the wide use of elections and the separation of powers together with short terms of office, popular approval of constitutional change, popular use of the ballot and petitions, with special safeguards for religious freedom and popular education. Harrington was quoted with respect by influential writers at the time of the American Revolution and his influence on Locke and Hume, and through Locke on Montesquieu was apparent.

tieth centuries. In protecting the rights of corporate entities as possessive individuals, the rights of human beings as free citizens were often sacrificed.<sup>32</sup> The "robber barons" sought the philosophical

32. When industrialism began after 1865 the creation of a new world, this Puritan code of worldly asceticism sprang into new importance. It had served well in a day when the wilderness was stubborn and when laborers were few. Then it had been a religious sanction behind inevitable frontier mores. But when Americans began the exploitation of the richest mineral resources of the world, the old doctrine began to have new uses. "By the proper use of wealth," wrote D.S. Gregory, author of a textbook on ethics used during the 1880's in many American colleges, "man may greatly elevate and extend his moral work. It is therefore his duty to seek to secure wealth for this high end, and to make a diligent use of what the Moral Governor may bestow upon him for the same end . . . . The Moral Governor has placed the power of acquisitiveness in many for a good and noble purpose . . . ."

[Andrew Carnegie wrote] "Avenues greater in number, wider in extent, easier of access than ever before existed, stand open to the sober, frugal, energetic and able mechanic, to the scientifically educated youth, to the office boy and to the clerk—avenues through which they can reap greater successes than ever before within the reach of these classes in the history of the world. . . . The millionaires who are in active control started as poor boys, and were trained in that sternest but most efficient of all schools—poverty. . . . Congratulate poor young men upon being born to that ancient and honorable degree which renders it necessary that they should devote themselves to hard work." Poverty, then, was viewed in terms of the individual, not of the mass. For the individual it was, or at least could be, a transient state. It was a blessing in disguise to the one who rose above it, but to him who did not, it was a symbol of shame, a sort of scarlet letter proclaiming that he was wanting in ability or character, or both.

The gospel of wealth was the intellectual concept of a generation that had stumbled upon easy money in a terrain well protected by nature from foreign brigands. It was the result produced when the individualism of a simpler agricultural and commercial civilization was carried over into a society luxuriating in all essential natural resources. But it was not the only result; this gospel of morality and of prosperity had its antithesis in the irresponsible philosophy of grab. The ill-fated gold corner of Fisk and Gould in 1867, the swindles of *Credit Mobilier*, the wars between powerful bands of railroad buccaneers, the exploitation of the defenseless immigrant laborer. R. Gabriel, *The Gospel of Wealth in the Gilded Age*, DEMOCRACY AND THE GOSPEL OF WEALTH (1949).

Pietro di Donato's *Christ in Concrete* has become a classic of American literature and a definitive, first hand description of "work" in America.

March whistled stinging snow against the brick walls and up the gaunt girders. Geremio, the foreman, swung his arms about and gaffed the men on. . . .

The Lean loaded his wheelbarrow and spat furiously. "Sons of two-legged dogs . . . despised of even the devil himself! Work! Sure! For America beautiful will eat you and spit your bones into the earth's hole! Work!" And with that his wiry frame pitched the barrow violently over the rough floor. . . .

Mike the "Barrel-mouth" pretended he was talking to himself and yelled out in his best English . . . he was always speaking English while the rest carried on in their native Italian. "I don't know myself, but somebody whose gotta bigga buncha keeds and he all times talka from somebody elsa!"

Geremio knew it was meant for him and he laughed. "On the tomb of Saint Pimple-legs, this little boy my wife is giving me next week shall be the last! Eight hungry little Christians to feed is enough for any man. . . ."

"Laugh, laugh all of you," returned Geremio, "but I tell you that all my kids must be boys so that they someday will be big American builders. And then I'll help them to put the gold away in the basements."

P. DiDONATO, *CHRIST IN CONCRETE* (1939). And what of the great American Dream that Geremio and his fellow-immigrants dreamt,

A corollary of the gospel of wealth was the popular formula of success. The stream of success literature which appeared after the Civil War became a flood by the end of the century. The patterns displayed in



these writings suggest the intellectual climate in which the gospel of wealth flourished. "Young men," said Horace Greeley, "I would have you believe that success in life is within the reach of every one who will truly and nobly seek it." L.U. Reavis made this sentiment of the New York Tribune's editor the theme of a little volume which he brought out in 1871: *L. REAVIS, THOUGHTS FOR THE YOUNG MEN OF AMERICA, OR A FEW PRACTICAL WORDS OF ADVICE TO THOSE BORN IN POVERTY AND DESTINED TO BE REARED IN ORPHANAGE* (1871). Success, taught Reavis, depended upon a few simple rules: "Don't be Discouraged. Do the Best You Can. Be Honest, and Truthful and Industrious. Do your Duty, and Live Right; Learn to Read, then Read all the Books and Newspapers You Can and All Will Be Well After Awhile." In a thousand variations of phrase this simple prescription for success was presented to all Americans able to read the English language. It was as universal as those other panaceas, *Castoria* and the Compound of Lydia Pinkham. It was acted out in the adventures and successes of heroes of novels by Horatio Alger and in the biographies for juveniles by William Makepeace Thayer.

R. Gabriel, *The Gospel of Wealth in the Gilded Age*, *DEMOCRACY AND THE GOSPEL OF WEALTH*, 59, 61, 63 (1949) [footnotes omitted]. And what of Geremio and the other immigrants who believed?

A great din of riveting shattered the talk among the fast moving men. Geremio added a handful of Honest tobacco to his corn cob, puffed strongly, and cupped his hands around the bowl for a bit of warmth. The chill day caused him to shiver, and he thought to himself: Yes, the day is cold, cold . . . but who am I to complain when the good Christ Himself was crucified?

Pushing the job is all right (when has it been otherwise in my life?), but this job frightens me. I feel the building wants to tell me something; just one Christian to another. . . . I don't like this. Mr. Murdin tells me, Push it up! That's all he knows. I keep telling him that the underpinning should be doubled and the old material removed from the floors, but he keeps the inspector drunk and . . . "Hey, Ashes-ass! Get away from under that pilaster! Don't pull the old work. Push it away from you or you'll have a nice present for Easter if the wall falls on you!" . . . Well, with the help of God I'll see this job through. It's not the first, nor the . . . "Hey, Patsy number two! Put more cement in that concrete; we're putting up a building, not an Easter cake!"

Patsy hurled his shovel to the floor and gesticulated madly. "The padrone Murdin-sa tells me, 'Too much, too much! Lil' bit is plenty!' And you tell me I'm stingy! The rotten building can fall after I leave!"

Six floors below, the contractor called, "Hey, Geremio! Is your gang of dagos dead?"

Geremio cautioned the men. "On your toes, boys. If he writes out slips, someone won't have big eels on the Easter table."

The day, like all days, came to an end. Calloused and bruised bodies sighed, and numb legs shuffled toward shabby railroad flats.

That night was a crowning point in the life of Geremio. He bought a house! Twenty years he had helped to mold the New World. And now he was to have a house of his own! What mattered that it was no more than a wooden shack? It was his own!

He had proudly signed his name and helped Annunziata to make her X on the wonderful contract that proved them owners. And she was happy to think that her next child, soon to come, would be born under their own roof tree.

Annunziata whispered, "Geremio, to bed and rest. Tomorrow is a day for great things . . . and the day on which our Lord died for us."

"Geremio. The month you have been on this job, you have not spoken a word about the work. . . . And I have felt that I am walking into a dream. Is the work dangerous? Why don't you answer?"

P. DI DONATO, *CHRIST IN CONCRETE* (1939). The American city was built by its immigrants as, many social studies classes carefully teach the children of today. Now many government spawned programs attempt to make students aware of the ethnic heritage of America. Indeed, as Pietro di Donato tells us, the immigrant often contributed more than just his toil to building the American city.

Job loomed up damp, shivery gray. Its giant members waiting.

Builders donned their coarse robes, and waited.

Geremio's whistle rolled back into his pocket and the symphony of struggle began.

The multitudinous voices of a civilization rose from the surroundings and melted with the efforts of the Job.

The Lean as he fought his burden on looked forward to only one goal, the end. The barrow he pushed, he did not love. The stones that

brutalized his palms, he did not love. The great God Job, he did not love. He felt a searing bitterness and fathomless consternation at the queer consciousness that inflicted the ever mounting weight of structures that he *had to! had to!* raise above his shoulders! When, when and where would the last stone be? Never . . . did he bear his toil with the rhythm of a song! Never . . . did his rasping heart knead the heavy mortar with lilting melody. A voice within him spoke in wordless language.

The language of worn oppression and the despair of realizing that his life had been left on brick piles. And always, there had been hunger and her bastard, the fear of hunger.

Murkin bore down on Geremio from behind and shouted: "Goddammit, Geremio, if you're givin' the men two hours off today with pay, why the hell are they draggin' their tails? And why don't you turn that skinny old Nick loose, and put a young wop in his place?"

"Now listen-a to me, Mister Murkin—"

"Don't give me that! And bear in mind that there are plenty of good barefoot men in the streets who'll jump for a day's pay!"

"Padrone—padrone, the underpinning gotta be make safe and . . ."

"Lissenyawopbastard! if you don't like it, you know what you can do!" And with that he swung swaggering away.

The men had heard, and those who hadn't knew instinctively.

The new home, the coming baby, and his whole background, kept the fire from Geremio's mouth and bowed his head. "Annunziata speaks of scouring the ashcans for the children's bread in case I didn't want to work on a job where . . . But am I not a man, to feed my own with these hands? Ah, but day will end and no boss in the world can then rob me of the joy of my home!"

Murkin paused for a moment before descending the ladder.

Geremio caught his meaning and jumped to, nervously directing the rush of work . . . No longer Geremio, but a machinelike entity.

The men were transformed into single, silent beasts.

[After lunch] the ascent to labor was made, and as they trod the ladder, heads turned and eyes communed with the mute flames of the brazier whose warmth they were leaving, not with willing heart, and in that fleeting moment the breast wanted much to speak of hungers that never reached the tongue.

About an hour later, Geremio called over to Pietro, "Pietro, see if Mister Murkin is in the shanty and tell him I must see him! I will convince him that the work must not go on like this . . . just for the sake of a little more profit!"

Pietro came up soon. "The padrone is not coming up. He was drinking from a large bottle of whisky and cursed in American words that if you did not carry out his order—"

Geremio turned away disconcerted, stared dumbly at the structure and mechanically listed in his mind's eye the various violations of construction safety. An uneasy sensation hollowed him. . . . The Lean brought down an old piece of wall and the structure palsied. Geremio's heart broke loose and out-thumped the floors vibrations, a rapid wave of heat swept him and left a chill touch in its wake. He looked about to the men, a bit frightened. . . .

Snoutnose's voice boomed into him. "Master Germio, the concrete is re-ady!"

His hand went up in motion to Julio. The molten stone gurgled low, and then with heightening rasp. His eyes followed the stone-cement pudding, and to his ears there was no other sound than its flow.

His train of thought quickly took in his family, home and hopes. And with hope came fear. Something within asked, "Is it not possible to breath God's air without fear dominating with the pall of unemployment? And the terror of production for Boss, Boss and Job? To rebel is to lose all of the very little. To be obedient is to choke. O dear Lord, guide my path."

*Id.* Today we have the Occupational Safety & Health Act (OSHA), labor laws and any number of administrative agencies and government bureaus protecting American workers whether newly arrived immigrants, native Americans or descendents of the earliest settlers or slaves. But for those who believe that industrial progress is worth the annual toll in maimed bodies and human life that are the result of what has euphemistically come to be called, for statistical purposes, the "industrial accident," consider Peitro diDonato's account of his father's death and transfiguration in the opening chapter of *Christ in Concrete*.

Just then, the floor lurched and swayed under his feet. The slipping of the underpinning below rumbled up through the undetermined floors.

Was he faint or dizzy? Was it part of the dreamy afternoon? He put up his hands in front of him and stepped back, and looked up wildly. "No! No!"

The men poised stricken. Their throats wanted to cry out and scream but didn't dare. For a moment they were a petrified and straining pageant. Then the bottom of their world gave way. The building shuddered violently, her supports burst with the crackling slap of wooden gunfire. The floor vomited upwards. Geremio clutched at the air and shrieked agonizingly. "Brothers what have we done? Ahhh-h children of ours!" With the speed of light, balance went sickening awry and frozen men went flying explosively. Job tore down upon them madly. Walls, floors, beams became whirling, solid, splintering waves crashing with detonations that ground man and material together in bonds of death.

The strongly shaped body that slept with Annunziata nights and was perfect in all the limitless physical quantities thudded as a worthless sack amongst the giant debris that crushed fragile flesh and bone with centrifugal intensity.

Darkness blotted out his terror and the resistless form twisted, catapulted insanely in its directionless flight, and shot down neatly and deliberately between the empty wooden forms of a foundation wall pilaster in upright position. His blue swollen face pressed against the form and his arms outstretched caught securely through the meat by the thin round bars of reinforcing steel.

The huge concrete hopper that was sustained by an independent structure of thick timber wavered a breath or so, its heavy concrete rolling uneasily until a great sixteen-inch wall caught it squarely with all the terrific verdict of its dead weight and impelled it downward through joists, beams and masonry until it stopped short, arrested by two girders, an arm's length above Geremio's head; the gray concrete gushing from the hopper mouth, and sealing up the mute figure.

Giocomo had been thrown clear of the building and dropped six floors to the street gutter, where he lay writhing.

The Lean had evinced no emotion. When the walls descended, he did not move. He lowered his head. One minute later he was hanging in mid-air, his chin on his chest, his eyes tearing loose from their sockets, a green foam bubbling from his mouth and his body spasming, suspended by the shreds left of his mashed arms, pinned beneath a wall and a girder.

A two-by-four hooked little Tomas under the back of his jumper and swung him around in a circle to meet a careening I beam. In the flash that he lifted his cherubic face, its shearing edge sliced through the top of his skull.

When Snoutnose cried beseechingly, "Saint Michael!" blackness enveloped him.

The rescuemen cleaved grimly with pick and ax.

Geremio came to with a start . . . far from their efforts. His brain told him instantly what had happened and where he was. He shouted wildly, "Save me! Save me! I'm being buried alive!"

He paused, exhausted. His genitals convulsed. The cold steel rod upon which they were impaled froze his spine. He shouted louder and louder. "Save me! I am hurt badly! I can be saved I can—save me before it's too late!" But the cries went no farther than his own ears. The icy wet concrete reached his chin. His heart appalled. "In a few seconds I will be entombed. If I can only breathe, they will reach me. Surely, they will!" His face was quickly covered, its flesh yielding to the solid sharp-cut stones. "Air! Air!" screamed his lungs as he was competely sealed. Savagely he bit into the wooden form pressed upon his mouth. An eighth of an inch of its surface splintered off. Oh, if he could only hold out long enough to bite even the smallest hole to air! He must! There can be no other way! He is responsible for his family! He cannot leave them like this! He didn't want to die! This could not be the answer to life! He had bitten halfway through when his teeth snapped off to the gums in the uneven conflict. The pressure of the concrete was such, and its effectiveness so thorough, that the wooden splinters, stumps of teeth, and blood never left the choking mouth.

Why couldn't he go any farther?

Air! Quick! He dug his lower jaw into the little hollowed space and gnashed in choking agoonized fury. Why doesn't it go through? Mother of Christ, why doesn't it give? Can there be a notch, or two-by-four stud behind it? Sweet Jesu! No! No! Make it give. . . . Air! Air!

He pushed the bone-bar jaw maniacally, it splintered, cracked, and a jagged fleshless edge cut through the form, opening a small hole to air.

basis for their "natural" law in economics rather than ethics and found in Social Darwinism<sup>33</sup> an industrial philosophy for the United

With a desperate burst the lung-prisoned air blew an opening through the shredded mouth and whistled back greedily a gasp of fresh air. He tried to breathe, but it was impossible. The heavy concrete was settling immutably and its rich cement-laden grout ran into his pierced face. His lungs would not expand and were crushing in tighter and tighter under the settling concrete.

[Geremio took a long time to finally die]

*Id.* And with the passing of life from Geremio, the living death of his family began,

At Easter dawn, the street door closed and footfalls sounded up the stairs. Paul nodded shock-awake, and called frantically, "Papa!"

Annunziata flew to the door, and as she reached out her arms . . . the policeman lowered his eyes and slowly removed his cap.

Easter morning bright. Slender dark-eyed Paul, holding little Annina's hand, entered the police station. He beat his thin fingers and stood nervously before the high desk.

The sergeant rested his elbows, peered forward, and finally said, "Well, what is it, kiddo?"

Paul opened his mouth to speak, but instead, round wet tears came down his cheeks and through the wavery blur he saw the high brown desk, the policeman, and behind him a big red, white and blue flag. He closed his eyes and gasped: "On Friday—Good Friday—the building that fell—my father was working—he didn't come home—his name is Geremio—we want him—"

The sergeant thought for a moment and called to the next room: "Hey Alden, anything come in on a guy named—Geremio?"

A second later, a live voice from the next room loudly answered: "What?—oh yeah—the wop is under the wrappin' paper out in the courtyard!" *Id.*

33. In its extreme form, the creed of competitive individualism became "Social Darwinism"—the doctrine that social progress and individual justice consist in the *bellum omnium contra omnes*, in the law of tooth and claw, in endless war leading to the survival of the fittest. This creed could be congenial to a businessman seeking to justify destruction of a competitor or exploitation of wage earners and consumers. But the typical American capitalist was not an educated man of the sort to read Darwin or Herbert Spencer, and Social Darwinism had its chief vogue among intellectuals like historian John Fiske, and sociologist William Graham Sumner. For every businessman who cited "the survival of the fittest," there were perhaps ten others who buttressed their behavior by talking about the "right to manage" See, R. GINGER, *AGE OF EXCESS, THE UNITED STATES FROM 1877-1914* (1965); R. HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (Rev. Ed. 1955); R.J. WILSON, *DARWINISM AND THE AMERICAN INTELLECTUAL* (1967).

In 1902 John D. Rockefeller, Jr. sought to explain the business success of his father with a fascinating analogy,

The growth of a large business is merely a survival of the fittest. . . .

The American Beauty rose can be produced in the splendor and fragrance which bring cheer to its beholder only by sacrificing the early buds which grow up around it. This is not an evil tendency in business. It is merely the working out of a law of nature and a law of God.

Quoted in W. GHENT, *OUR BENEVOLENT FEUDALISM* 29 (1902). The Social Darwinism of Herbert Spencer is one of the classic examples of an idea which has attained much wider acceptance than the evidence of its validity warrants. It offered the business tycoons a perfect rationalization for their brutal exploitation of human labor and their ruthless competition with each other and the public interest out of which they gathered their riches and power. Spencer was a friend of Charles Darwin and coined the phrase "survival of the fittest," which provided the robber barons of America and the Continent with a scientific justification for their tactics. They survived and prospered because they were the fittest in the struggle. Financial success in business was the obvious measure of the validity of Social Darwinism, the theory which linked the rapidly developing natural science of the nineteenth century to the newly emergent social "sciences." Social Darwinism provided a convenient way for industrialists and entrepreneurs to ignore the social consequences of their actions done in the name of "business," although President Woodrow Wilson, in his first inaugural address, delivered on March 4, 1913, noted,

There has been something cruel and heartless and unfeeling in our haste to succeed and be great. Our thought has been "Let every man look out for himself, let every generation look out for itself," while we reared

States and justification for their<sup>34</sup> self-righteous moral position.

Today, as throughout history, we wonder whether the ancient equitable maxim, *sic utere tuo ut alienam non laedas* (so use your own property as not to injure that of another) is sufficient to protect the rights of the sovereign people of the United States in and to the full benefit, use and enjoyment of the unique, national natural resource treasure represented by the arable lands, particularly the Class I, Class II, and Class III Soils<sup>35</sup> of the Americas.

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giant machinery which made it impossible that any but those who stood at the levers of control should have a chance to look out for themselves. Reprinted in II R. HOFSTADTER, *GREAT ISSUES IN AMERICAN HISTORY* 303 (1958).

34. It seems hard that a laborer incapacitated by sickness from competing with his stronger fellows, should have to bear the resulting privations. It seems hard that widows and orphans should be left to struggle for life or death. Nevertheless, when regarded not separately, but in connection with the interests of universal humanity, these harsh fatalities are seen to be full of the highest beneficence—the same beneficence which brings to early graves the children of diseased parents, and singles out the low-spirited, the intemperate, and the debilitated as the victims of an epidemic.

H. SPENCER, *SOCIAL STATICS* 323 (London 1851).

35. *SOILS AND MEN, YEARBOOK OF AGRICULTURE* (1938), contained a prophetic warning, "The social lesson of soil waste is that no man has the right to destroy soil even if he does own it in fee simple. The soil requires a duty of man which we have been slow to recognize."

Soils do not occur at random in the landscape. They have an orderly pattern related to the land form, the parent material from which the soil was formed, and the influence of the plants that grew on the soils, the animals that lived on them and the way men have used them.

The common-field system of agriculture or the open-field method of cultivation has had an extraordinarily long tenure in the history of world agriculture. Without some knowledge and appreciation of its operation, there can be little understanding of the evolution of real property law as it affects agricultural lands.

In Anglo-Saxon England, as in the Gaul of Julius Caesar, all the arable land in the township was divided into two or three open and unenclosed fields which were cultivated in rotation. Each of the fields was divided into a number of strips, the size of which varied with the intrinsic suitability of the soils in each field for raising particular crops. The holding of each landowner consisted of a multitude of strips scattered throughout the area and intermixed with those of neighbors. Attached to these holdings were certain common rights. Certain fields remained fallow each year, and while the field was fallow after the crop was cut, the cattle of the villagers could pasture in the fields. Many areas maintained Lammas meadows upon which hay was grown and which were divided into strips subject to individual ownership while the hay was growing, but common to all the villagers after the hay had been cut and gathered. As a general rule, there were extensive lands surrounding each community which were not intrinsically suitable for cultivation, and upon which the cattle of the township, or of adjoining townships could graze at will, subject to the rules which the community might promulgate.

The intricate delineation of fields, strips, pastures, hedgerows, furrow-strips and meadows found on any of the earliest British maps bears a striking resemblance to a modern soils map of the same area. It is this relationship that probably accounted for the continued existence of the common field system of agriculture through so many centuries and among such diverse cultures. Since we can probably assume that the original intention of those dividing the community landholdings was to divide them equally, we must recognize that these people also understood that an equal division of lands involved not only the quantity, but the quality of the land, and the simplest plan was to give each landowner some good land, some bad land and some land that was not particularly good or bad. It is a tribute to the agricultural wisdom of these early cultures that they were able to identify these three classes of soil and then divide each among their people in shares capable of approximately equal agricultural yield for the same amount of cultivation effort.

Caesar described the Gallic tribes as pastoral and vagrant people cultivating just enough land each year to supply themselves with grain. Later, Tacitus, describing the same area, notes that the tribes had come to dwell in small communities where, although each person had their own homestead, the arable

Over the centuries, attempts have been made to establish some standard for discriminating among the several archetypes of private property<sup>36</sup> in order to determine those which should be sanctioned by

land was divided year by year among the villagers and plowed afresh. The same practice existed among the early Welsh tribesman who annually plowed fresh grassland, leaving it to return to grass after the years harvest, a not so undesirable agricultural practice in the absence of artificial fertilizers and synthetic pesticides.

The common-field system certainly represents a transition between the early period in civilization where permanent ownership of land was unknown, and the rather recent idea that land can be the object of separate and individual private ownership.

Soils are classified by the Soil Conservation Service of the United States Department of Agriculture in terms of land capability classes, subclasses and units. Of the eight classes established by the Soil Conservation Service, most of the arable land in the United States and Canada falls into Class I, Class II and Class III although a limited amount of Class IV land can be cultivated on an intermittent yield basis provided rigorous soil conservation measures are taken.

Because several kinds of soil often occur in the same capability class in the same area, the classes are divided into subclasses, each of which recognizes a particular problem: (e)-erosion and runoff; (w)-wetness and drainage; (s)-root zone and tillage limitations, such as shallowness, stoniness, droughtiness, and salinity; and (c)-climatic limitations.

Soils are also identified by such characteristics as the kinds and numbers of horizons, or layers, that have developed in them. The texture (the relative amounts of stones, gravel, sand, silt and clay), the kinds and quantities of minerals presented the presence of salts and alkali help distinguish the horizons.

A soil series is a group of soils that have horizons that are essentially the same, with the exception of the texture of the surface soil and the kinds of layers that lie below what is considered the true soil. The names of the soil series are taken from the towns or localities near the place where the soils were first defined.

The soil type is a subdivision of the soil series based on the texture, (defined in terms of particle size) of the surface soil. Stones, gravel (between 0.08 and 3.0 inches), sand (between 0.08 and 0.0002 inch), silt (between 0.002 and 0.00008 inch), and clay (less than 0.00008 inch).

The soil type is the smallest unit in the natural classification of soils. The full name of a soil type includes the name of the soil series and the textural class of the surface soil equivalent to the plow layer—that is, the upper 6 or 7 inches.

While soil phase is not a part of the natural classification system, soil phases shown on soil maps are commonly based on characteristics of the soil significant to agriculture, and generally reflect differences in slope, degree of erosion, and stoniness, although other bases for defining phases include drainage and flood protection, climate, and the presence of contrasting layers below the soil.

The basic document in any legal system of land use regulation should be the soils map. Unless the classifications established in any zoning or districting scheme bear some reasonable relationship to the underlying soils in a rural or suburban area, there is no way to defend the legislation in the face of ecologically sophisticated attack.

The basic information on soils can be obtained most conveniently from the Soil Conservation Service of the United States Department of Agriculture and the United States Geological Survey of the Department of the Interior. Some of the foregoing was adapted from SOIL, YEARBOOK OF AGRICULTURE (1957), a relatively short work which was an adaptation of its 1938 predecessor. Other material was adapted from FUTURE ENVIRONMENTS OF NORTH AMERICA (1966).

36. It was Hobson who suggested a classification of proprietary rights based on the distinction between active and passive property along a line ranging from property which is obviously the payment for and a condition of personal services, to property which is merely a right to payment from the services rendered by others, or nothing more than a private tax.

A modern version of that list would include in the group of property interests which would accompany and in some cases condition the performance of work:

1. Property which represents payment for personal services;
2. Property in those objects necessary to maintain personal health and comfort;
3. Property in land and tools used by the owner;
4. Property in the work of authors and inventors protected by copyrights and patents.

positive law<sup>37</sup> and those which should not. From the late eighteenth century throughout the nineteenth and on into the twentieth until World War II temporarily terminated the economic unrest of the Great Depression, political thought oscillated between mutually inconsistent concepts of property which represented polar extremes, each leading in their different ways to extravagant claims and less than socially desirable states of human affairs.<sup>38</sup>

Such divergence of opinion is quite natural, since in most discussions of property the opposing theorists are usually discussing different things. Property is the most ambiguous of concepts, covering a multitude of rights which have nothing in common except that they are exercised by persons and enforced by the state. Apart from these formal characteristics, they vary indefinitely in economic character, in social effect, and in moral justification. They may be conditional like the grant of patent rights, or absolute like the ownership of ground rents; terminable like copyright, or permanent like freehold; as comprehensive as sovereignty or as restricted as an easement; as intimate and personal as the ownership of clothes and books, or as remote and intangible as commodity futures or shares in crude oil and natural gas reserves which have yet to be proven.<sup>39</sup>

It is only idle speculation to present a case for or against private property without specifying that particular form of property to which reference is made. The land developer who says, "Private

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and the group of property interests which arise from "the fortuitous confluence of propitious circumstances:" by operation of luck, chance or good fortune,

5. "Gambling" winnings, whether the result of commercial speculation or games of chance;
6. Property in the profit attributable to existence of a monopoly or oligopoly;
7. Property in urban ground rents; and
8. Property in royalties;

which obviously do not involve the performance of any social function or work by the property owner. There are some property interests, that partake of both active and passive property, such as agricultural rent, where the interest represents a necessary economic cost the equivalent of which must be born, whatever the legal arrangements under which the property is held, and is thus unlike the property represented by profits other than the equivalent of salaries and payment for risks necessarily taken, but which relieves the recipient from the obligation to perform personal services and thus resembles interests such as urban ground rents and royalties.

37. The best organized early statement of legal classification is that of Thomas Aquinas (1225-1274) in the *SUMMA THEOLOGICA*. There, in a series of questions (QQ. 90-97), Thomas considers the essence of law (Q. 90), the various kinds of law (Q. 91), the eternal law (Q. 93), the natural law (Q. 94), human law (Q. 95), its power (Q. 96) and mutability (Q. 97).

Human law, or positive

[l]aws were made that in fear thereof human audacity might be held in check, that innocence might be safeguarded in the midst of wickedness, and that the dread of punishment might prevent the wicked from doing harm . . . these things are most necessary to mankind. Therefore it was necessary that human laws should be made.

[I]n order that man might have peace and virtue, it was necessary for laws to be framed; . . . as man is the most noble of animals if he be perfect in virtue, so he is the lowest of all, if he be severed from law and justice. For man can use his reason to devise means of satisfying his lusts and evil passions, which other animals are unable to do. *Id.* at Q. 97.

38. See, e.g., *Land Use Crisis: Two Solutions*, SHOPPING CENTER WORLD, at 18-23 (March, 1974); AMERICAN SOCIETY OF REAL ESTATE COUNSELORS, PROCEEDINGS OF THE 1970 HIGH LEVEL CONFERENCE, Williamsburg, Va. (1970).

39. M. King Hubbard, *Energy Resources*, *The ENERGY CRISIS, DANGER AND OPPORTUNITY*, at 43-151.

Property is the foundation of civilization," cannot be said to disagree with Proudhon,<sup>40</sup> who said, "Private Property is theft!" Without further definition, the words of both are meaningless. Arguments which seem to support certain kinds of property rights may have no application to other kinds of property rights; considerations which are essential in one stage of the organizational evolution and

40. Property is a civil right, born of occupation and sanctioned by law; . . .  
 [property] is a natural right, originating in labor, . . .  
 Property is robbery! That is the war cry of '93!  
 That is the signal of revolutions!"

P. PROUDHON, *WHAT IS PROPERTY? AN ENQUIRY INTO THE PRINCIPLE OF RIGHT AND OF GOVERNMENT* 11-12 (1966).

Pierre Joseph Proudhon was born on January 15, 1809 in Mouillere, France. His father, though a cousin of the jurist Proudhon, a celebrated professor at Dijon, was a journeyman brewer. His mother, a genuine peasant, was a common servant. His family was so poor that they could not afford to furnish him with books, and he was obliged to copy the texts of his lessons from the books of his friends and from the town library. His friend and biographer, J.A. Langlois, tells us that one day, towards the close of his studies, on returning from the distribution of the prizes loaded with crowns, he found nothing to eat in the house.

Forced to earn his living first as a proof-reader and then as a compositor, he eventually became a foreman in the house of Gauthier & Co., a large printing establishment at Besancon where he corrected the proofs of the Fathers of the Church, and learned Hebrew by himself during the printing of a Latin Vulgate edition of the Bible from the original Hebrew. As the house of Gauthier published many works on Church history and theology, Proudhon came to acquire an extensive knowledge of theology which afterwards caused the misinformed to think that he had been in an ecclesiastical seminary.

In an 1839 letter to the Academy of Besancon applying for the prize academic pension, Proudhon expressed his firm resolve to labor for the amelioration of the condition of his brothers, the working men. In 1848, when asked by his biographer if he did not consider himself indebted in some respects to his fellow countryman, Charles Fourier, Proudhon replied,

I have certainly read Fourier, and have spoken of him more than once in my works; but, upon the whole, I do not think that I owe anything to him. My real masters, those who have caused fertile ideas to spring up in my mind, are three in number: first, the Bible, next, Adam Smith; and last, Hegel.

The first memoir on property appeared in 1840, under the title, *WHAT IS PROPERTY? OR AN INQUIRY INTO THE PRINCIPLE OF RIGHT AND OF GOVERNMENT*, and led to threats of prosecution. Thereafter, Proudhon spent the remainder of his life as a social activist, writing and speaking out, even from prison, on all of the important social issues of the day until his death on January 19, 1865.

Proudhon recognized that all of the economical categories—competition, monopoly, the balance of trade and the institution of private property, as well as the division of labor, machinery and mechanization, taxation and credit—when considered in their thesis, that is, in terms of the law or human tendency which created them, are rational. Nevertheless, all of these categories are antithetical and contain inherent contradictions; all are opposed, not only to each other but to themselves. These perceptions led Proudhon to a significant philosophical insight first expressed in his *SYSTEM OF ECONOMICAL CONTRADICTIONS* (1848), that the solution of "social" problems lies not, as suggested by the philosophy of Hegel, in discovery of the fusion of thesis and antithesis since that would annihilate the system, but in establishing equilibrium within the system established by the existence of contradiction—an equilibrium forever unstable, and varying with the evolutionary state of society. All social and political disorder is born of these inherent contradictions within the elements of social systems; hence, the subtitle of the work, "Philosophy of Misery." Proudhon differed from many of the radicals of nineteenth century France by recognizing that no category of economic, social or political relations which has become an accepted element of the social system can be entirely eliminated if civilization is to be maintained. The contradiction which exists within each category cannot be suppressed. All that the government and the law can do is maintain a state of dynamic equilibrium consistent with the aspirations of society at any given stage of history.

Adapted from the biographical essay by J.A. Langlois, which introduced the first volume of the published correspondence of P.J. Proudhon and was first translated into English in 1890.



economic development of society may become almost irrelevant in the next. The wise course is to pass through this semantic miasma undisturbed, neither attacking the concept of private property in general nor defending it generally, but considering particular instances under the circumstances of particular times in the context of specific cultures. The object of jurisprudence is to discriminate among the various concrete embodiments of what is, in itself after all, little more than an abstraction.

Another source of confusion in the modern debate over "private property rights" is the tendency to speak of property as if it were an institution having a fixed and immutable form constant throughout history, whereas, in reality, that which describes the *right* to dispose of and enjoy material objects, "property," has assumed many diverse forms and still is susceptible of great and unforeseen modifications. As many as are the forms of property, there will be found some theory as to its origin and some philosophical attempt to justify it.

The concept of private rights in land, landscape and natural resources, particularly non-renewable natural resources, requires careful consideration of the parallel yet interrelated concepts of natural law and sovereignty as well as the institution of property over the thousands of years since civilization emerged from the Fertile Crescent, leaving behind a barren desert and starting mankind on the march down the road towards ecocide.<sup>41</sup>

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41. Man's misuse of the land is very old, going back thousands of years even to the earliest periods of human history. It can be read in the despairing chronicle of ruins buried in sand, of rivers running in channels high above their surrounding landscapes, of ever-spreading deltas, of fallen terraces which once held productive fields or rich gardens. It can be seen in man-made deserts and in immense reaches of bare rock from which the once fertile soils have been washed and blown away. Occasionally in some watered part of the earth a trace may be found of what was once there before the vast destruction. Perhaps there will be a terrace wall that did not fall away but held its portion of soil where still are growing vines or olive trees that flourish in spite of the surrounding desolation, or a grove of ancient cedars in some protected place where all but their own small plot of land has been destroyed around them.

Erosion and its fatal consequences have often been attributed to gradual changes in the climate of a region, or more especially, to the fact that certain regions have, over long periods of time, suffered a marked diminution in rainfall.

How did man become a land destroyer?

In the region that lies between the Tigris and Euphrates Rivers there once was a land suggestive of the Garden of Eden, a rich land whose people lived well, built flourishing cities, established governments and developed the arts. Advanced methods of agriculture were developed which included complex and extensive systems of irrigation works during the reign of Hammurabi, about 2,000 B.C., by which the waters of the two great rivers were drawn off to increase the fertility of the land. Gradually great changes took place and the whole region deteriorated. This may have been because of cutting the forests outside the cities, thus exposing land to eroding rains at certain seasons, and to the quick runoff which must always mean a dearth of water from natural sources later on. Also it may have been because of overgrazing the grasslands, which would have a similar effect. Eventually war seemed to have caused the final demise of these early civilizations, as the ditches and canals, which were the life streams of the settled populations, were blocked or destroyed so that invaders could plunder the cities, graze in the fields and gardens and cut down trees for firewood. In the end this impoverished or destroyed the people. These cities and the elaborate civilization they represented are today lost under the sands.

Near other early cities in western Asia the land had been heavily cultivated, and quite often terraced to conserve the soil which was the meat and bread of the people. Farmers had discovered then—as they are now rediscovering in many diverse parts of the world—that steep land from which trees have been cut can still be preserved by terracing, and by putting back into the terraces all the animal and vegetable waste products available, all the while controlling the flow of water from level to level, so that all parts of the terraced land get their share. The famous Hanging Gardens of Babylon were probably terraced slopes.

It takes much more labor to maintain terraces in a state of fertility, however, for where a terrace wall breaks, the wreckage of that relatively small area may be carried to lower fields, to break their supporting walls and continue destruction downward in an ever-widening wedge of ruin. The much used lands of Babylonian civilization required many workers to keep them productive. When town populations were reduced during attacks by nomadic invaders, there were not enough men left to carry on the perennial work of restoration and land care, which alone would preserve fertility.

Most of what is sometimes called “the cradle of civilization” gradually became a desert. Those who were left in the cities took desperate measures to keep alive, and even tried to adopt a nomadic form of life themselves. For this they were unfitted, however, and their numbers decreased until they died out entirely, leaving the empty ranges to nomads who could maintain themselves and their herds in what desert oases they could find.

The story continues in Syria, once a land of great richness. As populations spread into Syria toward the Mediterranean they moved into a wonderful country with forests and rivers offering a wealth of natural resources. In this region red-brown earth covered the limestone hills. More than a hundred cities sprang up in North Syria, their builders making use of great beams of wood obtained from the forests, and of stone which they learned to handle with great skill. We know little about the past of these cities, but we do know that they prospered for a short time at least.

These cities demonstrate erosion at its worst. They are not buried under sand, but stand up starkly on their rock foundations, their doorways several feet above the foundation stones, showing that productive soil has been washed away from the very dooryards themselves. The limestone is there, but the red-brown soil has disappeared and cannot be seen at all except in small pockets where a wall has kept a little of it intact. In these pockets still grow the vines and olive trees that were once the glory of North Syria and the source of her prosperity. The remains of wine and oil presses abound in the region, cisterns among the ruins even now hold water, but no one is there. The cities have been dead for a long time.

Yet this was a country that exported so much oil and wine to Italy that the discarded shards of the jars used for export form a hill to this day: the hill of Testaccio on the boarders of the Tiber. The oil and wine were placed in huge pottery jars and transported by ship to Italy, there to be decanted into smaller containers. The large jars were not thought worth sending back to the country of their origin, and so were broken up and piled to form a hill whose great size can testify to the extent of the trade in oil and wine.

From the city of Byblos, on the North Syrian coast, went much timber to Egypt. The cedars of Lebanon went to Egypt for the building of houses and temples in the Valley of the Nile. In the Syrian cities an elaborate system of terracing was developed to prevent land loss as the forests were cut and the rainfall became menacing, and for a long time the agriculture of the region was preserved. Indeed the earliest recorded reference to agricultural terracing is reported to be found in an inscription of Thutmosis III on the wall of the great temple of Karnak. This record states that wheat was grown on terraces at Arvad, not far from the Lebanon mountains, in 1472 B.C.

But today the terraces are down and the cities are empty. Old Roman roads stand high above the land on which they were built; they are no longer level, as they used to be, with the fertile floor of the plains, for there are no longer any fertile plains.

Of course other causes contributed to the disappearance of the civilizations that had thrived in these once productive regions of the near East. It seems that there were well established practices which maintained a balance between what was taken from the land and what was returned to it. The cities grew in prosperity and artistic achievement from the third to the seventh century A.D. until peace was destroyed by a Persian invasion in 614 and an Arabian conquest in 630. Here too there are evidences that the old feud between the nomads with their cattle, sheep and goats, and the settled people on their land—played its part. Today all is desert which may never be restored.

The Asiatic picture is so unfavorable, and the situation of many Asiatic peoples so desperate, that it would be a happy contrast if one could turn to the Mediterranean basin and the lands that surround it, and find there today a region of plenty. Once it was a region of plenty.

In ancient Greece, with its forested hills, ample water supply and productive soils, civilization reached one of the high points in human history. As happens in all balanced human societies, the arts flourished throughout the region and philosophy supported and adorned the life of the people. Beautiful cities were built, and men had the opportunity to attain greatness in a creative atmosphere that lasted for several centuries.

Twenty centuries have passed and great changes have been wrought upon that once beautiful peninsula. Every region of Greece, including its cultivatable lands, is severely eroded. Very little of its original topsoil remains, and this can be found only in those isolated regions that are still forested. Crops are now being grown on remnants of the fertile upper soil layers or on virtually sterile subsoils. The nutritive value of the crops grown on soils such as those still remaining in Greece is something else again. Centuries of cutting, burning and overgrazing by sheep and goats have brought desolation to the hillsides. Chaparral or brush covers most of the former timberlands. Practically all wood needed for shipbuilding and building materials, and even charcoal, is imported, a situation that has prevailed for several centuries. The deterioration of the land is still continuing. Tremendous quantities of silt are being carried to the lowlands from the upper watersheds. Serious erosion on slopes too steep to stand up under cultivation is characteristic of practically all of the mountainous regions. Finally, the extensive use of farm manure for fuel, in the absence of local timber, deprives the land of the organic matter that is so badly needed to maintain its fertility.

Turkey too has suffered substantially from the destruction of its forests and the misuse of its croplands. The mountain slopes and broad valleys of European Turkey, lying across the Bosphorus north of Constantinople (Istanbul), once covered with extensive forests and prospering farms are now treeless. In desolation, scattered herdsmen keep flocks that search out such pasture as this sparse land affords. Successive invasions of nomadic hordes have been a major cause of the injury this country has suffered. The province of Anatolia provides one of the most dramatic examples of erosion to be found anywhere in the world. Here the washing of the soil into the sea has choked all the harbors with silt, with the result that some former port cities, such as Tarsus, now lie ten miles inland. It is estimated that the mouth of the Menderes River has advanced seaward at the rate of about half a mile per century since the time of Christ. Around Istanbul the hills lie slashed and barren and the city streets are filled with beggars. Nowhere is it more evident than in the Near East that land misuse and poverty go hand in hand. Palestine was once a forested, fertile country, but most of the formerly habitable areas were in a ruinous condition long before the state of Israel was established.

For thousands of years, Egypt, "the gift of the Nile," has had the security of a basic subsidy from nature. The great river whose silt-laden waters have provided both soil and moisture to the land from its sources in Kenya, Uganda and Ethiopia has supported a standard of living for thousands of years that was measured by the normal productivity of the soil carried to them by the annual floods. However, in the desire to gain financial profit from the soil through growth of "cash" crops for export rather than food for national consumption, year-round irrigation was substituted for basin or flood time irrigation, the secret of Egypt's fertility since long before the dynasties of the Ramses. The annual five month fallow, during which the essential fertility-preserving processes took place, was abolished and the soil steadily deteriorated. The Aswan dam, though a monument to engineering technology, also stands as a monument to ignorance of the basic principles of agronomy.

Great portions of North Africa bordering the Mediterranean, used to be fertile but are now desert. Wandering tribes of herdsmen move from oasis to oasis, their herds stripping such grass as there is from the gullied slopes, leaving nothing but the raw unstable soil. Here great cities lie buried under sand, ancient waterworks of extraordinary ingenuity are still found usable where attempts have been made to reclaim the land. Yet this garden of the Roman Empire has nothing about it today to show that it was ever a garden except scattered groves of olive trees standing in places which miraculously escaped the general wastage and erosion. The exact age of the trees is unknown, but the waterworks which have helped to protect them date back to Roman times. Their health and productive condition today would indicate that adverse weather conditions have had little or nothing to do with the desolation which surrounds them.

What must have happened to transform the fringe of Africa lying along the Mediterranean from the granary of the Roman Empire into a land of dead cities buried under silt and sand; a land of desolate valleys below rock-topped hills from which the soil has been torn away? There is little vegetation left anywhere. Gullies have developed throughout the region that once helped to feed a great nation, and such valuable soils as remain continue to be swept seaward. Again it

appears that in the age-old conflict between the settled farmers and stable communities which they support, and the roving herdsmen, the nomads and herdsmen have had the last word. Their flocks have eaten the green from the land and laid it bare to erosion from rain and wind, until the great cities of a flourishing culture were buried by silt and sand.

In Roman days this country was well cared for. It appears that the Phoenicians brought to it their skills in terracing and water control learned countless generations before and taken with them wherever they went. Throughout North Africa may be found the remains of cisterns and check dams of ancient origin.

Much of the foregoing was adapted from the work of Fairfield Osborn, particularly F. OSBORN, *OUR PLUNDERED PLANET* (1948).

During the great depression, Aldo Leopold pleaded for a conservation ethic. In philosophy an ethic differentiates social from anti-social conduct, but in biology, an ethic limits freedom of action in the struggle for existence. "The biologist calls [the tendency of inter-dependent individuals or societies to evolve modes of cooperation,] symbioses. Man elaborated certain advanced symbioses called politics and economics. Like their simpler biological antecedents, [they] enable individuals or groups to exploit each other in an orderly way."

Expediency was the characteristic originally common to all symbiotic relationships but, as the complexity of cooperative mechanisms increased with population density and technological efficiency, the human community eventually found expediency no longer a sufficient standard and was forced to evolve ethical standards. In the beginning, ethics dealt with relations among individuals and later with relationships between individuals and society.

As yet, there is no ethic dealing with the relationship between man and the land and between man and the non-human animals and plants which grow upon it. Land is still property; little more than a substrate for development. The relation between man and the land is still economic. The evidence that a new land ethic is needed has been with us since the earliest days of recorded history. Ezekial and Isaiah admonished us that despoilation of the land is not only inexpedient, but wrong. Nevertheless, society has not yet recognized that the extension of human ethics to include the relationships between man and the land is just the next step in the evolution of society.

For scientists and lawyers who are uncomfortable with philosophy, an ethic may be regarded as a mode of guidance for meeting ecological situations so new or intricate, or involving such deferred reactions, that the path of social expediency is not immediately discernable. ". . . [C]ivilization is not the . . . enslavement of a stable constant earth." It is a state of mutual and inter-dependent cooperation amongst humans, other animals, plants, and soils, which may be disturbed, even to the extent of serious, permanent and irreparable damage, at any moment by the failure of any element of the system. Land despoilation has evicted nations, and can on occasion do it again.

Plant succession has been a determining factor in historical evolution, and our own national history illustrates this fact even in recent years.

In the years following the Revolution, three groups contended for control of the Mississippi valley: the native Indians, the French and English traders, and American settlers. Historians wonder what would have happened if the English at Detroit had thrown more weight into the Indian side of those tipsy scales which decided the outcome of the Colonial migration into the cane-lands of Kentucky. Yet the wonder is why the cane-lands, when subjected to the particular mixture of forces represented by the cow, plow, fire, and axe of the pioneer, became bluegrass? What if the plant succession inherent in this "dark and bloody ground" had, under the impact of those forces, given us some worthless sedge, shrub or weed? Would Boone and Kenton have held out? Would there have been any overflow into Ohio? Any Louisiana Purchase? Any transcontinental union of the states? Any Civil War? Any machine age? Any Depression? The subsequent drama of American history, here as elsewhere, turned on the response of particular soils to the impact of particular forces exerted as the result of a particular kind and degree of human occupation. No statesman-biologist selected those forces, nor foresaw their effects. That chain of events, which in Fourth of July oratory we call our National Destiny hung on a "fortuitous concourse of elements," the interplay of which can now only dimly be seen in hindsight.

Contrast Kentucky with what hindsight tells us about the Southwest. The impact of occupancy here brought no blue grass, nor other plant fitted to withstand the buffetings of misuse. Most of these soils when grazed reverted through a successive series of more and more worthless grasses, shrubs, and weeds to a condition of unstable equilibrium. Each recession of plant types bred erosion; each increment of erosion bred a further recession of plants. The result today is still a progressive and mutual deterioration, not only of plants and soils, but of the animal community which depends upon them. The early settlers did

not expect this, ". . . [s]o subtle has been its progress that few people know anything about it."

All civilization seems to have been conditioned upon whether the natural plant succession, under the impact of human occupation, led to a stable and habitable assortment of vegetable types or an unstable and uninhabitable assortment. The swampy forests that Caesar found in Gaul were changed by human use for the better; while Moses' land of milk and honey was utterly changed for the worse. Both changes were the unpremeditated result of the impact between ecological and economic forces.

This generation is no less proud of technological ingenuity than prior generations. We drive cars with the solar energy impounded in the carboniferous forests of bygone ages. We fly through the air in mechanical birds. We hurl our words and pictures through space, and we have landed men on the moon.

But are these not in one sense mere parlor tricks compared with our utter ineptitude in keeping land fit to live upon? Our engineering has attained the pearly gates of near-millennium, but our applied biology still lives in the nomads' tents of the stone age. If our system of land use happens to be self-perpetuating we stay. If it happens to be self-destructive we move, like Abraham, to pastures new.

Consider astronauts who look down at the Southwestern United States and see:

A score of mountain valleys which were green gems of fertility when first described by Coronado, Espejo, Pattie, Abert, Sitgreaves, and Couzens. What are they now? Sandbars, wastes of cobbles and burrowed, a path for torrents. Rivers which Pattie said were clear are now muddy sewers through which pass the wasting fertility of the empire. A "Public Domain," once a velvet carpet of rich Buffalo-grass and grama, now an illimitable waste of rattlesnake bush and tumbleweed, too impoverished to be accepted as a gift by the states within which it lies.

Why?

Because the ecology of the American Southwest happened to be set on a hair trigger. Because cows ate brush when the grass was gone and thus postponed the penalties of over-utilization. Because certain grasses, when grazed too closely to bear seed stalks, are weakened and give way to inferior grasses, which in turn give way to inferior shrubs, and then to weeds, and then to naked earth.

Because rain which spatters upon vegetated soils stays clear and sinks, while rain which spatters upon unvegetated soils seals the interstices of that soil with collidal mud and hence must be run away as floods, cutting the heart out of the country as it goes.

Unforseen ecological reactions not only make or break the [historical evolution of the people,] they condition, circumscribe, delimit, and warp all enterprises, whether economic or cultural, that pertain to land. In the corn belt, after grazing and plowing out all of the cover in the interests of "clean farming," we grew tearful about wild-life and spent several decades passing laws for its restoration. We were like Canute commanding the tide . . . [We now know that the] implements for restoration lie not in the legislature, but in the [farmer's] toolshed.

In other instances we take credit for ecological windfalls. In the Lake States and the Northeast, lumbering, pulping, and fire accidentally created millions of acres of new second growth. At the proper stage we find these thickets full of deer. For this we naively thank the wisdom of our game laws.

The reaction of land to occupancy determines the nature and duration of civilization. . . . In all climates the plant succession determines what economic activities can be supported. The nature and intensity [of economic development] in turn determines not only the domestic but also the wild plant and animal life, the scenery and the whole face of nature. We inherit the earth, but within the limits of soil and plant succession we also rebuild the earth—without plan, without knowledge, and without understanding the increasingly coarse and powerful tools which science has placed at our disposal. We are remodeling the Alhambra with a steamshovel.

In 1933, Aldo Leopold wrote:

[The] interactions between man and land are too important to be left to chance, even that sacred variety of chance known as economic law. . . . [A]ll the new isms—Socialism, Communism, Facism. . . . outdo even capitalism itself in preoccupation with . . . the distribution of more people. They all proceed on the theory that if we can all keep warm and full, . . . own a Ford and radio, the good life will follow. Their programs differ only in ways to mobilize machines to this end . . . . They are competitive apostles of a single creed: salvation by machinery.

Much of the foregoing was adapted from a number of works by Aldo Leopold, including A. LEOPOLD, *A SAND COUNTY ALMANAC* (1949), A. LEOPOLD, *GAME*

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<sup>42</sup> 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<sup>43</sup> that the basic errors arise in consideration of sovereignty as a concept.

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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