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## Balancing Community Needs Against Individual Desires

### Cover Page Footnote

This essay benefited from the encouragement and criticism of Professor Margaret A. Baldwin, Academic Dean Donna R. Christie, and editors Ronald A. Christaldi and Roseanne Ziaukas.

# BALANCING COMMUNITY NEEDS AGAINST INDIVIDUAL DESIRES

HEATHER FISHER LINDSAY\*

## I. ALIENATION FROM ECOLOGICAL AWARENESS

*I summoned nature, pierced through all her store  
Broke up some seals, which none had touched before  
Her womb, her bosom, and her head,  
Where all her secrets lay a-bed,  
I rifled quite; and having passed  
Through all the creatures, came at last  
To search myself, where I did find  
Traces and sounds of a strange kind.<sup>1</sup>*

The inhabitants of Earth face an ecological crisis that has yet to be addressed adequately politically or legally. Despite the great strides taken through environmental legislation in the United States,<sup>2</sup> courts have not always allowed the full implementation of the legislative purposes,<sup>3</sup> and the burdens of administering the statutes

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\* B.A. 1992, University of Alabama; J.D. expected May 1995, Florida State University College of Law. This essay benefited from the encouragement and criticism of Professor Margaret A. Baldwin, Academic Dean Donna R. Christie, and editors Ronald A. Christaldi and Roseanne Ziaukas.

1. Henry Vaughan, *Vanity of Spirit*, in *THE COMPLETE POEMS* 171 (A. Rudrum ed., 1976) (Vaughan born in 1622).

2. Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544 (1988 & Supp. V 1993); Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993); National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(c) (1988 & Supp. V 1993); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992 (1988 & Supp. V 1993); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988 & Supp. V 1993); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

3. See John R. Bevis, *In re Jensen: Demonstrating the Need for Supreme Court Resolution of the Conflict Between CERCLA and the Bankruptcy Code*, 9 J. LAND USE & ENVTL. L. 179 (1993) (showing that courts implement Code's purposes instead of CERCLA purposes where conflicting). See also *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), where the Supreme Court held the petitioners did not demonstrate an injury in fact sufficient to meet standing requirements. Inclusive language in the citizen suit provision at issue, which stated that "any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter," indicates that the violation of the provision is itself the injury required for suit. *Id.* at 2146 (referring to 16 U.S.C. § 1540(g)). Curiously, the petitioner in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) demonstrated injury in fact though he alleged no more than the kind of "some day" intentions that fatally undermined the petitioners' claim to injury in *Lujan*. *Lucas*, 112 S. Ct. at 2908 (Blackmun, J., dissenting) (referring to *Lujan*, 112 S. Ct. at 2138).

compromise agency implementation.<sup>4</sup> Further, the judicial interpretations complicate the problem by assuming that land is fungible (worth only the money value reflected by the market).<sup>5</sup> Market analysis is inherently flawed in its reduction of rights to monetary value because the law recognizes ethical concerns as well as economic concerns.<sup>6</sup>

This essay suggests that a revitalization of the concept of property ownership rights is a necessary step in addressing environmental issues. Ecological harm and property law in the United States are products of our inheritance from European culture, so this essay attempts to describe the dominant themes and their reflection in the law. This essay suggests that reorienting the law of property must occur to protect against the exploitation of human and non-human life.

"[F]undamental social transformation" appears critical to remedying the gross irresponsibility of those with power.<sup>7</sup> Aside from the typical human resistance to change, the "legacy of male dominance" in our culture involves stubborn structural resistance to transformation.<sup>8</sup> The structure survives on a collection of conditions: first,

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4. For instance, Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988), *reprinted* in 5 U.S.C. § 601 (1988), requires economic impact analyses of regulations on property rights. Agencies are required to justify their regulations through cost-benefit analyses and are monitored for compatibility with presidential policy by the Office of Management and Budget. See Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

5. As an example, takings jurisprudence manifests this idea. Justice Scalia in *Lucas v. South Carolina Coastal Council* agrees with Lord Coke that "what is the land but the profits thereof?" 112 S. Ct. at 2894 (quoting 1 E. COKE, *INSTITUTES* Ch. 1, § 1 (1st Am. ed. 1812)). See also *Miller v. Schoene*, 276 U.S. 272, 278-79 (1928) (approving destruction of trees for purposes of protecting profitable enterprise); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922) (finding a taking and reasoning that a regulation making coal mining "commercially impracticable" has the "same effect for constitutional purposes as appropriating or destroying it," although the coal was valuable as a barrier against subsidence).

6. See MARK SAGOFF, *THE ECONOMY OF EARTH* 28, 181 (1988), for the propositions that environmental goals "stem from our character as a people, which is not something we choose, as we might choose a necktie or a cigarette, but something we recognize, something we are" and "the goals of social regulation—clean air and water, workplace safety, public health, and the like—are ethical, not economic. They are attempts . . . to make society better, not to make the economy more efficient." See also MURRAY BOOKCHIN, *REMAKING SOCIETY* 24 (1990) (characterizing such values as "social" rather than economic).

7. Janis Birkeland, *Ecofeminism: Linking Theory and Practice*, in *ECOFEMINISM* 13, 13 (Greta Gaard ed., 1993). Birkeland notes that "exploitation of nature" cannot end "without ending human oppression." *Id.* at 19. See also BOOKCHIN, *supra* note 6, at 170-71 (society must "recognize that our problems go to the heart of a domineering civilization, not simply to a badly structured ensemble of social relations" and "harmonization of nature cannot be achieved without the harmonization of human with human").

8. Birkeland, *supra* note 7, at 24. The author does not intend to overlook any one of the multiplicity of exploitative relationships in society; however, this essay cannot fully address these issues. Rather, the essay touches on many of the relationships in the context of land use

masculine and feminine archetypes are polarized; second, everything is instrumentalized so that nothing has value beyond its usefulness to "man"; third, "man" is autonomous; fourth, male experience is universalized; and fifth, power is exercised over others.<sup>9</sup> These elements have the synergistic effect of entrenching male supremacy because "if Mankind is by nature autonomous, aggressive, and competitive . . . , then psychological and physical coercion or hierarchical structures are necessary to manage conflict and maintain social order."<sup>10</sup> Transforming exploitative relationships can be done, however, because socialization, not genetics, has allowed enforcement of dominating relations.

Viewing the ecological community as a collection of fungible items is one expression of the power dynamic, and the view is dangerous in its simplification of a source of life into its exchange value as an exploitable resource.<sup>11</sup> Exploring why we value monetary gain over the health and safety of millions is as necessary as identifying the problem itself. By examining the source of environmental irresponsibility, we can begin to heal the environmental crisis, which encompasses the harm inflicted on Earth's cycles as well as the harm suffered by human and nonhuman species. Developing corrective lenses through which soil, water, air, and other species can be seen as valuable and powerful life forces<sup>12</sup> requires questioning the current value system. Restoring societal vision will transform our eighteenth century expectations of land ownership, dangerous in this era,<sup>13</sup> into an Earth ethic that respects the cycles we try to manage, control, and subdue.

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and environmental decision-making, with the recognition that men make most of the exploitative decisions.

9. *Id.*

10. *Id.* at 25.

11. See Vandana Shiva, *Development as a New Project of Western Patriarchy*, in REWEAVING THE WORLD 189, 196 (Irene Diamond & Gloria Feman Orenstein eds., 1990) (The "ideological and limited Western concept of productivity has been universalized with the consequence that all other costs of the economic process have become invisible."). See also Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

12. As long as soil, water, and air are capable of supporting life, then arguably those elements are living as well. At one time this observation would have been uncontroversial. See generally CAROLYN MERCHANT, *THE DEATH OF NATURE* 20-29 (1980).

13. See also Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 599 n.108 (1989):

[A]bsolutist approach to the takings issue assumes a world in which the public interest is simply the aggregate of those fortunate enough to own land. This eighteenth century view . . . would also stifle recognition of the essential public nature of natural resources allocation, substituting an artificial, atomistic view of the world for one in which individual landowner preferences are tempered by community values and collective choice concerning resources in which all have a legitimate stake.

Law as a system carries with it many moral judgments and attaches responsibility to various parties.<sup>14</sup> The real question here is not whether devaluing liberties to exploit property is a solution flawed for its normative quality. Rather, whether the normative judgment made should be reflected in the law is the question. The health and continued existence of human and nonhuman life depend on such a reorientation in the law of property. Current remedial measures may not be enough without debunking cultural assumptions about power and privilege.

## II. DON'T IGNORE THE MAN BEHIND THE CURTAIN

In the Wizard of Oz, Dorothy and her friends were urged by the Wizard image to "ignore the man behind the curtain," when they visited the Emerald City. Determining the causes of our environmental crisis should be addressed so that we may better understand why we have the false perceptions we do concerning land use. Pull the curtain back and see who is manipulating the controls. Blaming a faceless system such as capitalism or patriarchy is as much a mistake as blaming indistinguishable masses of humans. Similarly, although the following sections outline religious and political ideologies that have influenced the ecological crisis, these ideologies alone are not responsible. Systems and ideologies are people, and people cannot be summed up by an economic theory or a power paradigm. The following influences, however, greatly inform the problem of determining responsibility.

### A. Male Supremacy and the Judeo-Christian Tradition<sup>15</sup>

*For the windows of heaven are opened and the foundations of the earth tremble. The earth is utterly broken, the earth is rent asunder, the earth is violently shaken. The earth staggers like a drunken man, it sways like a hut, its transgression lies heavily upon it, and it falls, and will not rise again.<sup>16</sup>*

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*Id.*

14. "Focusing on the law as a set of rules tends to import a validity and legitimacy that both obscure and subordinate the fact that the legal process involves moral discretion." John W. Van Doren, *Implications of Jurisprudence to Law Teaching and Student Learning*, 12 STETSON L. REV. 613, 626 (1983).

15. Focusing on Christianity is particularly appropriate considering that the different political theories popular in the 1760s and 1770s "[were] shaped by and remained connected to some variant of Protestantism." See William W. Fisher III, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, 39 EMORY L.J. 65, 93-94 (1990).

16. *Isaiah* 24:18-20.

Currently, the predominant religion in United States is a "[p]atriarchal spirituality [that] has been transcendent and earth-disdaining rather than earth-honoring."<sup>17</sup> The Judeo-Christian god is a celestial god figure ranking superior to any Earth deities.<sup>18</sup> The transcendence and removed nature of the celestial god, then, is valued by our culture above the immanence associated with the more ancient vegetation and Earth goddesses and gods.<sup>19</sup>

Alternative spirituality could unify the dualistic concepts of mind and body; feminine and masculine; nature and atmosphere. Arguably, however, "changing people's way of thinking through spiritual or educational persuasion would not reach the prime movers"<sup>20</sup> in politics and the economy. The idea that addressing this one factor successfully would not cure the ecological crisis supports the argument that blaming patriarchal spirituality alone would be insufficient in determining the causes of our alienated perspective. Nonetheless, the impact of religion cannot be neglected.

Prior to the rise of male monotheism in the late Neolithic period, worship of goddesses as the mothers of the universe was widespread.<sup>21</sup> In fact, Yahweh could originally have been a goddess because the name, Iahu'anat, derives from the older Sumerian goddess Inanna.<sup>22</sup> The Hebrew religion developed in conflict with the established goddess-worshipping cultures<sup>23</sup> and imposed itself by "assimilating, transforming, and reversing [goddess] symbol systems."<sup>24</sup> "[F]or many people, Yahweh simply replaced Baal<sup>25</sup> as the husband of the Goddess. Asherah, another form of the Canaanite Goddess, continued to be worshipped alongside Yahweh in the Solomonic temple for two thirds of its existence. Ordinary graves of Israelites show Yahwist and Goddess symbols together."<sup>26</sup>

The messages in Genesis of human male privilege over human females, all species, and Earth come as no surprise when considered in light of the struggle between the cult of male monotheistic

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17. Birkeland, *supra* note 7, at 47.

18. MIRCEA ELIADE, *THE SACRED AND THE PROFANE* 118-25 (1987) (describing how the experience of the sky is sacred).

19. *Id.*

20. Birkeland, *supra* note 7, at 47.

21. See ROSEMARY RADFORD RUETHER, *SEXISM AND GOD TALK* 47-52 (1993); MONICA SJOO & BARBARA MOR, *THE GREAT COSMIC MOTHER* 21-31, 45-227 (2nd ed. 1991); MARIJA GIMBUTAS, *GODS AND GODDESSES OF OLD EUROPE* 112-214 (1982); MERLIN STONE, *WHEN GOD WAS A WOMAN* 9-29 (1976).

22. SJOO & MOR, *supra* note 21, at 266.

23. See STONE, *supra* note 21, at 163-97.

24. RUETHER, *supra* note 21, at 54.

25. Baal is referred to in *Hosea* 2:2-3, 7-8 & 14-16, for example.

26. RUETHER, *supra* note 21, at 56.

spirituality and the established religion centered on the mothering qualities of the deity. Yahweh is a sky god in Judeo-Christian tradition, and the spirituality of the mother goddess clearly respects and grounds itself in cosmic and earthly cycles.<sup>27</sup> "[M]ale monotheism reinforces the social hierarchy of patriarchal rule through its religious system in a way that was not the case with the paired images of the god and goddess."<sup>28</sup>

For example, the father sky god instructs humans to "subdue" the earth.<sup>29</sup> Additionally, the serpents, dragons, and horned gods associated with earth-oriented religions and their cosmology stories became demonized by Hellenic and Hebrew mythology.<sup>30</sup> In Greek myth, Apollo kills Gaia's python, Perseus kills Medusa (described as having snakes growing from her scalp), Hercules destroys the Hydra.<sup>31</sup> An Egyptian myth relates the killing of the dragon Apophis by the pharaohs.<sup>32</sup> In the Sumer-Babylonian tale of Gilgamesh, Marduk kills his goddess mother, represented as a dragon or serpent, from whose body the universe was made.<sup>33</sup> Hebrew and Christian judgment stories involve the killing of serpent-like Leviathan and the subduing of Satan as a dragon.<sup>34</sup> All of these myths involve the destruction of earth-oriented symbolism and domination over the powerful figures from Mother Goddess religion. The aggression and sanctioned violence of these stories presage the currently destructive approach toward living organisms.

Further, the images of Yahweh as bringing feasts forth from Earth in response to the people's repentance and obedience<sup>35</sup> effect alienation from Earth's processes. As before noted, Yahweh is a celestial god unlimited by the processes of Earth. Yahweh is not a participant as older vegetation goddesses and gods were. Accordingly, Yahweh is both separate from and in control of Earth's processes in these images. To be god-like and to fulfill the wishes of the Judeo-Christian god in Genesis, humans (males) must sever their participation within the cyclical processes as a means of harnessing power.

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27. See sources listed *supra* note 21.

28. RUETHER, *supra* note 21, at 53 (referring to 1 Corinthians 11:3, 7, which lists the hierarchy in descending order as Christ, man, and woman).

29. Genesis 1:28.

30. Marti Kheel, *From Heroic to Holistic Ethics: The Ecofeminist Challenge*, in *ECOFEMINISM* 243, 245 (Greta Gaard ed., 1993).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* See also Revelation 12-21:1; Psalms 74:13.

35. See Isaiah 25:6-9; Joel 2:22-24; Amos 9:13.



The connection between Judeo-Christian religion and male supremacy needs little explanation. Male aggression against and domination of women is chronicled in countless verses.<sup>36</sup> The books of Paul and Timothy reflect male supremacist values as well. During the period of medieval asceticism, the phobic image of woman/nature points to clerical misogyny.<sup>37</sup> For instance, woman's body is "described with violent disgust as the image of decay. Her physical presence drags down the souls of men to carnal lust and thus to eternal damnation."<sup>38</sup> Additionally, nature, earlier imaged as a "haughty male demonic figure whose fine robes conceal the vermin of rotting corruption," is imaged by the thirteenth century as Frau Welt, or dame nature. She has "a beckoning smile and courtly attire, but from the back she is revealed to be covered with foul, reptilian creatures of hell and the grave."<sup>39</sup> Here, then, the alienation from women and Earth connects.

That Christianity is connected to the destruction of life also should not be controversial. In the name of the Christian god, the Catholic Church killed between one and nine million persons over five centuries, extending into the seventeenth, during the Inquisition and witch hunts.<sup>40</sup> Eighty percent of those persecuted and burned in the witch hunts were female.<sup>41</sup> Further, in this century, five to six million Jews were killed in the name of the Christian god: Hitler, a Catholic, considered himself an agent of Jesus and accordingly justified to himself his genocidal plan.<sup>42</sup> Current events indicate that religion continues to motivate people to destroy each other, and if human life is not sacred, then nonhuman life certainly cannot be in the context of western spirituality.

The male supremacy examined here is part of the environmental degradation we experience today because the power dynamics of

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36. See, e.g., *Ezekiel* 9:6-7 (killing of women and children); *Lamentations* 1:17 (Jerusalem is a monstrous woman); *Leviticus* 12 (purity taboos indicating more sinful state of female); *1 Samuel* 21:4 (holy men avoid women); *Isaiah* 3:16-17 (female sexuality punished by the Lord, who "will discover their secret parts"). Even granting problems in translation, the fact that such translations exist demonstrates the maldevelopment of western male monotheistic spirituality.

37. RUETHER, *supra* note 21, at 81.

38. *Id.*

39. *Id.*

40. See SJOO & MOR, *supra* note 21, at 298-314.

41. *Id.* "Thousands upon thousands of acres of land, homes, farms, and businesses, personal wealth and goods—all were stripped from the accused witch, and absorbed into the Church. The Church amassed wealth in this way since the property of those burned passed to the Church. Children of the condemned were forced to stand before the stakes, watching their parents burn; as they watched, they were whipped by the priests, as punishment for being spawn of the Devil." *Id.* at 302.

42. See SJOO & MOR, *supra* note 21, at 311; JOHN TOLAND, ADOLF HITLER 803, 811 (1976).

male over female and human over nature are inextricably linked.<sup>43</sup> Although Christianity alone cannot account fully for the "European antinaturalism" that has alienated society from the concept of living matter:<sup>44</sup>

Christianity is the most anthropocentric religion the world has seen. . . . man shares, in great measure, God's transcendence of nature. Christianity . . . not only established a dualism of man and nature but also insisted that it is God's will that man exploit nature for his proper ends. . . . By destroying pagan animism, Christianity made it possible to exploit nature in a mood of indifference to the feelings of natural objects.<sup>45</sup>

The indifference referred to probably would not have developed without the supporting scientific theory examined below.

### *B. Science and Technology*

The discipline of science also has contributed to the false presumptions at work today by effectively transforming the image of nature. Today western culture hardly questions the "common sense" notion of nature as machine, but this idea is relatively new.<sup>46</sup> During the Renaissance, plants, animals, minerals and gems were considered "permeated by life."<sup>47</sup> Additionally, "[p]opular Renaissance literature was filled with hundreds of images associating nature, matter, and the earth with the female sex."<sup>48</sup> Over the last 300 years, "animistic, organic assumptions" gave way to the current regime in which nature is a "system of dead, inert particles moved by external, rather than inherent forces."<sup>49</sup> Moreover, the mechanistic framework "carried with it norms [of] . . . power and control [that] would mandate the death of nature"<sup>50</sup> so that the cycles would be understood as manipulable processes.

The loss of the previous value system that recognized the worth of all things and the concept of cyclical renewal is also a loss of the more ecologically sound concept of unity in diversity. Dualism, dangerous for its alienating character, is inherent in the work of Descartes and Newton. For instance, both worked from the

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43. See MERCHANT, *supra* note 12, at 1-41, 127-48.

44. See BOOKCHIN, *supra* note 6, at 25 (asserting that the alienated attitude already existed in pre-Judeo-Christian spirituality).

45. Lynn White, Jr., *The Historical Roots of Our Ecological Crisis*, in THE ENVIRONMENTAL HANDBOOK 20-21 (G. DeBell ed., 1970).

46. MERCHANT, *supra* note 12, at 193.

47. *Id.* at 27-28.

48. *Id.* at 28.

49. *Id.*

50. *Id.* at 190.

assumption that matter is inert and force is external.<sup>51</sup> The use of force against matter viewed as inert is implicitly taken for granted and therefore unquestioned.

Descartes was a major contributor to the mechanistic view. For him, "nature was a machine in perpetual motion, whose movements were predictable and caused of themselves by the mutual attractions and repulsions of its spinning vortices."<sup>52</sup> His attempts at rigorous questioning of assumptions led him to suppose that "his senses were like a book written to deceive him," and he viewed nature as an illusion or a dream.<sup>53</sup> Consequently, he established a "sharp dualism between mind and matter . . . . Man's passions are rejected as irrational intrusions, and the imagination is distrusted as a source of delusions."<sup>54</sup>

Francis Bacon's contributions cannot be minimized, however.<sup>55</sup> His perception of nonhuman life forms can be surmised from his attitude that "[t]he discipline of scientific knowledge and the mechanical inventions it leads to, do not 'merely exert a gentle guidance over nature's course, they have the power to conquer and subdue her, to shake her to her foundations.'"<sup>56</sup> Such an attitude has been argued to be at the root of the change of Earth's image "from a living, nurturing mother to inert, dead and manipulable matter" to serve the "exploitation imperative" of capitalism.<sup>57</sup> Bacon also has been called the "first man of technocracy,"<sup>58</sup> in that he stressed the connection between knowledge and how that knowledge could enrich the lives of people.<sup>59</sup> Baconian science made possible the Industrial Revolution, and in this period the mechanized perspective settled into culture.<sup>60</sup>

Around the turn of this century, another scientist echoed Bacon's sentiments with this congratulatory comment to Ernest Rutherford, experimental physicist and winner of the Nobel Prize in 1908: "The rush of your advance is overpowering and I do not wonder that Nature has retreated from trench to trench and from height to height,

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51. *Id.* at 276-77.

52. J. BRONOWSKI & BRUCE MAZLISH, *THE WESTERN INTELLECTUAL TRADITION* 226 (1986).

53. *Id.* at 223.

54. *Id.* at 227-28.

55. See MERCHANT, *supra* note 12, at 164-90 (detailing Bacon's influence).

56. VANDANA SHIVA, *STAYING ALIVE* 16 (1989) (quoting Bacon).

57. *Id.* at 17. Actually, this change for white European culture probably began with the shift from the old Mother Goddess religion to male monotheism. See generally, STONE, *supra* note 21.

58. NEIL POSTMAN, *TECHNOPOLY* 38 (1993).

59. *Id.* at 35.

60. *Id.*

until she is now capitulating in her inmost citadel."<sup>61</sup> Rutherford himself characterized his success this way: "My work on the atom goes on in fine style. Several atoms succumb each week."<sup>62</sup> Although nature continues to be imaged in a manner other than as machine, these references are simply precursors to the machine-like view. Until science exacts the desired power from nature, nature is a woman to be subdued (arguably raped in the language above).

The sexual rhetoric surrounding the drive to construct the atomic bomb reflects the same power dynamic articulated by Bacon.<sup>63</sup> Collectively, the scientists involved appeared to perceive their role as fathers of a child in the form of a bomb. The metaphors were popular among scientists and the political leaders involved. For example, in response to the idea of collecting and reusing missile rockets, one scientist commented that "[t]his sounds to me like a proposal to use the same condom twice;"<sup>64</sup> additionally, "fratricide" has been the term to describe explosions destroying accompanying missiles that have not reached their targets.<sup>65</sup> Historians state that the following telegram to the Secretary of War refers to the plutonium bomb: "Doctor has just returned most enthusiastic and confident that the little boy is as husky as his big brother. The light in his eyes is discernible from here to Highhold and I could have heard his screams from here to my farm."<sup>66</sup> The Secretary of War then notified Winston Churchill that the "babies" were "satisfactorily born."<sup>67</sup>

The fact that constructing bombs is compared to procreation not only points to human (male in this case) arrogance, but also to the pervasive character of the mechanized perspective. Not only are humans machines, but machines are the offspring of humans; further, this "offspring" is for the purpose of destroying life. This is just one symptom of the mechanized perspective that reveals its dysfunctionality. It is probably not coincidental that a leading theory on the origin of the universe is referred to as the "Big Bang."<sup>68</sup>

Today, the familiar image of Earth in space reflects the attempted distance from the planet. In this modern age, "we have left the

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61. BRIAN EASLEA, *FATHERING THE UNTHINKABLE* 60 (1983) (quoting astrophysicist G.E. Hale).

62. *Id.*

63. *See id.* for a thorough analysis of this problem.

64. *Id.* at 140.

65. *Id.*

66. *Id.* at 94.

67. *Id.* at 103.

68. Brian Swimme, *How to Heal A Lobotomy*, in *REWEAVING THE WORLD* 15, 18 (Irene Diamond & Gloria Feman Orenstein eds., 1990) ("no great surprise that we [physicists] would automatically come up with images of shrapnel and exploding bombs.").

cathedral."<sup>69</sup> As noted above, scientific disciplines developed an objectified image of nature. With NASA's "God's eye view," the "narrative and mythic Earth imagery [was] replaced by this static and literal photographic image."<sup>70</sup>

Photography is an aspect of technology through which we can "deny the subjectivity of what we view" and "transform[] the external world into a spectacle, a commodity, a manipulable package."<sup>71</sup> In western culture's fascination with photographic images, seen in everything from magazines, billboards, and advertising to the pictures of a weekend photographer, images are small packages of an objectified reality.<sup>72</sup> By condensing these images we can control them; pictures of Earth represent control over it. Through this distancing from Earth, we more easily accept planetary degradation: we see Earth as outside ourselves and as such damage to Earth affects less, if at all.

The perception that we can somehow increase Earth's elements through technology indicates strikingly human alienation from its environment. For example, physicist Vandana Shiva criticizes engineers and others in the business of water management as depending on the fallacy that one can "create water and have the power to 'augment' it."<sup>73</sup> She argues that this idea is dangerous since we are merely participants in the water cycle. She notes that "water . . . can be diverted and redistributed and it can be wasted, but the availability of water on Earth is united and limited by the water cycle."<sup>74</sup>

Despite the precision of mathematics and the laws of physics, we live in a time of ambiguity. The "certainty that technology and science would improve the human condition is mocked by the proliferation of nuclear weapons, by massive hunger in the Third World, and by poverty in the First World."<sup>75</sup> The promise of technological improvement of our lives appears broken. Instead, we have surrendered our culture to a technopoly.<sup>76</sup>

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69. Yaakov J. Garb, *Perspective or Escape? Ecofeminist Musings on Contemporary Earth Imagery*, in *REWEAVING THE WORLD* 264, 266 (Irene Diamond & Gloria F. Orenstein eds., 1990).

70. *Id.* at 267.

71. *Id.* at 268.

72. If "through the photographic act we [are] denied our subjectivity, . . . [then] we will be denied the respect and mutuality that obtains between two subjects." *Id.*

73. See SHIVA, *supra* note 56, at 182-83.

74. *Id.* at 183.

75. BOOKCHIN, *supra* note 6, at 20.

76. POSTMAN, *supra* note 58, at 71-72.

### C. Federalist Politics and Utilitarian Theory

Plato and Aristotle debated the utility of private property ownership in assuring individual autonomy from a group.<sup>77</sup> Today property may be thought of as a barrier between the individual and the government, and therefore, it protects the individual from tyranny by the majority. The needs of the community demand, however, that the individual yield when that individual wishes to disrupt the ecosystem. Although this approach runs counter to the Federalist position, such an approach does not contradict the Federal Constitution. Further, political autonomy can be maintained through means other than valuing the liberty to exploit property to its highest economic use.

Much of our environmental crisis can be attributed to the reductionist view of land as a commodity. Real property "must be viewed as land, not as money with trees on it."<sup>78</sup> The modern utilitarian theory of property fails because of its assumption that all entitlements have prices.<sup>79</sup> Land is not simply a good, it is a source of life,<sup>80</sup> but the "ecological value of land is left out of the traditional land use equation."<sup>81</sup> A perspective so one-dimensional as to recognize only the exchange value of a source of life "ignores the inter-relatedness of land and other natural resources and of users and non-users."<sup>82</sup> A pragmatic approach to takings claims, for instance, combined with the recognition that interests in fungible property deserve less Constitutional protection than personal interests would overcome the externality problem posed by the utilitarian theory.

One might argue here that this proposal injects subjective and therefore untrustworthy values into a system of law. The utilitarian theory is just as subjective as any other, however. All human

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77. Aristotle responded to Plato's ideas of group ownership in *THE REPUBLIC* by observing that "those who own common property, and share in its management, are far more often at variance with one another than those who have property in severalty." Jeb Rubenfeld, *Usings*, 102 YALE L.J. 1315, 1355 (1993).

78. Donald W. Large, *This Land Is Whose Land? Changing Concepts of Land As Property*, 1973 WIS. L. REV. 1039, 1081 (1973). An example of the reductionist paradigm at work is the misperception that a forest equals commercial wood only, or that wood amounts only to pulp and paper. SHIVA, *supra* note 56, at 24. The market recognizes only the forest's value as commercial wood, so all resources are much devalued on the market; Cf. Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269, 302-09 (1989) (describing how market valuation operates).

79. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 984-85 n.94 (1982).

80. Lynda L. Butler, *Private Land Use, Changing Public Values, and Notions of Relativity*, 1992 B.Y.U. L. REV. 629, 649-50 (1992) (asserting that a source of life cannot be fungible).

81. *Id.* at 656.

82. *Id.* at 640-41.

systems are shaped by the biases and ideologies of the humans developing such systems.

An example would be the Federalist position that the Constitution should "foster and rely upon the private interest, not public virtue; the talented few would run the government; the large republic would create a great distance between the people and their representatives."<sup>83</sup> The Federalists believed that democracy carried with it the danger of oppression by the majority.<sup>84</sup> Private property interests were to protect the autonomy of the individual against the majority. Economic inequality results from vesting power in the few, however, and the Anti-Federalists posed legitimate arguments about the danger of corruption resulting from such a concentration of power.<sup>85</sup> As we know from our republican form of government, the Federalist ideology prevailed.

Examination of the Federalist ideology reveals false premises that appear to result from personal biases of the propertied against those who do not own property. To illustrate, take the premise that some persons will always be poor, and economic inequality, therefore, is unavoidable.<sup>86</sup> Along with this premise is the Federalists' recognition that an industrial capitalist system is a system of workers and managers, and, thus, one of inequality.<sup>87</sup> The Federalists reasoned then that the masses are dangerous as a result of such inequality. In this way they justified a detached representative government to protect against this dangerous poor majority.<sup>88</sup>

This argument has force, but the point is that we must accept the initial premise that some will always be poor. In fact the more accurate premise is that some will always be poor in a capitalist system.<sup>89</sup> Because the capitalist system is one construct, the results of which are not dictated by all possible constructs, then we cannot assume in a vacuum the accuracy of the premise that some will always be poor.

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83. Jennifer Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 HARV. L. REV. 340, 347 (1982).

84. *Id.*

85. *Id.*

86. *Id.* at 348.

87. Nedelsky, *supra* note 83, at 349.

88. *Id.*

89. Commercial development characteristic of capitalism has been argued persuasively as a cause of poverty. See Shiva, *supra* note 11. Shiva also uses the example of famine in Ethiopia to make her point:

Displacement of nomadic Afars from their traditional pastureland in Awash Valley by commercial agriculture (financed by foreign companies) led to their struggle for survival in the fragile uplands which degraded the ecosystem and led to the starvation of cattle and the nomads.

SHIVA, *supra* note 56, at 11.

The Federalists feared oppression by the majority in a democratic society and viewed private property interests as protecting the individual from such oppression.<sup>90</sup> The Federalists consequently made certain the "just compensation" clause was included in the Bill of Rights to the Federal Constitution.<sup>91</sup> David Hume and Jeremy Bentham greatly influenced the thinking of Madison on this issue, and their views must be examined to understand the current emphasis on property interests as sustaining individuality.

David Hume theorized from the proposition that humans are "initially in an atomistic, nonsocial situation."<sup>92</sup> People's selfishness moves them to associate with others; "gregariousness or . . . sympathy" has nothing to do with it.<sup>93</sup> Parcelization then proceeds as rules of property develop to protect against people abusing the associations made among themselves. This objective analysis reduces the rules of property to "merely an artifact—a human invention, a social institution, a means of organization," as opposed to the prior theories resting on more organic premises.<sup>94</sup> Jeremy Bentham popularized Hume's view and stated that property "is most aptly regarded as the collection of rules which are presently accepted as governing the exploitation and enjoyment of resources."<sup>95</sup> Today, the utilitarian theory based on Hume's ideas, is the most popular view on property.<sup>96</sup>

The practical consequences of such a view include the false presumption that humans begin as solitary beings, somehow separate from their society.<sup>97</sup> Further, the utilitarian theory assumes that selfishness is the primary motivating force behind human interaction over resources. Additionally, implicit in the view is the notion that property rules are an objective system of organizing people, when in fact property rules cannot be objective since humans develop societal rules within their cultural context.

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90. Nedelsky, *supra* note 83, at 347.

91. U.S. CONST. amend. V.

92. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1208 (1967).

93. *Id.* at 1209-10.

94. JESSE DUKEMINIER & JAMES KRIER, *PROPERTY* 137-38 (2nd ed. 1988). Property theories developed by John Locke and Immanuel Kant and Georg Hegel have a basis in natural law: Locke posits that mixing one's labor with land renders the person the owner of the land; Kant and Hegel see property ownership as a means of developing one's personal identity. See *id.* at 133-37.

95. See Michelman, *supra* note 92, at 1211.

96. DUKEMINIER & KRIER, *supra* note 94, at 138.

97. Common sense dictates this conclusion. We do not begin our existence as solitary beings separate from our mothers' wombs, and we do not sustain our existence after maturity as solitary beings separate from our community and co-workers and employers.



The utilitarian theory fosters the perception that land is nothing but a resource for exploitation. Property rights are seen as promoting "the efficient use of resources."<sup>98</sup> "Efficiency" is maximizing welfare: total gains exceed total losses.<sup>99</sup> In determining conflicts over the use of property, courts frequently require damages to be paid rather than issue an injunction that would prohibit or make unprofitable economic activity. Problematic in this framework is the fact that "anyone who is prepared to pay the cost to [a right holder] of an injury will not be deterred from inflicting it."<sup>100</sup> Thus, a bottom-line mentality grows, and land is no longer seen as a source of life, but a source of maximizing gain. This mentality seems to be at the root of the takings claims challenging land use regulations and environmental legislation.

A second perception about property that causes resistance to corrective regulations restricting use of the environment is the idea that a person's independence of will is compromised by state interference in private ownership of land. Such interference "instrumentalizes the owner."<sup>101</sup> Property is seen as essential to effective protection by the Bill of Rights since political rights presuppose that members of society act independently from the government and by their own will.<sup>102</sup> Property's function is to maintain "independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner [even where] the owner may do what all or most of his neighbors decry."<sup>103</sup> Jeb Rubenfeld qualifies this broad idea with the statement that "[c]onstitutional guarantees . . . prevent specifically political abuses. Their indispensable point is to ensure political—not individual—autonomy."<sup>104</sup> Corrective regulations

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98. DUKEMINIER & KRIER, *supra* note 94, at 45.

99. See Michelman, *supra* note 92, at 1173. For a criticism of the utilitarian approach in property, see SAGOFF, *supra* note 6, at 192.

The idea that law attempts to allocate property rights efficiently, for example, by minimizing transaction costs, assumes the Lockean principle that the property rights are *there*, already defined, for law to help to allocate in efficient and equitable ways . . . . Without government in place—without a statutory framework, a legal culture, and a well-ordered society under law there are no property rights. . . . One has to understand that the legitimate power of courts, regulatory agencies, zoning boards, and legislatures . . . . *create* [rather than] *correct* markets.

*Id.*

100. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 30 (1987).

101. See Rubenfeld, *supra* note 77, at 1144.

102. Charles Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

103. *Id.* at 771.

104. Rubenfeld, *supra* note 77, at 1142. Please note that the assumption of human (male) autonomy is part of the structure of male supremacy in western culture. See *supra* note 9 and accompanying text.

restricting environmental uses are then perceived as threatening the balance between the autonomous individual and the tyrannical majority.

On the other hand, courts compromise the independence and dignity of those seeking to enjoin environmentally degrading conduct by preferring the remedy of damages to that of an injunction. Because the veto power implicit in a right to injunctive relief could "bring the economy to a screeching halt," utilitarians reject such a remedy even where the petitioner has a right to that relief.<sup>105</sup> Protection under only liability rules can and does undermine societal values implicit in property ownership.<sup>106</sup>

Property is a contested concept, however, and we should not be fooled into thinking that Madison's view as well as his words merit constitutional significance.<sup>107</sup> The just compensation clause does not prevent debate on the issue of what property rules should protect.<sup>108</sup> Current critiques of the liberal view of property outlined above assert that "the myth of the self-contained 'man' in a state of nature [is] politically misleading and dangerous. Persons are embedded in language, history, and culture, which are social creations; there can be no such thing as a person without society."<sup>109</sup> The "individualistic worldview that flowered in society with the industrial revolution"<sup>110</sup> can and should be modified according to our current environmental crisis, which the focus on individualism in part created.<sup>111</sup> Because "property rights are relative as between private parties" and a "set of relations which vary over time,"<sup>112</sup> no one should be surprised that our concept of property rights must adapt to changing societal needs.

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105. SAGOFF, *supra* note 6, at 176.

106. See BOOKCHIN, *supra* note 6; SAGOFF, *supra* note 6; Radin, *supra* note 79; Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 1127 (1990).

107. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents In the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1688 (1988). See also Butler, *supra* note 80, at 652-54 (stating that the Constitution is a document of compromise and therefore does not require a specific political viewpoint).

108. For instance, the Critical Legal Studies movement asserts that fixed property rights can promote domination by the wealthy of the poor and denigrate the community ideal. See Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

109. See Radin, *supra* note 79, at 965.

110. *Id.*

111. This is true because the "autonomous" individual has no need to consider ill effects of that individual's choices on the community. Poor land use decisions necessarily result from an alienated attitude of landowners from their environments.

112. See Butler, *supra* note 80, at 660.

### D. Imperialism

#### 1. Pioneer Tradition

Lynda Butler asserts that the historical origin of our land use expectations lie in the "pioneer tradition."<sup>113</sup> Pioneers viewed the environment as a barrier to their access to necessities like food and shelter.<sup>114</sup> The Indian nations presented another barrier to the European expansion, but perhaps the colonists' approach is best summed up in *Caldwell v. State*:<sup>115</sup> "the wildman . . . knows not the value of any of the comforts of civilized life: he claims no definite boundary of territory," and since Indian nations "make no actual and constant use, [the Europeans] may lawfully possess it and establish colonies there."<sup>116</sup>

The tension between the Indian peoples and the European settlers seems to reflect in part the tension between seeing land as a source of life and seeing land as nothing but its exchange value. For instance, Tashunka Witko, also known as Crazy Horse, stated that "one does not sell the earth upon which the people walk."<sup>117</sup> He apparently did not treat land as a resource easily converted into money. Similarly, Chief Joseph said, "I never said the land was mine to do with as I chose. The one who has the right to dispose of it is the one who created it. I claim a right to live on my land, and accord you the privilege to live on yours."<sup>118</sup> The value system reflected here would not allow land to be reduced into a fungible good because of the inherent restriction on the right to dispose of the land.

One of the most striking examples of the wrong-headed approach to land of our pioneer tradition (and of the cultural imperialism of the United States) was the increased tension between whites and the Indians concerning precious metals on reservation property. Once gold was discovered in the Black Hills, the Federal Government made efforts to purchase that part of the Sioux reservation. The Black Hills are sacred to the Sioux, however, and therefore not easily converted into money. No price was agreed on, and the Sioux stood firm in their resolve to retain the Hills.

The agents of the government recommended that Congress appropriate a fair amount for the purchase and force the sale. It was

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113. Butler, *supra* note 80, at 636.

114. *Id.* at 637 n.34.

115. 1 Stew. & P. 327 (Ala. 1832).

116. *Id.*

117. See DEE BROWN, BURY MY HEART AT WOUNDED KNEE 273 (1970).

118. See Large, *supra* note 78, at 1041 n.13.

said that avoiding conflict in the West required obtaining possession of the Hills for white miners.<sup>119</sup> The whites valued the Hills for their mining potential. Their conversion of the Hills into a fungible good appears to have been unquestioned by white culture.<sup>120</sup> Further, the invasion of sacred land of the Sioux indicates the conversion of culture itself into a fungible item. A part of one's identity should not be an alienable property right, transferable on the market, regardless of so-called economic efficiency.<sup>121</sup>

## 2. Capitalism

With the "philosophy that the world was a vast machine made of inert particles in ceaseless motion," came the "time when new and more efficient kinds of machinery were enabling the acceleration of trade and commerce."<sup>122</sup> The development of industry was "compatible with the image of the mechanical cosmos."<sup>123</sup> The "death of the world soul and the removal of nature's spirits" removed cultural constraints against environmental interference such as the mining, deforestation, and use of transportation developments associated with the industrial revolution.<sup>124</sup> In the context of capitalistic economies such as ours, "[n]ature is unproductive."<sup>125</sup> This is because Earth's cycles do "not produce profits and capital" unless they are developed.<sup>126</sup>

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119. See BROWN, *supra* note 117, at 284.

120. The Indian peoples were "exterminated" where they resisted giving up their homeland. *Id.* at 388 (used by governor of Colorado in reference to the Ute nation, who were also facing pressure from white miners wanting their resources).

Similarly, areas in Latin America were reduced to their weight in precious metals. The Spanish and Portuguese mined gold and silver there, developing the typical mercantilism economy of colonialization. The areas with the largest source of cheap labor received the most Spanish influence; thus, cultures were reduced to their members' labor capability. See LATIN AMERICAN POLITICS AND DEVELOPMENT 8, 13, 578 (Howard J. Wiarda & Harvey F. Kline eds., 1990).

121. The enslavement of African people also reflects the perverse reductionism of life and cultural identity into monetary terms (of course, enslaved people did not get the market value of themselves). Prostitution and pornography are part of the same dynamic, making sexuality a marketable item (and how often do the people used in these industries receive the market value of their sexuality?).

122. MERCHANT, *supra* note 12, at 226-27.

123. *Id.* at 227.

124. *Id.*

125. Shiva, *supra* note 11, at 191.

126. *Id.* at 192. Shiva takes issue with the term "development" as well and refers to the phenomenon as "maldevelopment" since it subverts natural processes and leads to exploitation of living organisms, particularly humans. *Id.*

Capitalism has been criticized as "a system that promotes and depends on wasteful consumption."<sup>127</sup> The movement of our culture through industrial expansion has lead to a reductionism of "human life to working" and "gorging"<sup>128</sup> in that needs are created for the purpose of an "uninterrupted flow of any and all goods which invention allows the economy to produce."<sup>129</sup> A society "based on competition and growth for its own sake must ultimately devour the nature world," since destruction of resources, rather than creation, is the norm.<sup>130</sup> Additionally, capitalism assertedly "severed the relationship of the producer to the consumer, eliminating any sense of ethical responsibility of the former to the latter."<sup>131</sup>

Corporations "[i]n the name of private property and free enterprise," may "pollute the air, water, and soil we all share."<sup>132</sup> Corporate activity indicates that these criticisms of capitalism cannot be easily dismissed.<sup>133</sup> For example, Occidental Chemical Corporation, Hooker Chemical Company, Dow Chemical, and Shell Oil produced at different times the pesticide DiBromoChloroPropane (DBCP). Yet test results of the chemical had demonstrated that exposure resulted in liver and kidney damage, sperm cell damage, the shrinking of testicles, cancers, and death.<sup>134</sup>

Working conditions promoted extended exposure, but employers did not warn workers of the hazards of the chemical.<sup>135</sup> Because the chemical was dripped into irrigation water, consumers suffered exposure and so did children who played in streets flooded with

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127. Chaia Heller, *For the Love of Nature: Ecology and the Cult of the Romantic*, in *ECO-FEMINISM* 219, 238 (Greta Gaard ed., 1993). She also criticizes the assumption that this flaw is "inherent within 'human nature.'" *Id.*

128. JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* 221 (John Wilkinson trans., 1964). The reductionism of humanity to working capacities is another way of describing the problem of exploitation of the working class.

The reductionism is probably also linked to the Protestant work ethic and the idea of a covenant of works with the Christian god. Ellul states that the development of a work morality resulted in "[a] kind of economic predestination" where "[h]uman destiny seemed to revolve about the making of money or the failure to make it." *Id.* at 220. This dynamic could be the source of the rhetoric of the "deserving" and "undeserving" poor surrounding welfare issues. See, e.g., CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980* (1984).

129. ELLUL, *supra* note 128, at 221.

130. BOOKCHIN, *supra* note 6, at 15.

131. *Id.* at 187.

132. Cynthia Hamilton, *Coping with Industrial Exploitation*, in *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS* 63, 65 (Robert D. Bullard ed., 1993).

133. See RUSSELL MOKHIBER, *CORPORATE CRIME AND VIOLENCE* (1988) for an extensive cataloging of dangerous corporate activity and a critique of the lack of enforcement or passage of pertinent legislation that would hold corporations accountable.

134. *Id.* at 142.

135. *Id.* at 140.

irrigation water.<sup>136</sup> The companies did not want to withdraw the product despite the danger to public health and safety; instead, they weighed the costs and benefits by assessing the likelihood and extent of liability if they continued to manufacture the product.<sup>137</sup> Such preoccupation with profit in the face of causing human suffering reflects the reductionist paradigm at work in the industrial setting. If it is profitable to create circumstances that lead to the destruction or debilitation of living organisms, then the rational choice for a capitalist is to ignore ethical considerations.

Love Canal is a well-known example of such profit-driven behavior. Hooker Chemical and Plastics Corporation dumped at the site 20,000 tons of at least 200 chemical substances, such as benzene (known to cause leukemia), chloroform and trichloroethylene (carcinogens), and dioxin (one form of which has been referred to as "the most poisonous small molecule known").<sup>138</sup> Hooker sold the property for one dollar. The property was not marked as a dumping site, and children often played there. One afternoon, a child fell into a muddy ditch and returned to his mother "covered with this oily goo."<sup>139</sup> The company denied any responsibility for the resulting diseases and deformities suffered by Love Canal residents. They did finally settle a lawsuit for twenty million dollars to be distributed among over 1,000 plaintiffs.<sup>140</sup> Children born to exposed persons suffer blindness, ear deformities, heart disorders, and liver and kidney problems.<sup>141</sup>

Reserve Mining Company also used the environmentally reckless approach. The company mined hard rock for iron and disposed of the crushed rock by mixing it with water and dumping the waste into Lake Superior,<sup>142</sup> which of course played a vital role in the surrounding community. The Environmental Protection Agency (EPA) initiated a suit against Reserve Mining, and after four years, Reserve Mining was enjoined in 1980 from dumping its 67,000 ton-a-day refuse into Lake Superior.<sup>143</sup> Now, Reserve Mining dumps on land.<sup>144</sup> The full effects on Lake Superior and those living on the north shore there are unknown, but asbestos fibers were among the

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136. *Id.* at 146.

137. *Id.* They were held liable for damages in later court proceedings. Such cost-benefit analyses indicate that health and life are viewed as fungible goods by the analyzer.

138. *Id.* at 270.

139. *Id.* at 269.

140. *Id.* at 275.

141. *Id.* at 273.

142. *Id.* at 384.

143. *Id.* at 390.

144. *Id.*

waste dumped in the lake that served as a drinking supply, a recreational source, and a fishing source.

The most egregious corporate acts demonstrate in themselves that the decision makers are alienated from the effects of their choices. The "sheer impersonality of vast markets" alienates the manufacturer from those who are harmed by unsafe products or waste.<sup>145</sup> An example of such alienation lies in a statement by an anonymous chemical company executive, who said, "[a]s long as these people can't be *identified*, as long as they're not *specific* people, [neglecting to pay the cost for eliminating waste from drinking water is] OK. So you put a filter on your own house and try to protect yourself."<sup>146</sup>

Not all adverse effects of environmental degradation can be accounted for as costs of doing business. For instance, for the people living at Prince William Sound, the 1989 Valdez accident resulted in long term effects such as higher rates of vandalism, rape, sexual abuse, and wife battering since the spill.<sup>147</sup> Similarly, Love Canal survivors suffer depression and some have committed suicide; again, the market takes inadequate account of effects.<sup>148</sup> Even if the polluters pay the cleanup costs of these disasters, they are not held fully responsible because the difficulty of establishing legal proximate cause frustrates potentially well-deserved tort liability. Without forcing environmental degraders to take full account of the costs of their messes, these human costs will continue to go unrecognized and unmitigated.

Environmental justice is an issue receiving increasing attention.<sup>149</sup> Poor communities bear a disproportionate amount of risk associated with exposure to toxic substances. Members of the dominant culture "assume that poor people are concerned first and foremost with improving their immediate economic condition. Poverty, the reasoning goes, makes poor people willing to accept certain risks

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145. JONI SEAGER, *EARTH FOLLIES* 85 (1993).

146. *Id.* (quoting ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* (1988)).

147. *Id.* at 95-99.

148. *Id.* at 80.

149. See, e.g., Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994); Colin Crawford, *Strategies for Environmental Justice: Rethinking CERCLA Medical Monitoring Lawsuits*, 74 B.U.L. REV. 267 (1994); Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991); Rodolfo Mata, *Hazardous Waste Facilities and Environmental Equity: A Proposed Siting Model*, 13 VA. ENVTL. L.J. 375 (1994); Omar Saleem, *Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions*, 19 COLUM. J. ENVTL. L. 211 (1994).

that others would not."<sup>150</sup> Communities of color are easy targets for waste disposal and waste-to-energy incinerators partly because of low property values.<sup>151</sup>

The above instances show that the utilization of a "resource"<sup>152</sup> for industrial purposes yields detrimental effects to less powerful members of the community. Yet regulated land owners and facility operators argue that corrective measures place burdens on them they should not have to bear. Harsh effects from development and exploitation of Earth and other life forms do not end with industry, however.

### E. Militarism

The military has been called the biggest threat to our environment because of its activities whether at war or in peace.<sup>153</sup> The problem is exacerbated by "militaries feed[ing] on and fuel[ing] the masculinist 'prerogative' of men conquering nature."<sup>154</sup> Additionally, the military discourages an "environmentally responsible consciousness" through its prioritization of national security over compliance with national environmental standards.<sup>155</sup> Such a

150. Conner Bailey et al., *Environmental Politics in Alabama's Blackbelt*, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 107, 116 (Robert D. Bullard ed., 1993). The authors note that Sumter County, Alabama's waste landfill was brought into the community by a white-controlled county commission. *Id.*

151. Hamilton, *supra* note 132, at 70. She proposes "decentralized, local, and regional approaches to development, production for use, and the greening of urban environments as well as preservation of the wild" as a solution. Cf. Robert Sitkowski, *Commercial Hazardous Waste Projects in Indian Country: An Opportunity For Tribal Economic Development Through Land Use Planning*, 10 J. Land Use & Envtl. L. 239 (1995).

152. The meaning of this word itself suggests the attitude that arguably has caused the problems we face today. If we continue to view land, water, air, and other species as assets or fungible goods to be utilized for commercial gain, we will continue to behave in an unsound manner, as a species alienated from the ecosystem and therefore destructive to it. This is because we have separated one aspect of a resource, its commercial value, from other values associated with the resource. Such separation grinds against the grain of nature's logic, which starts with the premise that everything is interdependent and connected.

153. SEAGER, *supra* note 145, at 15. Cf. Kirstin S. Dodge, *Countenancing Corruption: A Civic Republican Case Against Judicial Deference to the Military*, 5 YALE J.L. & FEMINISM 1 (1992); Courtney W. Howland, *The Hands-Off Policy and Intramilitary Torts*, 71 IOWA L. REV. 93 (1985); Cary Ichter, "Beyond Judicial Scrutiny": *Military Compliance with NEPA*, 18 GA. L. REV. 639 (1984); Barry Kellman, *Judicial Abdication of Military Tort Accountability: But Who Is to Guard the Guards Themselves?*, 1989 DUKE L.J. 1597 (1989); Kenneth M. Murchison, *Reforming Environmental Enforcement: Lessons From Twenty Years of Waiving Federal Immunity to State Regulation*, 11 VA. ENVTL. L.J. 179 (1992); Michael L. Richmond, *Protecting the Power Brokers: Of Feres, Immunity, and Privilege*, 22 SUFFOLK U. L. REV. 623 (1988); Stephanie N. Simonds, *Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform*, 29 STAN. J. INT'L L. 165 (1992).

154. SEAGER, *supra* note 145, at 15.

155. *Id.*



privileged status multiplies the extent of the environmental degradation the military has caused through experimental bombings and disposal of waste.

For instance, Vietnam's forests have suffered irreparable damage from the dumping of twenty-five million gallons of defoliants and toxins in the military's effort to live up to their Vietnam creed, "[o]nly we can prevent forests."<sup>156</sup> The Vietnamese lost twenty-five million acres of farmland as a result of the military's dropping twenty-five million bombs.<sup>157</sup> Consequently, hazardous floods occur three times as often as before the war, farmers have turned to heavy pesticide use in an effort to increase production, and runoff has poisoned the water supply.<sup>158</sup> Over eight million people are starving because the soil cannot sufficiently support agriculture for the population.<sup>159</sup>

More recently, our military caused significant environmental harm in the war with Iraq. The "apocalyptic" conditions caused by the strategic bombing of the U.S.-led coalition include many thousands of homeless persons, epidemics, and food shortages.<sup>160</sup> These conditions will be complicated once Iraqis feel the consequences of water pollution resulting from the bombings on nuclear and chemical facilities, which were located on the Tigris River.<sup>161</sup> Furthermore, the EPA estimated that the oil fires in Kuwait created ten times as much air pollution as that emitted by all U.S. power-generating plants combined.<sup>162</sup>

The Reagan Administration was remarkably callous toward the destruction caused by the drug war, in which the military was used. For instance, the administration wished to have Peruvian coca plants killed by using a chemical called "Spike," which can render an area barren for up to five years. Eli Lilly, a manufacturer of "Spike," refused to sell it to the government based on inadequate testing for its effects on human health. Reagan aides said the Eli Lilly executives were "hysterical," and "going AWOL in the war on

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156. *Id.* at 17, 19.

157. *Id.* at 17.

158. *Id.*

159. SEAGER, *supra* note 145, at 18. Vietnamese women suffer the highest spontaneous abortion rate in the world and deliver fetuses deformed by Agent Orange. *Id.* See also MOKHIBER, *supra* note 133, at 75 (1988) for more details on the effects of Agent Orange and the corporate culpability for the injuries caused by exposure.

160. SEAGER, *supra* note 145, at 20.

161. *Id.* at 20-21. Pollution of the Tigris River, which empties into the Persian Gulf, will contribute to the pollution of the Gulf and its fish, aquatic vegetation, and wildlife. *Id.*

162. *Id.* It is too easy to deny U.S. responsibility by pointing out who started the oil fires. The destruction was in response to U.S. aggression against Iraq, and all parties to a war must take partial responsibility for all retaliatory or reactionary actions.

drugs."<sup>163</sup> The administration did not choose another chemical; it bought "Spike" from another company.<sup>164</sup> Unfortunately, the poor in Latin America grow coca among the food crops.

Civil wars in Central America involve less obvious examples of the U.S. military's contribution to environmental degradation. The political struggles have caused significant "soil erosion, pesticide poisonings, water pollution, and wildlife extinctions."<sup>165</sup> Bombs and defoliants have destroyed eighty percent of El Salvadoran forests; pesticides cause more deaths in Nicaragua than anywhere else on the planet; and indiscriminate herbicide spraying in Guatemala has polluted food and water supplies as well as poisoned all exposed species.<sup>166</sup> Responsibility for the degradation might appear to be in part a result of the large population of Central American poor consuming natural resources.<sup>167</sup> In fact, the elite and military of Central American nations, and by extension through monetary support and military training, the United States and the former Soviet Union, must take full responsibility.<sup>168</sup>

A more direct example of the military's environmental insanity lies in the suffering of the Pacific islanders at the hands of the U.S. military's "peacetime" bombing for decades after World War II.<sup>169</sup> Some 200 explosions have rendered homelands uninhabitable for

163. SEAGER, *supra* note 145, at 29-30. The judgments implicit in these criticisms reflect a challenge to the manhood of the executives at Eli Lilly. Interestingly, "hysterical" is a distinctly feminine and negative term, with its root in the Greek for "uterus," which reflects the male supremacist perspective behind much environmentally irresponsible behavior.

164. *Id.* at 30.

165. *Id.* at 24.

166. *Id.* at 24-28.

167. Heller, *supra* note 127, at 225 ("overpopulation' in the Third World contributes little to the overall depletion of the earth's resources. It is rarely considered that one white middle class person in the United States consumes three hundred times the food and energy mass of one Third World person"). Similarly, Vandana Shiva has calculated that:

Our global energy conversion from all sources (wood, fossil fuel, hydroelectric power, nuclear power, and so on) at the present time [1990] is . . . more than twenty times the energy content of the food necessary to feed the present world population at the United Nations Food & Agriculture Organization's standard diet of 3,600 calories a day.

Shiva, *supra* note 11, at 196. This supports the assertion that rather than a scarcity of resources being responsible for the starvation of so many people, actually the situation is a result of resource allocation.

168. See generally John A. Booth, *Nicaragua: Revolution Under Siege*, in *LATIN AMERICAN POLITICS & DEVELOPMENT* 467, 473, 477-78 (Howard J. Wiarda & Harvey F. Kline eds., 1990); Roland Ebel, *Guatemala: The Politics of Unstable Instability*, in *LATIN AMERICAN POLITICS & DEVELOPMENT* 498, 503, 507, 514 (Howard J. Wiarda & Harvey F. Kline eds., 1990). This book includes other articles demonstrating that the military and elite of Latin American countries make all important resource exploitation decisions as well as the extent to which the financial backing of the United States and the former Soviet Union contributed to ecological destruction.

169. SEAGER, *supra* note 145, at 63.

25,000 years or "vaporized" in military language.<sup>170</sup> Cancer proliferates, deformities occur in children at high rates, and often "jelly-fish" babies, having no recognizable human shape because of malformed heads and limbs, are the result of pregnancies.<sup>171</sup>

At home, our military has a similar record. The Pentagon "produces more toxic waste than the five largest American chemical companies combined."<sup>172</sup> Nonetheless, we rarely learn through the media of environmental harm caused by the military or regulation limiting the military's environmentally insane behavior. When a community in Virginia confronted the officer in charge about the local base leaking PCBs, the officer replied, "we're in the business of protecting your country, not the environment."<sup>173</sup> Residents of a Jacksonville, Florida suburb had to abandon their neighborhood once they discovered that a Navy waste dumping site, located under their homes, contained leaking and surfacing drums of toxins.<sup>174</sup> The American Army's Rocky Mountain Arsenal in Denver, Colorado has been called one of the most toxic places on the planet.<sup>175</sup> Further, a congressional report has stated that cleaning up places contaminated by the military may be impossible.<sup>176</sup>

In solving our environmental problems, society must examine carefully who or what generates destructive dynamics and situations. Some criticize the large human population as a cause of our environmental problems. The presumption that humans en masse are unhealthy for the planet is simply false. The corporate managers, military officers, and other business people (primarily male and primarily members of white cultures) are the responsible parties.<sup>177</sup>

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170. *Id.* at 63-64. Our military did not always warn neighboring people of the bombings. Neither did our military restore the islanders to any position of health and security after destroying their homes.

171. *Id.* at 66. The babies are multi-colored, often hairless, and unable to live more than a few hours after birth. *Id.*

172. *Id.* at 31. That amounts to at least one third of all hazardous waste produced in the United States; the military "routinely generates toxic waste that includes cyanides, acids, heavy metals, PCBs, phenols, paints, and contaminated sludge." *Id.* at 33.

173. *Id.* at 37. PCB's cause cloracne, nausea, abnormal menstruation, impotence, headaches, and diarrhea in humans. MOKHIBER, *supra* note 133, at 364. Other possible effects shown through experiments involving monkeys demonstrate that PCB's can cause a high rate of miscarriage, some uterine growths, and some sterility. One half of the offspring born alive in these experiments died within four months of birth. *Id.* at 370.

174. SEAGER, *supra* note 145, at 31-32.

175. *Id.*

176. *Id.* at 33. Additionally, the military secretly using its own personnel reflects the disrespect for life inherent in military activities. For instance, after the Korean conflict, the Army tested veterans without their consent for the effects of nuclear explosions on humans. See Nancy Hogan, *Shielded from Liability*, ABA JOURNAL, May 1994, at 56.

177. SEAGER, *supra* note 145, at 36. One survey showed that women occupied only 44 of some 1,015 national security policy-making positions in the United States. *Id.* at 38. Further,

There are enough resources for all, but currently they are malapportioned.<sup>178</sup>

### III. WHAT PROPERTY MEANS TO US

As the European settlers in North America developed the territory of the Indian nations into U.S. property, the perception that owning land included a right to earn a profit off the land arose. This "right" included the power to "change the very essence of the land, if necessary, to obtain that profit."<sup>179</sup> *Pennsylvania Coal Co. v. Sanderson*<sup>180</sup> has language that reflects the law's recognition of this "right." A neighbor to the coal company sued for damages caused by the company's operations and prevailed in a lower court.<sup>181</sup> The Supreme Court reversed and noted that a property owner "may cut down the forest trees, clear and cultivate his land, although in so doing he may dry up the sources of his neighbor's springs, or remove the natural barriers against wind and storm."<sup>182</sup> The Court continued, stating that "the rightful use of one's own land may cause damage to another, without any legal wrong. Mining in the ordinary and usual form is the natural user of coal lands. They are, for the most part, unfit for any other use."<sup>183</sup>

This factual judgment could not have been correct. Perhaps the underlying statement was that the land could not have been used profitably by the coal company in any other way. The policy of the Court in rendering this decision becomes clear with the Court's statement that "the leading industrial interest of the state" could carry on their business in the ordinary way without being held "accountable" for the consequences of doing business.<sup>184</sup> The Court emphasized the role of gravity as the source of the damage plaintiffs suffered.<sup>185</sup>

Early in this century, the Court demonstrated its support of the reductionist attitude in *Pennsylvania Coal Co. v. Mahon*.<sup>186</sup> The Court stated in that case that where a regulation renders mining

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white males hold 95% of the top management positions of the largest of the United States' corporations. *Id.* at 82. Male control of the military and government is also indicated by the common phrase "old boy networks" used by Americans. *Id.* at 118.

178. "There is enough in the world for everyone's need, but not for some people's greed." SHIVA, *supra* note 56, at 6 (quoting Mahatma Gandhi).

179. See Large, *supra* note 78, at 1044 nn.22-24.

180. 6 A. 453 (Penn. 1886).

181. *Id.* at 453.

182. *Id.* at 456.

183. *Id.* at 457.

184. *Id.*

185. *Id.*

186. 260 U.S. 393, 415 (1922) (stating as the general rule that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

unprofitable, the regulation "appropriat[es] or destroy[s]" coal.<sup>187</sup> The coal company had acquired only mining rights to a parcel, and the Court stated that "we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought."<sup>188</sup> The government that required the coal company to leave some coal underground to protect against subsidence, however, apparently recognized that the separation of rights to a parcel into surface rights and mining rights can be impracticable. With the right to mine the coal went the responsibility to protect against subsidence, according to the regulation. The Supreme Court held that requiring the company to exploit safely their rights burdened the company's rights so as to require compensation.<sup>189</sup>

Recently the United States Supreme Court decided a takings case, *Lucas v. South Carolina Coastal Council*,<sup>190</sup> that may point to a trend by the Court toward economic determinism. Mr. Lucas, the plaintiff, wanted to build on his barrier island property but was prohibited from doing so for health and safety as well as environmental concerns.<sup>191</sup> The Court held that where "all economically beneficial uses [are sacrificed] in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."<sup>192</sup> Such a ruling presumes that economic development "rights" are so essential to property ownership that compromising this one aspect of ownership requires compensation for the entire parcel.<sup>193</sup>

The Court has earlier ruled that "destruction of one 'strand' of the bundle [of property rights] is not a taking."<sup>194</sup> This ruling as well as the holdings in *Penn Central Transp. Co. v. City of New York*<sup>195</sup> and *Keystone Bituminous Coal Ass'n v. DeBenedictis*<sup>196</sup> demonstrate that in

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187. *Id.* at 414.

188. *Id.* at 416.

189. *Id.*

190. 112 S. Ct. 2886 (1992).

Commentators have criticized this case extensively. See, e.g., Daniel R. Mandelker, *Of Mice and Missiles: A True Account of Lucas v. South Carolina Coastal Council*, 8 J. LAND USE & ENVT'L L. 285 (1993). See also Michael C. Blumm, *A Colloquium on Lucas: Property Myths, Judicial Activism, and the Lucas Case*, 23 ENVTL. L. 907 (1993) for a general critique of the Court's departure from precedent.

191. 112 S. Ct. at 2889.

192. *Id.* at 2895 (emphasis in original). In contrast, *Pennsylvania Coal* stated that diminution in value is "one fact for consideration" in the takings analysis. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

193. Certainly, one person should not be required to bear the entire burden of regulation for the benefit of the community. On the other hand, Stevens' dissent indicates that Mr. Lucas had notice that development would be restricted when he purchased the property.

194. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

195. 438 U.S. 104 (1978).

196. 480 U.S. 470 (1987).

deciding takings claims, courts must look at the parcel as a whole. The inconsistency of *Lucas* is apparent, and without overruling the previously mentioned cases, the Court has introduced yet another level of uncertainty into takings jurisprudence. Looking at the parcel as a whole has been the standard practice of the Court, but *Lucas* signals a preference for categorical rules over the pragmatic balancing held to be appropriate in *Penn Central*.

Today, a clash of values over protecting property rights has developed.<sup>197</sup> Libertarians argue property law must support individual liberty, privacy, and self determination; communitarians argue that property law must support equality and thick social ties.<sup>198</sup> Classical liberalism cannot justify persons' use of property as a means of controlling others, yet the power associated from private property ownership does allow such abuse.<sup>199</sup> Currently, those seeking to develop land to its highest economic use regardless of environmental consequences represent that group of owners who are abusing their power as owners. Refusing to order compensation for the interference with the twig referred to here as the liberty to exploit neither compromises environmental concerns nor libertarian values because political autonomy can be achieved without profit maximization.

Neither the Federal Constitution nor takings jurisprudence requires the courts to compensate developers when regulation or other governmental action limits the liberty to exploit.<sup>200</sup> Courts must use their inherent authority to modify the common law so as to protect the community from the environmental degradation that results from property owners' drive for profit maximization. Devaluing the liberty to exploit associated with real property ownership will render categorical rules irrelevant to the takings inquiry.<sup>201</sup> Some may argue that such a step is unnecessary, that adjustments in favor of increased property right protection should be implemented

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197. For treatment of the conflict in Florida, see David J. Russ, *How the "Property Rights" Movement Threatens Property Values in Florida*, 9 J. LAND USE & ENVTL. L. 395 (1994).

198. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1352 (1993).

199. See Radin, *supra* note 79, at 980, for an extended discussion of this problem. See, e.g., *State v. Shack*, 277 A.2d 369 (N.J. 1971) (owner *qua* owner interfering with the rights of association of migrant workers temporarily residing on owner's property).

200. Frank I. Michelman uses this phrase in *Property, Utility and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, *supra* note 92, at 1187 n.45.

201. See Butler, *supra* note 80, at 655 (stating that the traditional expectation of exploitative use of land is no longer viable or reasonable). Changing the law of nuisance would be an obvious solution, but that will not be explored here because such a change would require the lengthy process of common law development among the states. Faster positive results for our environment will accrue if the United States Supreme Court returns to a balancing approach that acknowledges community values.

instead.<sup>202</sup> Such an attitude contributes to the environmental crisis by refusing to acknowledge its existence.

#### IV. REACHING FOR A SOLUTION

Some assert that addressing the ecological crisis requires more than a change in the doctrine of our property system; rather, it has been argued that private property itself must be abolished.<sup>203</sup> Perhaps such a drastic change will be necessary to solve the problem; however, if transformation of systems already in place can be done, then this less destabilizing change is desirable. Private property ownership may not guarantee political independence in any case because of the growing power of government.<sup>204</sup> Private wealth depends more and more on a relationship with the government. Some free enterprise operations do business only with the government and enjoy "public generosity" in the form of government contracts. Many receive the benefit of using public resources such as grazing lands for nominal cost and may seek to profit from this use. "Power over a man's [sic] subsistence amounts to a power over his [sic] will."<sup>205</sup>

As public and private spheres cross over, a new line of privacy must be drawn. More and more people cannot depend on private property to protect their independence. Current property lines no longer suffice since benefits upon which we depend for survival could be withdrawn without compensation.<sup>206</sup> Additionally, as right holders depend less on any private property interests for assurance of political independence, protecting economic interests in private property has less legitimacy, especially in the context of environmental needs. Margaret Jane Radin suggests a solution that would aid courts in respecting the environmental needs of society.<sup>207</sup> She proposes a property system that respects personal interests in property over interests in property that are fungible.<sup>208</sup>

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202. See generally Russ, *supra* note 197.

203. BOOKCHIN, *supra* note 6, at 189 ("The precondition for a harmonious relationship with nature is social: a harmonious relationship between human and human. This involves [in part] the abolition of . . . private property.").

204. See Reich, *supra* note 102.

205. *Id.* at 787.

206. *Id.* See also Large, *supra* note 78, at 1040 (stating that a "vast majority of people are more dependent for their economic well-being on their status rather than on any proprietary interest they may have in the land.").

207. Radin, *supra* note 79.

208. *Id.*

She refers to *Lynch v. Household Finance Corp.*<sup>209</sup> as supporting her theory.

[T]he dichotomy between personal liberties and property rights is a false one. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.<sup>210</sup>

She sees the personal right in property as referring to "an individual being bound up with an external 'thing'."<sup>211</sup> She criticizes the objectivism inherent in the libertarian focus on "autonomy" as the interest served by rights and liberties.<sup>212</sup> The "abstract rationality" reflected in the notions of autonomy and control of one's external environment "fails to convey this sense of connection with the external world."<sup>213</sup> She asserts that "a person cannot come to exist without both differentiating itself from the physical environment and yet maintaining relationships with portions of that environment."<sup>214</sup> Therefore, a system respecting the personal nature of rights reflects reality more accurately.

She explains her distinction between fungible property and personal property with the statement that "[o]ne may gauge the strength or significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss."<sup>215</sup> For instance, a wedding ring may be both fungible and personal property. A jeweler who makes a wedding ring will have less personal connection to the ring than a devoted spouse who will wear it. The ring's worth to the jeweler is probably limited to its exchange value, whereas the same ring may be irreplaceable to the devoted spouse.<sup>216</sup> To ask how much the spouse would pay to protect the ring indicates how much society is dependent on the market to assign value to what we call property. The point is that money cannot accurately sum up all values.

She proposes that "the more closely connected with personhood, the stronger the entitlement."<sup>217</sup> Fungible property rights can be related to personhood, but she suggests that where a property right

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209. 405 U.S. 538 (1972).

210. Radin, *supra* note 79, at 957 n.2 (quoting *id.* at 552).

211. Radin, *supra* note 79, at 960.

212. *Id.*

213. *Id.*

214. *Id.* at 977.

215. *Id.* at 959.

216. *Id.*

217. *Id.* at 986.



is fungible, "there is a *prima facie* case that that right should yield to some extent in the face of conflicting recognized personhood interests."<sup>218</sup> On the other hand, recognized personhood interests will not include those that rise to the level of a fetish.<sup>219</sup> Those who live "only for material objects" are considered to be "lacking some important attribute of humanity."<sup>220</sup> Such an observation would apply to developers who might assert that their identity is wrapped up in their ability to accumulate profit.

In a later article, Radin addresses takings law specifically.<sup>221</sup> She supports the "essentially *ad hoc* factual inquiries"<sup>222</sup> the Court has used in the past; such pragmatism is "holistic" and "is much feared because of its particularism, because of its wholehearted embrace of the contextuality of everything."<sup>223</sup> This approach conforms to the ecological perspective that all is interconnected<sup>224</sup> and protects against the recent problems of conceptual severance<sup>225</sup> and market failure<sup>226</sup> in takings law. Accordingly, she states that "some kind of 'compelling state interest' test for compensated takings of personal, but not fungible, property seems to be appropriate."<sup>227</sup> Further, *per se* rules have no place in such an approach.<sup>228</sup>

Whether the judiciary should be the institution to implement this change in property law is not clear. "Courts . . . are far too removed from the voice of the citizenry, and judges' backgrounds are too homogeneous and distinct"<sup>229</sup> to assure appropriate judicial action. Activist courts can provide leadership, however, "[p]articularly where there is a presumption of legitimacy, as in the case of Supreme Court opinions."<sup>230</sup> Because of the many checks on judicial power,

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218. *Id.* at 1014-15.

219. *Id.* at 961.

220. *Id.*

221. See Radin, *supra* note 107, at 1680-81.

222. *Penn Central Transp. Corp. v. City of New York*, 438 U.S. 104, 124 (1978).

223. See Radin, *supra* note 107, at 1680-81.

224. Lynda Butler's analysis *supra* note 80 supports this approach.

225. The problem of conceptual severance occurs when a court makes the mistake of looking at the effects on only one aspect of the property of regulation or other governmental action. The *Penn Central* decision makes clear the precedent of viewing the "parcel as a whole." Radin proposes specifically that the court disfavor conceptual severance. See Radin, *supra* note 107, at 1681.

226. The market is not an efficient means of allocating resources or reflecting societal values since not all personal satisfaction can be measured with material means. See Michelman, *supra* note 92, at 1173.

227. See Radin, *supra* note 107, at 1691.

228. *Id.* at 1687.

229. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1542 (1992).

230. Van Doren, *supra* note 14, at 633.

"[f]ears of judicial tyranny are unwarranted."<sup>231</sup> Property law is common law, and judges have legitimate authority to modify outdated common law concepts. The valid criticism concerning the lack of diversity among judges can be overcome in the short term<sup>232</sup> if judges question thoroughly the cultural context in which property issues have been decided and apply that analysis to their own assumptions about what property ownership means. Responsibility accompanies the right to use and enjoy property, and if such a right continues to be maintained, owners must recognize their responsibilities to society. Science has proven the interconnectedness of natural phenomena; property lines are artificial constructs.

## V. CONCLUSION

Private property is in place to protect our political autonomy and serves as a basis for an ordered society. Devaluing the liberty to exploit does not undermine the role private property plays in our culture. Indeed, circumstances demand that we respond to our environmental crisis by curbing the self-indulgence of some for the preservation of the community. At no time has the Constitution granted persons the ability to abuse their liberties. Developers and industrialists can no longer be permitted to transform their twig to exploit into a club. Further, the federal government must take more responsibility for military action that degrades the environment and violates human rights.

The environmental crisis should put owners on notice of potential regulation of their property. Although restrictions on exploiting property certainly will disappoint investors and will affect the market's stability, we must recognize that such demoralization is minimal compared to the importance of preserving our health and safety in the context of a dying ecosystem. All organisms have a legitimate interest in the wise and sane use of the planet's resources, and humans should use responsibly their advantages over other life forms. Restricting the liberty to exploit during this crisis appears to be a fair answer.

Reductionist thinking, a characteristic of an alienated value system, must be openly critiqued before we can devalue the liberty to exploit. Evidence demonstrates that the dangerous view of Earth as

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231. *Id.*

232. All groups in our culture should have adequate representation on the bench; otherwise, the judiciary's legitimacy will remain questionable. The power of the judiciary must be used responsibly in the context of our diverse and complex culture and the needs of exploited and disenfranchised groups. Whether the judiciary is "politically accountable" in the technical sense is irrelevant to this issue.

a replaceable, fungible good leads to the death of ecosystems. Bolstering the foundation of societal systems with holistic values will renew respect for living matter. The persons responsible for the environmental destruction must learn from cultures that do not engage in an alienated thought process that objectifies and mechanizes organisms and planetary cycles. We can all get what we need from Earth and each other if we curb the domineering impulses of those who strive to get always what they want.

