

EARTH JURISPRUDENCE AND LOCKEAN THEORY: RETHINKING THE AMERICAN PERCEPTION OF PRIVATE PROPERTY

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I. INTRODUCTION

I was six years old when I accidentally killed my new pet. A tiny lizard named Pete survived just three days in the ecosystem I had built for him in a clear plastic Tupperware[®] container. After capturing Pete in my backyard, I placed him in his new home and added sand, rocks, ants, and freshly plucked grass. I enhanced his new home with a small bowl of water so he would have a “pool to swim in.” At that age, I truly believed Pete was living the good life—lizard paradise, complete with all the ants he could eat.

The first day in his new home, Pete was distressed. Frantically searching for an escape, Pete darted around the plastic container desperate for a way out. I could not comprehend this. After all, why would Pete want to leave lizard paradise? The days went by and Pete deteriorated rapidly. The lizard paradise to me was more like a lizard jail to him. Pete wasn’t eating, wasn’t drinking, and wasn’t moving at all. He began to lose body mass, his light brown skin wrinkling. Eventually, Pete passed away. Wiping the tears from my eyes, my grandfather explained why Pete did not flourish in his new home. The green of the grass had faded. The ants were busy tunneling a new home of their own in the sand, unavailable to the weakened Pete. I learned that Pete didn’t need a pool to swim in, but fresh water, every day. Pete needed his natural habitat.

My fascination for animals and their dependence on the outdoors grew as I eagerly listened to my grandfather’s wisdom. He began to teach me to respect the Earth, and everything on it: to respect life, the animals among us, the plants, the water, and the air we breathe. With an understanding and an appreciation for all wildlife, there was no need to be overly wary of snakes or poison ivy. Most importantly, my grandfather taught me that I did not own Pete simply because I caught him or because I was bigger than him—I did not have a right to place him in the plastic container that housed him in his last days, and that what I had done was wrong. Treating Pete as my “property,” I failed to appreciate, from a lizard’s perspective, that a natural habitat was necessary as Pete’s life-sustaining force. My grandfather educated me to look at things from Pete’s perspective to better understand his needs.

Earth Jurisprudence adopts this “Earth-centered” or “ecocentric” approach. This paper explores Earth Jurisprudence as an alternative to the property regime in the United States. It examines the fundamental principles of property ownership, frequently attributed to the philosophy of John Locke, but digs deeper into these “Lockean” roots to reveal important caveats to Locke’s general principles which have been overlooked in modern times. This paper also applies the influential philosophy of Locke to the budding legal field of Earth Jurisprudence, and to the ever-expanding science that is the study of the Earth and its being.

The first section orients the reader to some of the complexities and interconnected relationships in nature. While articulating all of these relationships is impossible, as many are not scientifically understood or appreciated, the goal of this section is to introduce the reader to

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the notion of the need for a broader lens when focusing on natural issues. This framework is important for understanding concepts of Earth Jurisprudence, which are discussed next.

The following section addresses the philosophy of Locke and how it has contributed to our overly anthropocentric (human-centered) views of nature as a commodity or resource for human use.¹ Locke's philosophy includes a proviso against waste, but when people switched to a monetary system of exchange versus a barter system of exchange, humans began to ignore the hazards of overconsumption, or waste, because the permanency of gold made wealth accumulation possible. While these developments might have been beneficial for economic advancement, and especially for those in a position to exploit resources, the natural balance was thrown off, emphasizing short-term satisfaction at the expense of long-term homeostasis.

Once Locke's theories are more fully understood and thoughtfully applied, they are actually consistent with the principles of Earth Jurisprudence. Thomas Berry, father of the Earth Jurisprudence movement, called for re-examining human-Earth relations. In the final section of this paper, a fresh look at Lockean theory uncovers a more symbiotic or mutualistic relationship for humans and nature in the human-Earth balance. Although Locke's views on waste cannot be directly applied in modern economic discourse, they afford a useful area for further study.

II. BACKGROUND

A. The Complex, Interconnected, Natural World

We need much more than sunshine and water to survive. The complexities in nature are astonishing. For example, the fig wasp and the fig tree are dependent on one another to subsist; without one, the other would cease to exist.² The fig wasp's sole purposes are to procreate and pollinate. A female fig wasp digs into the fig fruit, depositing any pollen on her body into the fruit, thereby pollinating the fig fruit and enabling it to survive.³ She then lays her eggs within the fruit.⁴ The wasp larvae develop for several weeks.⁵ When the eggs hatch, the first thing the new wasps do is mate.⁶ After mating, the males lead the females out of the fruit, and promptly die.⁷ The female wasps then fly around, gathering pollen, before digging into a fig fruit to lay their own eggs and begin the process all over again.⁸

The fig wasp is the only pollinator of the fig tree, and the fig tree is the only place the fig wasps can procreate, an 80 million year old mutualism found across the world.⁹ This mutualism exemplifies the intricate dependencies of Earth's life forms, and the ways in which plants and

¹ Philosophy is the antithesis of science. It is flexible; it does not rely on experimental data. Instead, philosophy reaches beyond the plain facts—the cause and effect, the “what” and the “how.” It evokes a certain craving for knowledge and understanding of the moral and ethical, of the “what should be” and “why.”

² Jean-Yves Rasplus & Simon van Noort, Pollinators of Fig Trees, http://www.figweb.org/Interaction/Who_pollinates_fig_trees/index.htm (last visited June 28, 2011).

³ Jean-Yves Rasplus & Simon van Noort, How Fig Trees Are Pollinated, http://www.figweb.org/Interaction/How_do_fig_wasps_pollinate/index.htm (last visited July 5, 2011).

⁴ James M. Cook & Jean-Yves Rasplus, *Mutualists with Attitude: Coevolving Fig Wasps and Figs*, 18 TRENDS IN ECOLOGY & EVOLUTION 241, 242 (2003).

⁵ *Id.*

⁶ Rasplus & van Noort, *supra* note 3.

⁷ *Id.*

⁸ *Id.*

⁹ PhysOrg.com, Trees Retaliate When Their Fig Wasps Don't Service Them, <http://www.physorg.com/news183834526.html> (last visited June 30, 2011).

animals are mutually connected. The interconnectedness of the Earth and its living organisms, including humans, is the cornerstone of an ecocentric philosophy. As Thomas Berry noted, we must view nature as a communion of subjects, rather than a collection of objects.¹⁰

Communion—living in common with and among species—recognizes this interconnectedness. Amazingly, biologists today have concluded that every species in the world is involved in a mutualistic relationship, sometimes hundreds of mutualistic relationships, making each species imperative to the greater whole.¹¹ As Lynn Margulis and Dorion Sagan wisely observe, “[l]ife did not take over the globe by combat but by networking.”¹² Margulis and Sagan afford a worldview where “[t]he world shimmers, a pointillist landscape made of tiny living beings.”¹³

B. What is Earth Jurisprudence?

Earth Jurisprudence is a newly emerging genre of law that aspires to promote a greater respect for nature and all living things on Earth, aiming to intertwine Earth’s natural law with the body of law that governs humanity. Professor Judith Koons, author of numerous Earth Jurisprudence articles, defines Earth Jurisprudence as an “emerging legal theory based on the premise that rethinking law and governance is necessary for the well-being of Earth and all of its inhabitants.”¹⁴ As Thomas Berry noted, we must necessarily shift our thinking from a human-centered to an Earth-centered system of law and governance.¹⁵

At its simplest, “Earth Jurisprudence is a love of the laws of Earth.”¹⁶ Earth Jurisprudence attempts to alter the way that we, as humans, understand the Earth “and to realign our values so that our laws can be revamped to support our environment.”¹⁷ It aims to harmonize humanity with the rest of the world again; it strives for a commensalistic symbiotic relationship rather than a parasitic symbiotic relationship. In other words, we should live on this Earth without harming it, without draining it of its resources. Ultimately, unless and until “we possess an attitude of humility[, we won’t] learn how to develop law and governance to regulate ourselves effectively as an integral part of the whole.”¹⁸

¹⁰ THOMAS BERRY, *THE GREAT WORK: OUR WAY INTO THE FUTURE* 82 (1999).

¹¹ Press Release, Daniel Stolte, *From Bees to Coral Reefs: How Humans Impact Partnerships in the Natural World* (Oct. 18, 2010) (http://www.eurekaalert.org/pub_releases/2010-10/uoa-fbt101810.php).

¹² Lynn Margulis & Dorion Sagan, *MICROCOSMOS: FOUR BILLION YEARS OF MICROBIAL EVOLUTION* 29 (1997).

¹³ *Id.* at 191.

¹⁴ Judith E. Koons, *What Is Earth Jurisprudence? Key Principles to Transform Law for the Health of the Planet*, 18 PENN ST. ENVTL. L. REV. 47, 47 (2009).

¹⁵ BERRY, *supra* note 10, at 56-57, 80-81.

¹⁶ Patricia Siemen, *Earth Jurisprudence: Toward Law in Nature’s Balance*, 11 BARRY L. REV. 1, 2 (2008). Sister Pat heads the Center for Earth Jurisprudence and is a professor teaching Earth Jurisprudence at Barry University School of Law.

¹⁷ Sarah Schwemin, *What If We Could Sue the Hurricanes? The Necessity of Recognizing the Rights of Natural Entities*, 11 BARRY L. REV. 95, 97 (2008). “We are deaf to Earth’s voice, we feign ignorance to Earth’s plight, and we choose not to view Earth’s suffering. We have lost our connection with the Universe around us. Earth Jurisprudence seeks that reconnection.” *Id.* Sarah Schwemin graduated from Barry University School of Law in 2009 as valedictorian.

¹⁸ Siemen, *supra* note 16. “Understanding Earth jurisprudence requires us to possess a basic knowledge and experience of how geo/eco/biological systems work and are interconnected.” *Id.*

Earth Jurisprudence seeks ways to “formalize and systematize Earth-oriented concepts in the field of law.”¹⁹ The law, “after all, is intended to bind, constrain, regularise and civilise. Law’s rules, backed up by force, are designed to clip, prune and train the wilderness of human behavior into the manicured lawns and shrubbery of the civilised garden.”²⁰ Earth Jurisprudence asks that the human species recognize the importance of self-control by self-regulation in order to preserve the Earth’s resources.²¹ As author Cormac Cullinan observes, developing Earth-centered laws requires a conscientious and continuous commitment to the “process of adapting human practices to Earth rather than vice versa.”²² Earth, as our home, is not just ours to use. It is ever evolving, alive with some of the most fascinatingly simple and devastatingly complex ecosystems, plants, and animals. The Earth’s well-being is directly connected to the well-being of humanity, and yet in this relationship, only humanity has the power to preserve Earth’s health.

One barrier to this ideal form of sustainability and protection for both humanity and the Earth as a whole is the man-made doctrine of private property; another is the idea that nature may be used as a public resource without restriction. The former notion is derived from the principles advanced by Locke; however, the latter is contrary to Locke’s teachings. The next section explores these Lockean roots.

III. LOCK AND AMERICAN PROPERTY ROOTS

A community’s governance system is going to have certain frames of reference that will guide what the community will “see, and what they regard as acceptable in terms of methods and approaches.”²³ Thomas Berry, in the foreword to Cormac Cullinan’s *Wild Law: A Manifesto for Earth Justice*, noted that “[f]rom its beginning the American Constitution was clearly a document framed for the advancement of the human,”²⁴ and not for the Earth Community as a whole. Locke’s theories on property aided in the formation of an idealistic government in which all are created equal.²⁵ However, when the Founding Fathers contemplated the values for which the United States would stand, the world was less populated and the available land appeared endless, with its fruits unbounded. Ultimately, due to such abundance, an important part of Locke’s theory was ignored—the Framers ignored the proviso that one must leave “enough and as good for others.”²⁶

Locke believed that political power came from natural law in the state of nature.²⁷ To Locke, the state of nature is a place in which all men are equal and have a right to do as they

¹⁹ Koons, *supra* note 14, at 53. “Proponents of Earth Jurisprudence do not claim that its principles alone will save Earth. However, Earth Jurisprudence can play a critical part in changing legal institutions and human behavior, and eventually help to transform other institutions and human consciousness.” *Id.* at n.31.

²⁰ CORMAC CULLINAN, *WILD LAW: A MANIFESTO FOR EARTH JUSTICE* 29 (2d ed. 2011) [hereinafter *WILD LAW*].

²¹ *Id.* at 12-13. “This book is about how we might begin to rethink how we constitute and regulate our societies so that we can regulate our species in a manner that reflects our responsibility for playing a mutually enhancing role within the wider community of life on this planet.” *Id.* at 13.

²² *Id.* at 111.

²³ *Id.* at 59.

²⁴ Thomas Berry, *Foreword to WILD LAW*, *supra* note 20, at 19.

²⁵ Mark F. Griffith, *John Locke’s Influence on American Government and Public Administration*, 3 J. MGMT. HIST. 224 *passim* (1997).

²⁶ JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* 26 (Eerdmans Publ’g. Co. 1978) (1690). *See infra* notes 44-52 and accompanying text (discussing Locke’s proviso for leaving “enough and as good for others”).

²⁷ Griffith, *supra* note 25, at 227.

please, essentially making the state of nature a state of war, a place in which there is constant threat of opposition.²⁸ Furthermore, Locke concluded that humanity's pursuance of self-preservation implied humanity's need for property rights, or in other words, property protection. Therefore, political power was tied directly to the "preservation of private property."²⁹ Moreover, Locke came to two significant conclusions on the nature of human beings: first, the natural desire of humanity to preserve the well-being of one's self, and second, the natural tendency for people to care about others.³⁰ From these conclusions, Locke rationalized the basis of politics. Due to the need for property rights, Locke believed people naturally created the need for government.³¹ Locke believed that people needed peace, and that peace was only attainable through the installation of a government entity.³²

First and foremost, Locke concluded that the government is designed to protect a person's rights, "that is, his life, liberty and estate."³³ He believed that all men are created equal in the state of nature—that all men should "be equal one amongst another without subordination or subjection."³⁴ He stated that "men living according to reason, without a common superior on earth, to judge between them, is properly the state of nature."³⁵ Moreover, Locke believed that men have basic, natural, unalienable rights that cannot be taken away by the government.³⁶ His ideas on the human right to life stem from self-preservation in the state of nature.³⁷ His thoughts on the right to liberty arise from the idea that government was created, and currently exists, because it was commonly agreed upon in the state of nature.³⁸ However, his emphasis on the right to one's estate is his "unique contribution to the history of political theory."³⁹

²⁸ *Id.* at 228.

²⁹ *Id.*

³⁰ LOCKE, *supra* note 26, at 17. "Every one, as he is bound to preserve himself, and not to quit his station willfully, so by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice on an offender, take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another." *Id.*

³¹ Griffith, *supra* note 25, at 228.

³² *Id.* "Government creates peace and therefore is the only vehicle to true liberty, because freedom occurs only in a state of peace." *Id.*

³³ LOCKE, *supra* note 26, at 43. "Man being born, as has been proved, with a title to perfect freedom, and an uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man, or number of men in the world, hath by nature a power, not only to preserve his property, that is, *his life, liberty and estate*, against the injuries and attempts of other men; but to judge of, and punish the breaches of that law in others, as he is persuaded the offence deserves, even with death itself, in crimes where the heinousness of the fact, in his opinion, requires it." *Id.* (emphasis added).

³⁴ *Id.* at 16. "A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection, unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty." *Id.*

³⁵ *Id.* at 22.

³⁶ *See id.* at 24-25. "This freedom from absolute, arbitrary power, is so necessary to, and closely joined with a man's preservation, that he cannot part with it, but by what forfeits his preservation and life together: for a man, not having the power of his own life, cannot, by compact, or his own consent, enslave himself to any one, nor put himself under the absolute, arbitrary power of another, to take away his life, when he pleases. No body can give more power than he has himself; and he that cannot take away his own life, cannot give another power over it." *Id.*

³⁷ Griffith, *supra* note 25, at 228.

³⁸ *Id.*

³⁹ *Id.*

Locke's theories on property are not only some of the most influential, but also some of the most controversial. Locke began in the state of nature, like Hobbes and Rousseau,⁴⁰ where the world is owned by all. Locke, however, separated himself as a political philosopher by proposing that property is an integral basis for politics.⁴¹ Being in this state of nature, Locke believed that God gave the world for all to use, and that private property only became such because of rational convenience and protection. He said "God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life, and convenience."⁴²

Furthermore, according to Locke, property and labor are interrelated. Locke understood that because all men are free, they have property in themselves. If man invests himself, through his labor, into a piece of property, he may then own it because he owns himself. Chapter V, Section 27, of Locke's *Two Treatises of Government* explores this labor theory:

Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.⁴³

However, there are exceptions. These are better known as the Lockean provisos. Locke believed that one may only accumulate the amount of land that can be worked with his or her own labor, one may only take enough that can be used before it spoils, and most significantly, one must leave "enough and as good for others."⁴⁴

It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.⁴⁵

Locke strongly believed in not wasting the Earth, and not taking so much for yourself that there is not enough left for everyone else. These are often referred to as the *sufficiency* and *spoilage* limitations on Locke's labor theory. Today, however, the spoilage limitation is often regarded as moot due to the creation of money, which cannot spoil.⁴⁶ With money, unlimited accumulation is possible.⁴⁷ The sufficiency limitation still has modern day implications. Locke's limits on the accumulation of wealth are directly correlated to his theory that all men are equal.⁴⁸ This made him a favorite in American eyes, particularly as the Founding Fathers

⁴⁰ *Id.* at 231.

⁴¹ *Id.*

⁴² LOCKE, *supra* note 26, at 26.

⁴³ *Id.*

⁴⁴ *Id.* at 27.

⁴⁵ *Id.* at 26-27.

⁴⁶ Griffith, *supra* note 25, at 233.

⁴⁷ *Id.*

⁴⁸ *Id.*

pondered political philosophies as they pieced together what would become the Declaration of Independence, and eventually the United States Constitution.⁴⁹

“Everything Locke wrote, from his religious writings to his political writings, was part of the American landscape at the creation of the USA [sic].”⁵⁰ Thomas Jefferson took into great consideration Locke’s words⁵¹ as he constructed one of the most influential sentences of American history: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”⁵² In addition, the Founding Fathers referred to Locke’s theories with frequency during the Constitutional Convention of 1789.⁵³ There is no doubt that Locke’s ideas had a substantial influence on American democracy, and on American property.

Because Locke believed that the world was owned by all in the state of nature, and land could only be acquired by mixing one’s labor unless there was not “as much and as good” left for others, Locke must have assumed that regulation by a political entity would be necessary to make sure another was not harmed by one’s appropriation of land. According to Locke, when the conditions are right, meaning the necessities of life are plentiful to all, acquiring a piece of land does not harm anyone else and is therefore legitimate. However, when these conditions are not met, land is scarce, and should therefore be subject to regulation. So, what happens when land is used, farmed, built upon, and ultimately made useless for future generations?

IV. ANTHROPOCENTRIC BRANCHES FROM LOCKEAN ROOTS

A. Human Impact

The body of law that governs us is anthropocentric. From that perspective, nature is viewed as nothing more than a collection of things, or objects, to be used however the owners see fit.⁵⁴ The human community perpetuates the attitude that the Earth is nothing more than a resource, a collection of objects that humanity may exploit without barrier.⁵⁵ As Cormac Cullinan put it, “Human societies are savaging Earth.”⁵⁶ The general symptoms that trouble biologists and ecologists alike are over-consumption, mass extinctions, decreasing ability of the Earth to support life and inadequate human responses.⁵⁷ Cullinan suggests the problem of a dying Earth can be countered “[i]f the human cultures that currently dominate the planet were to change their worldview so that we once more understood that the role of humans is primarily to fit in with, and contribute to, the larger Earth system and process, the purpose of governance would change.”⁵⁸ Earth Jurisprudence provides a philosophical guidance to the creation and

⁴⁹ See *id.* at 228-29.

⁵⁰ *Id.* at 229.

⁵¹ *Id.* at 228.

⁵² THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁵³ Griffith, *supra* note 25, at 229.

⁵⁴ Judith E. Koons, *Earth Jurisprudence: The Moral Value of Nature*, 25 PACE ENVTL. L. REV. 263, 264 (2008).

⁵⁵ See Glen-Peter Ahlers, *Earth Jurisprudence: A Pathfinder*, 11 BARRY L. REV. 121, 122 (2008).

⁵⁶ CULLINAN, *supra* note 20, at 35.

⁵⁷ *Id.* at 37-42.

⁵⁸ *Id.* at 111.

implementation of our human governance system, resulting in the formation of new laws and policies.⁵⁹

Today, environmental laws give the Earth a thin layer of protection. They are a multifaceted and intricate body of law made up of global, international, national, state and local statutes, treaties, conventions, regulations and policies which aim to protect the environment.⁶⁰ Environmental laws seek to protect and maintain the natural resources affected, or perhaps endangered, by means of human impact.⁶¹ For example, the Clean Air Act regulates air emissions primarily to protect public welfare.⁶² The Clean Air Act only secondarily protects other creatures or the general environment. Because the United States cannot even attain all of the primary National Ambient Air Quality Standards, it is not surprising that the secondary standards are largely ignored. Similarly, the Federal Water Pollution Control Act (Clean Water Act)⁶³ primarily protects the quality of the waters of the United States for human use; it does not adequately protect the living organisms within the water or the other creatures that rely on clean water. It appears that even though environmental law as a whole seeks to protect nature, the laws are not enacted because the environment is being damaged, but because humans are. This is the most unfortunate shortcoming of environmental law. Preventing degradation only at the point that it impacts humans disregards opportunities to safeguard clean land, water and air for all the Earth.

This leads to the next important problem: do people have a legal right to a clean environment? For the most part, no. However, some governments, such as those in Montana, Ecuador, and Brazil, have a constitutional provision that guarantees the right to a clean environment within that state or nation.⁶⁴ Yet there is no national right to a clean environment in the United States Constitution. The Supreme Court has found that the right to a clean environment is neither protected by the due process clause nor guaranteed by the Bill of Rights.⁶⁵ When humanity treats land and its non-human contents as objects of property to be consumed freely, humankind risks losing important values belonging to all creatures alike, such as clean water and air. Property ownership without adequate controls or regulation leads to a

⁵⁹ *See id.* at 112-13. “In relation to laws, it can be seen as functioning like the spirit of the law (to borrow from Montesquieu), a spirit that I believe will restore wildness in the heart of the law.” *Id.* at 111.

⁶⁰ HG.org, Environmental and Natural Resources Law—U.S., <http://www.hg.org/environ.html> (last visited June 24, 2011).

⁶¹ *Id.*

⁶² Clean Air Act, 42 U.S.C. §§ 7401-7671q (2006). “The Clean Air Act (CAA) is the comprehensive federal law that regulates air emissions from stationary and mobile sources. Among other things, this law authorizes EPA to establish National Ambient Air Quality Standards (NAAQS) to protect public health and public welfare and to regulate emissions of hazardous air pollutants.” United States Environmental Protection Agency, Summary of the Clean Air Act, <http://www.epa.gov/lawsregs/laws/caa.html> (last visited June 30, 2011).

⁶³ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (2006). “The CWA made it unlawful to discharge any pollutant from a point source into navigable waters, unless a permit was obtained.” United States Environmental Protection Agency, Summary of the Clean Water Act, <http://www.epa.gov/lawsregs/laws/cwa.html> (last visited July 1, 2011).

⁶⁴ MONT. CONST. art. II, § 3; CONSTITUTION OF 2008 art. 71 (Republic of Ecuador), *available at* <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> (unofficial translation); CONSTITUTION OF THE FEDERAL REPUBLIC OF BRAZIL OF 1988 art. 225, *available at* <http://pdba.georgetown.edu/Constitutions/Brazil/english96.html> (unofficial translation, including reforms of 1992, 1993, 1994, 1995, and 1996). *See also* Daniel Reeder, *Federalism Does Well Enough Now: Why Federalism Provides Sufficient Protection for the Environment and No Other Model Is Needed*, 18 PENN ST. ENVTL. L. REV. 293, 302 (2010).

⁶⁵ Reeder, *supra* note 64, at 307.

society focused exclusively or predominantly on consumption, and therefore leads to overconsumption of the Earth. This consequence must be traced to these unbridled “property roots.”

B. Earth Jurisprudence and Rethinking Lockean Theory

“Constitutions, laws, and the judgments that interpret them also express and reflect our idea of what law is and ought to be, and what societies believe in and aspire to.”⁶⁶ The body of law that governs a body of people ethically, fundamentally, and physically is certainly a mirror of that society’s moral compass. Yet human jurisprudence today is “based on a number of premises that we know to be false, such as the belief that our well-being is not derived directly from the well-being of the Earth Community as a whole, and the belief that the Earth is an infinite resource for our use.”⁶⁷ Therefore, globally there must be a new jurisprudence, an Earth Jurisprudence, that shifts this paradigm.

The problem, and the need for Earth Jurisprudence, is best described by Aldo Leopold, who states, “We abuse land because we regard it as a commodity belonging to us.”⁶⁸ Many people believe the world, the fruits of the land, and all animals living on it are theirs for the taking. We take for granted the ways in which the world produces the sustenance we need to survive. We take for granted the abundance and profusion of today, and it will likely hurt us tomorrow. As people grow in population, the world and its resources will become seemingly smaller. We must respect not only that the world *does* provide for us, but *how* the world does so. “When we see land as a community to which we belong, we may begin to use it with love and respect.”⁶⁹ Only then will we be protecting our future.⁷⁰

Locke did not believe humans had the right to destroy or waste what was made by God.⁷¹ “Locke’s theory of property rights is grounded in a premise of his natural law argument: God intends that the earth should serve the preservation of mankind.”⁷² One could only take what could be used; one could appropriate the fruits of the Earth, but not in a way that would waste what could have been used by another. This limitation, the spoilage limitation, “is suggestive of legitimate land use practices.”⁷³ Although it is likely that Locke believed there was enough Earth for everyone to have what he or she needs, “the proviso will necessarily fail [today]

⁶⁶ CULLINAN, *supra* note 20, at 57.

⁶⁷ *Id.* at 59. “It is also bolstered by a dangerous arrogance that assumes, for example, that technology will provide a solution to any problems that we create in the course of destroying natural systems. However, what makes these human self-delusions so dangerous is the fact that because of the extraordinary degree to which humans have altered the natural functioning of the Earth, they affect the survival and well-being of the whole Earth Community.” *Id.*

⁶⁸ ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* at viii (2d ed. 1968).

⁶⁹ *Id.*

⁷⁰ Joan L. McGregor, *Property Rights and Environmental Protection: Is This Land Made for You and Me?*, 31 ARIZ. ST. L.J. 391, 392 (1999). “The environment can no longer be seen as a vast unlimited resource that we can exploit without consequence for our own advantage. The environment is finite and our activities significantly affect its well-being. Our understanding of our place in the world is evolving; we now recognize that we are dependent on the health and well-being of the environment for our own survival. Beyond prudential reasons, we are coming to recognize the intrinsic value of the natural world, and what follows from that recognition is that we have moral responsibilities to it.” *Id.*

⁷¹ *Id.* at 403.

⁷² *Id.* at 399.

⁷³ *Id.* at 403.

because inevitably there will not be ‘enough and as good’ for others.”⁷⁴ However, the basis for Locke’s argument, if interpreted to mean that land owners have a duty to prevent waste and maintain their land to be “enough and as good,” should not be taken literally, but figuratively. As Joan McGregor points out, because we know with some certainty that human life will be in existence on this Earth one hundred years from now, if we apply “Locke’s natural law argument, don’t we now have duties to [future humans] to ensure they will have the means for preservation?”⁷⁵ If Locke was arguing that people have rights to preserved land, then “Locke would have supposed that anyone would have those rights, including future persons.”⁷⁶

Although Locke’s theory on property was meant to “protect against initial appropriators illegitimately harming the interests that others have in their own preservation,”⁷⁷ the idea that future generations would suffer harm supports a modern application of the Lockean proviso to assume that his intentions were to prevent all harms. “Because of the effects on present community members, future generations, and the natural community, what a particular property owner does with his or her property is of vital concern to a large audience.”⁷⁸ As “[f]uture persons have important interests in how we presently appropriate property and use the earth based on their rights to preservation, . . . there is no good reason for excluding from the proviso future persons.”⁷⁹

Therefore, “[i]f each individual has a natural right to the means of preservation, then each has a claim on environmental goods necessary for preservation: clean air, water, soil, [and] a share of natural resources.”⁸⁰ Earth Jurisprudence will allow for the preservation of clean air, water, and soil in order to preserve the Earth for present and future generations only so long as the boundaries upon which modern property law are based are redrawn to set governmental restrictions on private property abuse.

V. OUR RIGHT TO A CLEAN FUTURE

*I can’t help feeling that we are the most wretched ancestors that any future generation could have.*⁸¹

Locke’s theory on property implies that there should be an obligation to leave “enough and as good” of land for others—always. This proviso ought to include future generations. Locke’s sufficiency limitation should be interpreted to mean that people, particularly land owners, have a duty to leave their land in a condition sufficient to maintain humanity generation after generation. This is what Earth Jurisprudence is fighting for; humanity is dependent on the Earth and must take care of it to ensure survival in the future. Earth Jurisprudence calls for a change in point of view: humanity can no longer view the Earth as property we’re entitled to, but rather, as a partner in the process of life.

⁷⁴ *Id.* at 406.

⁷⁵ *Id.* at 407.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 393.

⁷⁹ *Id.* at 407.

⁸⁰ *Id.*

⁸¹ Interview by Jonas Salk with Yehudi Menuhin, Violinist (PBS television broadcast Sept. 27, 1982), *quoted in* RICHARD P. HISKES, *THE HUMAN RIGHT TO A GREEN FUTURE: ENVIRONMENTAL RIGHTS AND INTERGENERATIONAL JUSTICE* 5 (2009).

A clean environment is a right that all generations should share, and therefore that right deserves to be protected by the judicial system.⁸² However, neither the environment nor future generations have adequate protection of the law. There is no existing legal protection for damages or injuries sustained by the environment, which cannot vocalize the harm, or victims that have not yet been born. The United States Supreme Court “has been absolutely clear in its discussion of environmental issues . . . that environmental protection is only a regulatory issue, not a fundamental rights issue.”⁸³

Even though the Earth has rights on an international level,⁸⁴ there is no international mechanism or tribunal available to enforce these rights. As such, these rights are illusory at best. However, by returning to our Lockean roots and incorporating the Lockean proviso on a national level, the United States could take positive steps to advance Earth Jurisprudence.

Locke’s theory on property implies a responsibility to maintain land use, to avoid waste, to avoid hoarding, and to be modest and respectful to others and the land. Private property owners do not have sole authority over how they may use their land. In fact, today we accept zoning restrictions and other constraints on land use without a second thought. Among these limits are restrictive deeds, local land use laws, and easements for sidewalks. However, these widely accepted limits on private property owners have not yet been broadly applied so as to provide a clean environment for all.⁸⁵

Arguably, the United States Constitution must be amended to guarantee a clean environment.⁸⁶ If the United States and other major world powers created such national protections, other nations might be encouraged or motivated to do so as well. “[T]he cultural aspects of every nation’s environmental heritage lead it to view environmental protection as its own local prerogative,”⁸⁷ but should this be? Individual regulation has clear global consequences. Those who will later inherit this Earth are going to have suffered harm and should be “entitled to *action* and not only symbolic public gestures.”⁸⁸

There are already over 350 multi-national treaties and 1000 bilateral treaties among governments in which nations acknowledge a duty to protect the environment for future generations.⁸⁹ The significant number of international documents summoning the recognition of

⁸² See Joshua J. Bruckerhoff, Note, *Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights*, 86 TEX. L. REV. 615, 629 (2008).

⁸³ Reeder, *supra* note 64, at 296.

⁸⁴ United Nations Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc A/CONF.151/26 (Vol. I) (Aug. 12, 1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

⁸⁵ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 (1992). See also *Coastal Zone Management Act*, 16 U.S.C. §§ 1451–1464 (2006). These are two examples of the government restricting land use to benefit and preserve the environment.

⁸⁶ E.g., Robin Kundis Craig, *Should There Be a Constitutional Right to a Clean and Healthy Environment?*, 34 ENVTL. L. REP. 11013 (2004).

⁸⁷ HISKES, *supra* note 81, at 102. “Unlike the political rights of sovereignty or self-determination, there is no analogous and immediately apparent *cultural* right of environmental decision making, but a relatively recent acknowledgment of cultural entitlement exists in the practice of national apologies, in which one nation or its leaders apologizes for its past and present generations’ treatment of another nation’s citizens: past, present, and with implications for future ones.” *Id.*

⁸⁸ *Id.* at 103.

⁸⁹ Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT’L L. 545, 586 (2000) (citing Fatma Zohra Ksentini, Special Rapporteur, U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Hum. Rts., Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, *Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned:*

environmental obligations⁹⁰ corroborates the ineffectiveness of the international regime. For example, a United Nations conference in Stockholm, Sweden, in 1972 produced the Stockholm Declaration, stating: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”⁹¹

Yet suitable environmental protection is still a far-fetched international goal. Nations have acknowledged that a clean environment should be a fundamental right, but are not taking appropriate steps to ensure such acknowledgements are enforced. It seems as though the only way to guarantee future generations an Earth worth living on, or perhaps even with life sustaining conditions, will require that national constitutionalism and participatory democracies become more involved.⁹² In *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice*, Richard Hiskes calls for national political action:

Only in that political environment can substantive and procedural environmental human rights be protected and guaranteed for future as well as present generations of citizens, and it *is* citizens we speak of here, not simply all human beings. As we have seen, as opposed to altruism or even general moral duty, justice requires *political* identities—citizens of individual nations who recognize in each other and in the imagined faces of generations of their own future citizens a shared obligation to preserve their environment as part of a duty to maintain their own authenticity or group identity.⁹³

Without national governmental action it is unlikely that anything will change. If Locke’s theory on property is applied not only to land owners, but to nations, it would be the government’s responsibility to maintain a healthy environment for present and future generations so as to prevent the spoilage of any land, and to leave “enough and as good for others.” Doing this requires that Lockean notions of property ownership evolve to reflect the reality of resource limitations.

“As land or soil, real property is a part of the natural world, part of the biosphere we call Earth, and part of smaller functional systems which we call ecosystems.”⁹⁴ Robert Goldstein, author of *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into*

Human Rights and the Environment, ¶24, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994), available at http://www1.umn.edu/humanrts/demo/HRandEnvironment_Ksentini.pdf. This number has undoubtedly increased since the publication of Herz’s article in 1994.

⁹⁰ HISKES, *supra* note 81, at 120.

⁹¹ United Nations Conference on the Human Environment, Stockholm, Sweden, June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, Principle 1, U.N. Doc A/CONF.48/14, available at <http://www.unep.org/Documents/multilingual/Default.asp?DocumentID=97&ArticleID=1503/>.

⁹² HISKES, *supra* note 81, at 143.

⁹³ *Id.*

⁹⁴ Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347, 348 (1998). “‘Property’ is more than just the physical thing—the land, the bricks, the mortar—it is also the sum of all the rights and powers incident to ownership of the physical thing. It is the tangible and the intangible. Property is composed of constituent elements and of these elements the right to use the physical thing to the exclusion of others is the most essential and beneficial. Without this right all other elements would be of little value” *Passailaigue v. United States*, 224 F. Supp. 682, 686 (M.D. Ga. 1963).

Real Property Law, proposes four concepts that must be considered when analyzing how environmental ethics can fit into modern day property law: “(1) the basis of property; (2) the meaning of property; (3) the incidents of property ownership; and (4) the nature and extent of the estate.”⁹⁵ All modern day analysis concludes that property in itself is a bundle of rights. With those rights come incidents, such as entitlement to manage the property, to receive the income from it, to use it up or destroy it, and to sell it, among others.⁹⁶ Significantly, the law of real property ownership “has evolved to a conceptual level that ignores the *res*, the property itself.”⁹⁷ If an owner can do whatever he or she pleases with his or her property, enjoying a right to consume entirely or destroy, there will not be much left for future generations. Instead, an owner could be constrained to leave “enough and as good for others.” In the grand scheme of things, the preservation or enhancement of a piece of land is consistent with Locke’s proviso. Starting with this new view of property in a larger sense, perhaps the government could work to allow beneficial use, but not destructive use.

Even today, estates in property are never entirely absolute.⁹⁸ Estates are subject to some limitations already, such as nuisance law.⁹⁹ “The vexing issue is . . . the role that the science of ecology and the philosophy of environmental ethics have to play in those limitations,”¹⁰⁰ and how the growth of Earth Jurisprudence will potentially limit ownership rights of an estate in the future. If Lockean theory is applied without the proviso to protect “others” (a term to include the Earth Community), one would have the right to do whatever one likes on one’s property. However, if Locke’s sufficiency limitation is interpreted to mean that leaving “enough and as good for others” means leaving healthy land for future inhabitants, then one should not be permitted to destroy or completely consume property, and further limitations on estates need to be implemented. As Henry David Thoreau once said, “We are a young people & have not learned by experience the consequence of cutting off the forest. One day they will be planted methinks [and] nature reinstated to some extent.”¹⁰¹ One can only hope. We now are aware that private, personal land use can, and will, affect the private, personal land use of another.¹⁰²

How would Locke have been affected by the thought of overpopulation, pollution and the abuse of the Earth as a commodity?¹⁰³ Perhaps he would have been clearer as to whether land owners have an obligation to use only what is needed and share so that there is enough to go around as a form of protection and a type of insurance for the Earth’s future. Perhaps the Framers of the United States Constitution should have believed all people have a right to life, liberty, property, *and* a clean environment.

VI. CONCLUSION

Regardless of what country we live in, how much money we make, or the color of our skin, each and every person depends on the fruits of the Earth for survival. At the very core, we need fresh water to drink and clean air to breathe. We must remember that we as creatures are

⁹⁵ Goldstein, *supra* note 94, at 370.

⁹⁶ *Id.* at 375.

⁹⁷ *Id.* at 407.

⁹⁸ *Id.* at 409.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ HENRY DAVID THOREAU, *A YEAR IN THOREAU'S JOURNAL: 1851* at 200 (Penguin Classics 1993) (1906).

¹⁰² Goldstein, *supra* note 94, at 422.

¹⁰³ *See id.* at 430.

each a part of the greater Earth community with significant similarities. As the Earth and all of its living organisms are interconnected, we should seek to maintain health amongst us all. Earth Jurisprudence is seeking to introduce a new philosophy that is not complicated or biased. Instead, Earth Jurisprudence aims to protect everything and everyone on this planet.

When I was young, my grandfather's understanding of, and compassion for, the environment and all of its creatures taught me a profound lesson about appreciating the complexity and importance of the interconnections of life forms and living beings. If only Pete the Lizard had his natural habitat in its most healthy form, he may have lived a longer life. Instead, I reconstructed what I thought would be necessary for him to survive and caused his unfortunate death. What Pete needed was clean water, nourishing food, fresh air and the sun's warmth to sustain him. Similarly, all of humanity depends on these resources of the Earth to sustain our health. It is imperative that our natural habitat remain intact, and able to provide the essential elements we as a species need to survive.

Locke stated that "the earth and all that is therein is given to men for the support and comfort of their being."¹⁰⁴ Not unlike Earth Jurisprudence ideals, Locke's proviso can be interpreted to signal a need for preservation. Locke, opposed to waste, greed and destruction of the fruits of the Earth, proposed that each owner of land must leave "enough and as good for others"—likely all others, a proposition that would enable humanity to survive on this planet without draining every last resource possible. Locke, and the United States, sustain the preservation of the right to private property, and yet only Locke included a proviso for the protection of the property itself. If the United States applied Locke's theory on property in its entirety, interpreting Locke's proviso to mean that all land should be maintained so as to leave it in a livable condition for others, then a clean environment would be vital to doing so. Therefore, Locke's theory on property does not oppose the preservation of the Earth's resources due to the doctrine of private property, but rather aids in the Earth Jurisprudence movement.

¹⁰⁴ LOCKE, *supra* note 26, at 25.