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Property In The Anthropocene

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PROPERTY IN THE ANTHROPOCENE

E. LEES*

ABSTRACT

Intergenerational justice, community interests, and environmental protection are all goals sought through the imposition of the duties of stewardship onto owners of land. But such duties, when imposed by law, require justification beyond the morality of maintaining and preserving land in a good condition for its present and future use. The potential for sanction imposed by the state means that stewardship duties, if they are to be justified, must be grounded in established principles of justified legal intervention. Of those, the most convincing is, and always has been, the harm principle: intervention is justified where a rule prevents one person from harming another. This test is a challenge for duties of stewardship, where the focus is on preserving one's own land for the benefit of future generations; who is harmed by a failure to comply? This Article explains that the harm in such a breach of duty lies in the erosion of the collective interest which cements the community of land owners and users, a collective to which the relevant owner of land herself belongs. The community is justified in imposing sanction for breach of that rule, not because of any environmental damage per se, but in order to ensure the continued and ongoing existence of the group. In this way, stewardship should be seen not as a rule arising from environmental ethics, but as a coordination rule, justified by the role it plays in maintaining the collective, and as such, stewardship thus inheres in private property. The two are not dichotomous, but inextricable.

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Man did not weave the web of life: he is merely a strand in it.

*Whatever he does to the web, he does to himself.*¹

¹ Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT'L L. 198, 198 (1990) (citing Letter from Chief Seattle, patriarch of the Duwamish and Squamish Indians of Puget Sound, to U.S. President Franklin Pierce (1855) (presenting a powerful case for obligations resting on the present generation for the collective of future generations, and for an ensuing planetary trust)). Its reproduction

INTRODUCTION

As we enter the era of the anthropocene,² a call to arms reverberates around the environmental law academy for the imposition of stewardship duties onto the owners of land.³ Such owners would become obliged to maintain their land for the benefit of future generations,⁴ for the natural world as a whole,⁵ and for their own well-being.⁶ Such a call assumes, however, that the imposition of this obligation is justified, relying as it does on the “universally accepted” goal of environmental protection.⁷ This

here is testament to both its sentiment, and to the arguments of Brown Weiss which follow this quotation.

² The term “anthropocene” was used first by Eugene F. Stoermer and has since been popularized by Paul J. Crutzen and others. It is used to signify the geological era defined by man’s influence on the Earth’s geology. See Paul J. Crutzen & Eugene F. Stoermer, *The “Anthropocene,”* 41 GLOB. CHANGE NEWSL. 17 (2000); Will Steffen et al., *The Anthropocene: Are Humans Now Overwhelming the Great Forces of Nature?* 36 AMBIO 8 (2007).

³ E.g., Edith Brown Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 ECOLOGY L.Q. 495, 496 (1984); David Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public’s Interest in Environmentally Critical Resources*, 12 HARV. ENTL. L. REV. 311, 319 (1998); Lynton K. Caldwell, *Rights of Ownership or Rights of Use?—The Need for a New Conceptual Basis for Land Use Policy*, 15 WM. & MARY L. REV. 759, 766 (1974); James P. Karp, *A Private Property Duty of Stewardship: Changing our Land Ethic*, 23 ENVTL. L. 735, 735 (1993); William Lucy & Catherine Mitchell, *Replacing Private Property: The Case for Stewardship*, 55 CAMBRIDGE L.J. 566, 566 (1996); Charles Reich, *The Liberty Impact of the New Property*, 31 WM. & MARY L. REV. 295, 304–05 (1990); Charles Reich, *The New Property*, 73 YALE L.J. 733, 787 (1964); Christopher Rodgers, *Nature’s Place? Property Rights, Property Rules, and Environmental Stewardship*, 68 CAMBRIDGE L. J. 550, 553 (2009); Jennifer Welchman, *A Defence of Environmental Stewardship*, 21 ENVTL. VALUES 297, 298 (2012); Victor Yannacone, *Private Property Plus Public Interest Equals Social Property*, 23 S.D. L. REV. 71, 71 (1978).

⁴ See discussion *infra* Section I.C.1.

⁵ See discussion *infra* Section I.C.2.

⁶ The argument that complying with the duties of stewardship is good for one’s own health is not considered in detail here, for the essence of stewardship is managing resources for the benefit of others. In that sense, management for one’s own health is not an optimal expression of stewardship duties. Having said that, it is of course trite to note that maintaining one’s land in an environmentally sound state is likely to be beneficial to one’s own health, even if it is not necessarily beneficial to one’s coffers. Furthermore, in the more attenuated sense explained in Section II.C, it is very much in one’s own interest to comply with the duties of stewardship. However, as Edith Brown Weiss explains, each person has an intimate connection with the planet and its ecosystem. Brown Weiss, *supra* note 1, at 198–99. Caldwell, too, notes that the stewardship ethic views “man as belonging to the totality of nature,” and this applies as much to the landowner as it does to her neighbors and the wider community. Caldwell, *supra* note 3, at 767.

⁷ E.g., Christopher B. Barrett & Raymond E. Grizzle, *A Holistic Approach to Sustainability Based on Pluralism Stewardship*, 21 ENVTL. ETHICS 23, 23, 35–36 (1999) (in which

Article generates justification for the imposition by law of the precise duties of stewardship through an understanding of the nature of group obligations. In brief, stewardship is justified when conceptualized as a coordination rule.

Stewardship of land is commonly understood to be an ethical and legal principle (in the sense that it promotes, but does not demand, a particular course of action), invoked to justify the imposition of specific duties onto one with control over a particular resource, so that they utilize and exploit that resource only in such a way as to protect the integrity of the resource.⁸ The word “stewardship,” however, is occasionally used imprecisely as *justification* for limiting the ability of the right-holder to damage, destroy, or diminish the resource.⁹ It is an environmentalist’s panacea, a concept which in a single breath has the power to capture how we should be caring for our planetary resources and which would sit at the heart of our private property system, so maligned for its ongoing effects on the natural world.

But this is not enough. We must explain *why* such an obligation would be justified as being imposed *by law*. As an ethical principle, its justifications are relatively clear, if multitudinous (and, by that token, open to their own challenges).¹⁰ This does not tell us why legal property rights should be limited. Stewardship is an answer: it is not a justification for limitation of rights; it *is* the limitation of rights. Much scholarship fails to appreciate this.¹¹ In this way, the scholarship becomes mere

the authors make reference in their opening remarks to the consensus emerging amongst environmentalists about the need to protect nature and to limit property rights to achieve that protection).

⁸ The nature of legal principles is of course a contested issue within the environmental law literature, and more generally. The definitional approach adopted here is in line with that of Dworkin, who explains that principles, unlike rules, “state[] a reason that argues in one direction but does not necessitate a particular decision.” RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 26 (1977). In an environmental context, this approach to principles seems especially apt, as explained by Fisher. ELIZABETH FISHER, *RISK: REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM* 41 (2d ed. 2010).

⁹ *E.g.*, Caldwell, *supra* note 3, at 769–70 (explaining what would be required of a rational land use policy, including ensuring that individuals take account of wider society when making decisions in relation to their ownership of land, so that such duties are imposed because the landowner is a steward). Stewardship on these approaches is justified because it achieves an end, but the step from morality to law is not explained.

¹⁰ See *infra* Section I.C (considering the justifications for the ethical principle of stewardship).

¹¹ See Caldwell, *supra* note 3, at 767 (Caldwell emphasizes that the source of this ethical duty is at once semi-religious, mythical, and scientific, as we explore below. See discussion *infra* Section I.C).

rhetoric. Stewardship is *not* a justification, so to take its place among the pantheon of legal norms, it requires justification.

However, it is possible to justify stewardship. There are many theoretical bases upon which such a justification can be built. Some call, altruistically, upon a resource-holder to self-limit his actions for the benefit of others.¹² This would be admirable, but it would make stewardship and the imposition of stewardship duties in a private property focused legal system a hard sell. Indeed, such an approach is almost impossible to align with the concerns expressed in the “harm principle” and as such will neither be universally accepted, nor enough to justify the imposition of coercive punishments in cases of breach. This Article demonstrates justification for stewardship not as a rule which allows for protection of the environment, but as a coordination rule. Stewardship is to property ownership, as driving on the right (or, in this author’s jurisdiction, on the left) is to safe highways. The justification for stewardship duties arises therefore through membership of the community of landowners and users and in the mutually supporting duties which are required to keep a network of rights operating smoothly. Thus, stewardship duties are inherently justified by the fact of property rights in land. As we proceed into the anthropocene, understanding such justification may well be necessary in the face of impending environmental disaster.

I. STEWARDSHIP AS AN ETHICAL PRINCIPLE

As noted, stewardship is an ethical concept¹³ and a legal principle. The relationship between the two is complex. However, the history of stewardship gives us some clues as to its justifications. The starting point is the ethical concept because it allows a deeper understanding of the meaning of stewardship. Indeed, as an ethical principle, stewardship has a long and varied history, appearing in different value systems and ethics to perform a variety of tasks, and it is therefore difficult to generalize about its meaning.¹⁴ Despite the difficulty of defining stewardship, it is nevertheless possible to outline a relatively uncontroversial, if broad,

¹² See Jennifer Welchman, *The Virtues of Stewardship*, 21 ENVTL. ETHICS 411, 415 (1999).

¹³ See Caldwell, *supra* note 3, at 767 (Caldwell emphasizes that the source of this ethical duty is at once semi-religious, mythical, and scientific, as we explore below. *Infra* discussion at Section I.C).

¹⁴ Welchman, *supra* note 3, at 199–200; ROBERT ATTFIELD, *THE ETHICS OF THE GLOBAL ENVIRONMENT* 45 (1999).

definition of stewardship in land,¹⁵ and we will look here at environmental stewardship in particular to give richness to the texture of the principle as it emerges in the literature. We then briefly outline the different justifications for the stewardship ethic in order to explore more fully how we ought to understand stewardship and to shed some light on why it is so challenging to bridge the gap between the morally right and the legally justified.

A. *Stewardship Generally*

As with almost all areas of ethical debate, uncontroversial and conclusive definitions here prove elusive. The main problem lies in giving enough content to the principle to make it a meaningful guide to conduct, whilst remaining sufficiently general that the full range of stewardship is captured. The definition given by Welchman demonstrates this problem. She explains that, “[t]o be a steward is to devote a substantial percentage of one’s thoughts and efforts to maintaining or enhancing the condition of some thing(s) or person(s), not primarily for the steward’s own sake.”¹⁶

This definition attempts to state the general thrust of stewardship, but fails to highlight what is distinctive about stewardship as an ethical principle and indeed is (understandably) tentative in its conclusion. Crucially, however, this definition fails to emphasize the importance of accountability. It is not enough that the steward acts with something in mind other than her own interests. She will also be answerable for her actions in “maintaining or enhancing” the thing.¹⁷

At the heart of the stewardship ethic is a notion of enforceable responsibility and of sanction, be that, in secular versions of the principle, accountability to the people or state, or in non-secular versions, to God. It is only by acknowledging that the true steward must justify himself to others that the operation of stewardship can be understood. In the non-secular stewardship model, man, as a whole, and each person individually, is responsible to God for their actions as steward.¹⁸ Attfield explains that, “[w]hatever our laws may say about property . . . humans do not own the Earth . . . but hold or possess [it] on a provisional basis hence their answerability.”¹⁹

¹⁵ Different arguments may apply where the object of the stewardship duty is not land.

¹⁶ Welchman, *supra* note 12, at 415.

¹⁷ *Id.*

¹⁸ ATTFIELD, *supra* note 14.

¹⁹ *Id.*

It is this answerability in Attfield's account that is the essence of stewardship, and, as we shall see below, the provisionality of man's presence on Earth also goes some way to explaining the justification for legal duties.

In secular versions too the steward is accountable and will be responsible to the state, the people generally, or to a specific person for his actions.²⁰ Stewardship entails answerability precisely because the owner of property is not able to use this property in any way he desires. The key to a trust is the enforceability of the trust obligation, the duty to account.²¹ The same can be said for stewardship.²² For this reason, Welchman's definition will be adapted to include this element of sanction for the moral failure to comply with the obligations of stewardship. Therefore, the general definition as derived from the ethic of stewardship is: a steward must manage or enhance something for someone or something else and will be answerable for any failure to do so. As will become apparent, this definition links closely with how stewardship has developed as a legal principle.

B. *Environmental Stewardship*

We come now to environmental stewardship, but one of a multitude of branches of the wider ethic: Agricultural stewardship, stewardship of historical and cultural artifacts, and stewardship of companies all fall within this wider concern to manage a resource for the benefit of something or someone other than the current users.²³ Although each of these focuses on the key idea of an obligation to manage for the benefit of others, the content of the obligation will vary from context to context. In this sense, stewardship in general, and its specific manifestations, are contingent, hence their status as principles rather than rules. In addition, the "others" for whom one must manage the property will also vary depending on the strand of stewardship being examined.

A useful definition with which to commence our discussion is that formerly adopted by the United States Environmental Protection Agency ("EPA"):

²⁰ *Id.*

²¹ This analogy between the trust and stewardship will be discussed in more detail below. See discussion *infra* Section II.A.2. For the role of accountability in the ethical principles of stewardship, see Barrett & Grizzle, *supra* note 7, at 30; *supra* Section I.A.

²² See *id.*

²³ *E.g.*, GUIDO VAN HUYLENBROECK & MARTIN WHITBY, COUNTRYSIDE STEWARDSHIP: FARMERS, POLICIES AND MARKETS 1–2 (1999); John L. Paterson, *Conceptualizing Stewardship in Agriculture within the Christian Tradition*, 25 ENVTL. ETHICS 43, 44 (2003).

We define environmental stewardship as the responsibility for environmental quality shared by all those whose actions affect the environment It is also a behavior, one demonstrated through continuous improvement of environmental performance, and a commitment to efficient use of natural resources, protection of ecosystems, and, where applicable, ensuring a baseline of compliance with environmental requirements.²⁴

This definition is useful because it is relatively specific and highlights a number of important features of environmental stewardship. This definition, although detailed, fails to mention the aspect of answerability outlined above, missing one of the crucial aspects of stewardship.

Critically, it does, however, emphasize an important issue regarding environmental stewardship. The term “stewardship” refers to responsibilities *and* the behavior of the steward when meeting his responsibilities. The norm and the descriptor of a behavior are not coterminous, and just because someone is behaving as a steward, it does not mean that they ought to do so. The ethic of stewardship is a guide—it tells us how we should behave. When examining discussions of stewardship, it is important always to distinguish between the norm, “one should behave according to the principle of stewardship” and the description, “he is behaving as a steward.” This distinction is crucial when asking the question, “who is the steward” since this could mean either, “who should act according to the principles of stewardship” or “who is acting according to these principles.” This Article explores the first sense and in this way is explicitly a normative, rather than a descriptive, project. Our definition of environmental stewardship then is a definition of what the ethical principle of stewardship demands in relation to the environment. Stewardship entails an obligation to manage or enhance the use of natural resources (for the purposes of this Article, land) to ensure a high level of environmental performance, demonstrating a commitment to efficient use of natural resources and to protection of ecosystems for the benefit of someone or something else, and ensures accountability for any failure to do so.

This definition requires further elaboration. We know that stewardship requires management of property for the benefit of “others,” but we must ask, first, what is meant by the management of property to ensure a high level of environmental performance, and second, who the “others”

²⁴ U.S. ENVTL. PROT. AGENCY, EVERYDAY CHOICES: OPPORTUNITIES FOR ENVIRONMENTAL STEWARDSHIP (2005) at 2.

are. In relation to the first, Lucy and Mitchell describe “[t]he hallmark of stewardship [as] land holding subject to responsibilities of careful use, rather than extensive rights to exclude, control and alienate that are characteristic of private property.”²⁵ They therefore focus on the notion of careful use, which, when adapted to cover environmental concerns specifically, indicates that responsible environmental performance is achieved not by reference to some absolute standard, but rather by reference to what is reasonable or expected from the steward in terms of their attitude. This approach, whilst sensitive to the contingent nature of principles explained above,²⁶ is also circular. We have also excluded from our definition here the reference in the EPA definition to compliance with existing legal standards,²⁷ for stewardship may go further and not as far as such standards. Instead, existing legal standards may, when the *ethic* of stewardship is translated into law, help to give content to the general norm but be insufficient in themselves, or they may be the very definition of it. Thus, neither a purely subjective “attitude-focused,” nor reference to existing norms, can be enough to populate the concept of ensuring a high level of environmental performance. Rather, we must accept that the content of this obligation, both ethically, and as we shall see, legally, will flex according to the surrounding facts, but must contain within it references to both the attitude, and to the objective outcome, of decisions made.

In terms of the “others” for whom stewardship will demand one acts, Caldwell explains that “ownership or possession of land is viewed as a trust, with attendant obligations to future generations as well as to the present.”²⁸ This is reflective of many accounts of the ethic of stewardship, so that the obligation is therefore not only to use the land carefully, but to manage the land with a view to benefitting future generations, even where this conflicts with the steward’s present needs. Lucy and Mitchell, in not relying on the interests of future generations in their definition, may well avoid some of the difficulties of determining which of a theoretically infinite number of future generations should be taken into account, and of working out what actions would or would not be in their interest.²⁹ Missing this future element, however, fails to demonstrate what is distinctive about stewardship. It is the mixture of right and obligation with a view to both the present and the future that is central to the notion of environmental stewardship, however challenging it may be in practice

²⁵ Lucy & Mitchell, *supra* note 3, at 584.

²⁶ See *supra* text at note 8.

²⁷ U.S. ENVTL. PROT. AGENCY, *supra* note 24, at 2.

²⁸ Caldwell, *supra* note 3, at 766.

²⁹ See Lucy & Mitchell, *supra* note 3. Cf. Brown Weiss, *supra* note 1, at 199–200.

to know what behaviors such a norm entails. Stewardship is about more than ensuring that the earth's resources are not depleted—it is also about ensuring that land is in a certain state and as such can be used to tackle pollution and contamination, as well as overuse. In order to understand this general definition more fully, it is necessary to examine the justifications said to be behind this ethical principle. *Why* is there an obligation to manage property for the benefit of future generations?

C. *Justifications for the Ethical Principle of Stewardship*

There are many potential justifications for the ethic of stewardship, and these justifications can lead to conflicting formulations of the content of the obligation. This Article will discuss some of these different justifications, not to determine which is the most coherent or satisfactory in terms of explaining stewardship, but in order to try to highlight some common features which then form the starting point for exploring the justifications for any ensuing legal obligations. The justifications examined here will be, first, secular justifications based on ideas of justice and ecology, and, secondly, religious justifications.

1. Intergenerational Justice

First, many see stewardship as based on the moral duties associated with intergenerational equity (hence the future focus). Brown Weiss takes this approach, arguing that, “[a]s members of the present generation, we hold the earth in trust for future generations. At the same time, we are beneficiaries entitled to use and benefit from it.”³⁰ Attfield, too, relies on an intergenerational justification for stewardship but gives more details as to the content of the resulting obligations.

Current agents, to the extent that they have the necessary powers and resources, have obligations to provide for the satisfaction of the basic needs of future generations, and to facilitate the development in the future of characteristic human capacities . . . that such satisfactions and development can foreseeably be facilitated.³¹

³⁰ Brown Weiss, *supra* note 1, at 199.

³¹ ATTFIELD, *supra* note 14, at 157.

He argues that the ethical justification for the principle “supplies a substantive content to trusteeship.”³² The obligation that he thus associates with intergenerational justice is an obligation not only to allow the basic needs of future generations to flourish, e.g., through permitting food production and maintaining water supplies, but also to develop distinctively human characteristics. Arguably this implies that the stewardship duty could include maintaining the aesthetic value of areas of natural beauty to promote artistic and literary endeavors, or the protection of buildings of special historical value to promote learning. In this sense, we can see in these definitions a close relationship between the requirements of intergenerational justice and the idea of human flourishing.

Brown Weiss too advocates this approach as it allows a wealth and depth of cultural and ecological heritage.³³ She outlines three principles of intergenerational justice which support the principles of stewardship. First, each generation will fall under an obligation to preserve the “diversity of the natural and cultural resource base”;³⁴ second, each generation must keep the planet in a good state such that it is passed on in “no worse a condition than that in which it was received . . .”;³⁵ and third, each generation must ensure that future generations have access to the “legacy of past generations.”³⁶ The scope of this definition of intergenerational justice, and of the stewardship obligation that it engenders, are wider than environmental protection, and extend into a justification for preservation of the total range of sensory and intellectual sources that each generation has the privilege to enjoy. It includes within it a crucial focus on the state of the planet and its resources. In short, each generation must manage its resources in such a way that will not harm or prevent the flourishing of future generations. We can justify this intergenerational focus by reference to Rawlsian conceptions of justice. According to Rawls:

The correct principle is that which the members of any generation (and so all generations) would adopt as the one their generation is to follow and as the principle they would want preceding generations to have followed (and later

³² *Id.* at 162.

³³ Brown Weiss, *supra* note 1, at 202.

³⁴ *Id.* at 201–02.

³⁵ *Id.* at 202.

³⁶ *Id.*

generations to follow), no matter how far back (or forward) in time³⁷

Stewardship which concerns itself with management of natural resources fits into this pattern of acting from the “position of ignorance.”

There are difficulties with the approach which looks to the balance of rights and obligations between generations, and whilst it is not possible to examine the nature of this controversy in detail here, it is necessary to outline the difficulties with an “intergenerational justice” explanation of stewardship. There is considerable controversy, despite the fact that the justification for stewardship is the promotion of the interests of future human beings, as to whether future generations are in fact capable of holding “rights” (either moral or legal) which are enforced through these obligations.³⁸ This difficulty is significant for the question of the nature of the obligation that rests on the steward. To put this another way, using concepts of intergenerational justice to explain the necessity of accountability to a true definition of stewardship is not straightforward.

Certainly it is problematic to ground any such obligations in rights or interests held in “the present” by future generations, since such generations (obviously) do not yet exist, nor can we know who or how many will make up the sum of these future generations. This argument is often presented as a stumbling block to our having obligations owed to future generations.³⁹ Thus, per White, “[i]t is . . . a fallacy to argue, as is commonly done, that because a certain class of thing, whether . . . the environment [or] . . . generations yet to come, . . . is capable of having, or actually has something in its interest, therefore it is capable of having a right.”⁴⁰

Interests, he highlights, are not enough to ground rights and, as a corollary, may not be enough to ground obligations.

There are answers to this problem. First, it is possible to conclude, as White does, that interests are neither sufficient nor necessary to the founding of rights and that temporality is not critical to the existence of

³⁷ JOHN RAWLS, *POLITICAL LIBERALISM* 274 (Expanded ed. 2005).

³⁸ Lukas Meyer, *Intergenerational Justice*, STAN. ENCYCLOPEDIA OF PHIL. (Aug. 10, 2015), <http://plato.stanford.edu/entries/justice-intergenerational/> [<https://perma.cc/BF6V-P35L>].

³⁹ See Meyer, *supra* note 38 (citing Richard De George, *The Environment, Rights, and Future Generations*, in *RESPONSIBILITIES TO FUTURE GENERATIONS: ENVIRONMENTAL ETHICS* (Ernest Partridge, 1981); Ruth Macklin, *Can Future Generations be Said to Have Rights?*, in *RESPONSIBILITIES TO FUTURE GENERATIONS: ENVIRONMENTAL ETHICS* (Ernest Partridge, 1981).

⁴⁰ ALAN R. WHITE, *RIGHTS* 80 (1984).

rights; persons, he argues, whether born or not, are capable of having rights simply by virtue of their being persons.⁴¹ Similarly, Warren, when discussing the rights of persons who will never be born, discusses the position in relation to future generations and concludes that:

To say that merely potential people are not the sort of things which can possibly have moral rights is by no means to imply that we can have no obligations toward people of future generations, or that they (will) have no rights that can be violated by things which we do now.⁴²

As fellow human beings, we should treat them as we would want to be treated. This approach disentangles the obligation from rights, and departs from the widely accepted understanding that obligations entail rights and vice versa.

The second potential solution to this difficulty is suggested by Hoerster. He argues that:

[W]e can safely assume, first, that future people will be bearers of rights in the future, second, that the rights they have will be determined by the interests they have then, and third, that our present actions and policies can affect their interests. If we can violate a person's rights by frustrating her interests severely, and if we can so severely frustrate such interests of future people, we can violate their future rights.⁴³

As a result it is theoretically possible to ground an obligation in the notion of intergenerational justice. If either of these explanations can ground rights in future generations, then we can conclude that this could give rise to a corresponding obligation on us.⁴⁴ It is perhaps no surprise, however, that this theory is not universally accepted.

2. Ecocentric and Ecological Justifications

Any understanding of stewardship which relies on intergenerational justice does seem to ignore the potential ecological, rather than

⁴¹ *Id.* at 90.

⁴² Mary Anne Warren, *Do Potential People Have Moral Rights*, 7 *CAN. J. PHIL.* 275, 288 (1977).

⁴³ Meyer, *supra* note 38, at Section 2.1.

⁴⁴ Brown Weiss, *supra* note 1, at 201.

anthropological, benefits of stewardship. This is a popular comment on the stewardship approach that relies on Rawls. Barry, for example, sees long-sighted anthropocentrism as a key aspect of ecological stewardship.⁴⁵ Goldstein, too, focuses on the anthropocentric moral justification for the principle: “[s]tewardship is about benefitting society, but it includes future generations within that zone of protection.”⁴⁶ These views exclude the protection of natural interests for their own sake.

This focus on the needs and wants of man has often been used as a criticism of stewardship.⁴⁷ Goldstein argues that stewardship “gives us a legally cognizable obligation, based on ecology and interpreted using the principles of environmental ethics.”⁴⁸ The ethics of ecology stipulate that the natural world should be seen as a single system within which one interference can have wide and unexpected consequences.⁴⁹ For this reason, many of those of a “deep green” or ecocentric perspective advance the principle of stewardship, not as a matter of intergenerational equity, but as a means of promoting ecological soundness.⁵⁰ As Caldwell makes clear, however, stewardship can only promote ecological principles where it is accompanied with a change in social behavior and understandings of man’s relationship with nature.⁵¹ It is this aspect of stewardship that draws many tribal cultures to it, e.g., American Indian and Aboriginal culture. Buddhism also places value on ecological awareness and stewardship for ecocentric, as opposed to anthropocentric, reasons.⁵²

Difficult as it is to ground rights in future generations on the basis of intergenerational equity, however, it is even more problematic to found an obligation on an individual person to behave according to the principles of stewardship on the basis of “rights” of an ecosystem or a species. This Article is not the place to discuss the ability of animals and plants to hold rights,⁵³ but even if such rights are logically possible, the adoption

⁴⁵ JOHN BARRY, *RETHINKING GREEN POLITICS* 154 (1999).

⁴⁶ ROBERT J. GOLDSTEIN, *ECOLOGY AND ENVIRONMENTAL ETHICS: GREEN WOOD IN THE BUNDLE OF STICKS* 96 (2004).

⁴⁷ See ATTFIELD, *supra* note 14, at 45–50.

⁴⁸ GOLDSTEIN, *supra* note 46, at 95.

⁴⁹ See *id.* at 2, 4.

⁵⁰ See *id.* at 3.

⁵¹ Lynton K. Caldwell, *Land and the Law: Problems in Legal Philosophy*, 1986 U. ILL. L. REV. 319, 334 (1986).

⁵² See Charles Hartshorne, *The Rights of the Subhuman World*, 1 ENVTL. ETHICS 49, 49 (1979).

⁵³ For more information on this topic see: Anthony J. Povilitis, *On Assigning Rights to Animals and Nature*, 2 ENVTL. ETHICS 67 (1980); Richard A. Watson, *Self-consciousness and the Rights of Nonhuman Animals and Nature*, 1 ENVTL. ETHICS 99 (1979); and Hartshorne,

of a wholly ecocentric approach to stewardship must result in serious consequences for the type of ensuing obligation.

It is suggested here that it is not necessary to adopt a *wholly* anthropocentric view in order to allow the relevant rights to be vested in future generations. In the same way that parents have rights for the benefit of their children, and trustees have rights for the benefit of the beneficiary, it is suggested that future generations can be the holders of rights that the current generation act according to the principles of stewardship, both for their own benefit, and for the benefit of the natural world. This allows us to take a middle course between a wholly anthropocentric and a wholly ecocentric approach. It allows a recognition that both man and nature can be benefitted if stewardship is adopted given its anthropocentric and ecocentric secular justifications. Brown Weiss argues that these two ideas can be joined together under a broad understanding of intergenerational justice, stating:

[t]here are two relationships that must shape any theory of intergenerational equity in the context of our natural environment: our relationship to other generations of our own species and our relationship to the natural system of which we are a part.⁵⁴

3. Judeo-Christian Stewardship

There is also widespread non-secular justification for stewardship. It has very strong ties with both Judeo-Christian⁵⁵ and Islamic culture.⁵⁶ Christian and Jewish philosophies draw on, amongst other texts,⁵⁷ Genesis: “[t]he Lord God took the man and put him in the garden of Eden to work it and keep it.”⁵⁸ This viewpoint sees man as unique in being able to protect other parts of the ecosystem. With this ability comes responsibility to

supra note 52. Christopher Stone’s article is also informative in this regard. *See generally* Christopher Stone, *Should Trees Have Standing?—Towards Legal Rights for Natural Objects*, 1972 S. CAL. L. REV. 450 (1972).

⁵⁴ Brown Weiss, *supra* note 1, at 199.

⁵⁵ This discussion is not suggesting that all Judeo-Christian theology supports the foundation of a stewardship ethic, but rather that there is a grounds within the relevant texts for such an ethic, and that this has found support amongst a wide range of writers. For an objective assessment of the ranges of stewardship traditions within the Christian faith, see generally Paterson, *supra* note 23; *see also* JOHN PASSMORE, *MAN’S RESPONSIBILITY FOR NATURE* (2d ed. 1980).

⁵⁶ *See infra* Section I.C.4.

⁵⁷ *See Psalm 148; Leviticus 25* (English Standard Version).

⁵⁸ *Genesis 2:15* (English Standard Version).

ensure that man does not exploit the Earth, but instead maintains it and keeps it on behalf of God. As with the secular justification of intergenerational justice, many have argued that this attitude, of man as dominant over nature, tends to sacrifice nature to man's will rather than imposing a duty to protect it.⁵⁹ Brennon and Lo argue, however, that "[t]he Judeo-Christian tradition of thought about nature, despite being predominantly despotic, contained resources for regarding humans as stewards or perfectors of God's creation."⁶⁰ The United States Conference of Catholic Bishops⁶¹ agrees with this, describing man's stewardship of land as being about thoughtful, rather than selfish, management.⁶²

Not only is there a strong philosophical justification for stewardship founded in these religions, there is also a strong link between the Judeo-Christian concept of stewardship and the legal principle. It is perhaps unsurprising that the links between them are so close since the two grew up side by side in early legal systems. This can be seen in Leviticus 25:23: "The land shall not be sold in perpetuity, for the land is mine. For you are strangers and sojourners with me. And in all the country you possess, you shall allow a redemption of the land."⁶³

The reference here to tenancy demonstrates the links between the ethical and legal principle. At the time of the Old Testament, a steward was generally a manager for another, usually a royal personage.⁶⁴ It seems then that not only is there a Judeo-Christian justification for the principles of stewardship, but these religions have also helped to shape the content of the legal forms of the principle.

4. Islamic Stewardship

Islamic philosophy on stewardship also sees the world as belonging to God with man accountable for its upkeep.⁶⁵ An example of this is

⁵⁹ E.g., JOHN BLACK, *THE DOMINION OF MAN* (1970); PETER SINGER, *ANIMAL LIBERATION: A NEW ETHIC FOR OUR TREATMENT OF ANIMALS* (1976); Lynn White Jr., *The Historical Roots of Our Ecological Crisis*, 155 *SCI.* 1205 (1967); see also Paterson, *supra* note 23, at 44, n.6.

⁶⁰ Andrew Brennon and Yeuk-Sze Lo, *Environmental Ethics*, *STAN. ENCYCLOPEDIA OF PHIL.* (July 21, 2015), <http://plato.stanford.edu/entries/ethics-environmental/> [<https://perma.cc/A6FN-6S3C>]; see also Lloyd Steffen, *In Defense of Dominion*, 14 *ENVTL. ETHICS* 63, 68 (1992).

⁶¹ United States Conference of Catholic Bishops, *Renewing the Earth Part 1 [C]* (1991).

⁶² See also ATTFIELD, *supra* note 14, at 49 (quoting The General Synod Board for Social Responsibility of the Church of England, *Christians and the Environment*).

⁶³ See *Leviticus 25:23–24* (English Standard Version).

⁶⁴ Paterson, *supra* note 23, at 49.

⁶⁵ ATTFIELD, *supra* note 14, at 53.

the Islamic law rule of “himas” which involves the protection of specified areas of land from overuse.⁶⁶ This rule is used today in Islamic cultures to advocate a stewardship approach to environmental protection:⁶⁷ the overall goal of the hima revival is to mesh traditional practices with recent conservation science as a way to reach sustainable development.⁶⁸ This attitude is a reflection of the teachings of the Qur’an, which states: “I am setting on the earth a vice-regent.”⁶⁹ This is not to say of course, either in relation to Islam, or the Jewish and Christian faiths, that there is a prevailing opinion that man is steward of the earth amongst followers of the faiths. Rather the purpose of this discussion is to demonstrate that the principle does at least find support in these religious texts such that it is possible to draw on the relationship between man and the deity in order to justify stewardship.

5. The Success of and Interaction Between These Justifications

There is therefore a series of strong justifications for stewardship. As was highlighted above, there are flaws in these justifications and each may not be capable of justifying stewardship but there is not space here to defend each of the justifications against possible criticisms. Instead, it is hoped that the discussion here has shown enough at least to suggest that the stewardship moral obligation is potentially justifiable. This Article is not the place to attempt to outline a definitive justification for stewardship. It has been argued at least, however, that the anthropocentric and ecocentric views can to an extent be reconciled.⁷⁰ Barrett and Grizzle describe the pitting of ecocentrism against anthropocentrism as unnecessary.⁷¹ It is not possible to draw all these justificatory threads together in limited space, but what can be said clearly is that the justification for

⁶⁶ Richard Foltz, *Is There an Islamic Environmentalism?*, 22 ENVTL. ETHICS 63, 64 (2000); see also Iqtidar H. Zaidi, *On the Ethics of Man’s Interaction with the Environment: An Islamic Approach*, 3 ENVTL. ETHICS 35, 35 (1981).

⁶⁷ Foltz, *supra* note 66; Zaidi, *supra* note 66.

⁶⁸ See *Hima*, SOCIETY FOR THE PROTECTION OF NATURE IN LEBANON, <http://www.spn.org/hima/> [<https://perma.cc/YM2H-EQPF>] (last visited Jan. 11, 2019).

⁶⁹ Foltz, *supra* note 66, at 64 (translating the Qur’an 2:30).

⁷⁰ Barrett & Grizzle, *supra* note 7, at 25–26 (arguing that a practical approach to stewardship requires that the dichotomy drawn between anthropocentrism and ecocentrism is a barrier to the achievement of the goals of both camps, so that a genuinely pluralistic approach should be taken, allowing for the creation of a system of checks and balances in which the understandings of both sides are taking into account when shaping the scope of the stewardship obligations).

⁷¹ *Id.* at 35.

stewardship broadly relies on the fact that man ought to manage natural resources, be this for his own benefit, for the benefit of nature, or in order to fulfill his obligations to God. As a result, environmental stewardship must at least aim to protect and manage the state of land and must do so for the benefit of the future.

Neither an ecocentric nor an anthropocentric justification for stewardship can, however, account for the *legal* obligations that arise to ensure stewardship, and reconciling them in the way suggested here does not solve this problem. Thus, an anthropocentric approach does not demand that a landowner manage his land in order to ensure a range of ecological habitats where the species that subsequently flourish do not give rise to any identifiable benefit to man. Conversely, stewardship obligations do not necessarily demand that the interests of nature are treated equally with the interests of man such that the obligation can be justified by deep green principles. This is not to say that stewardship obligations cannot be justified, but that "stewardship" as a concept is sufficiently broad to cover the obligation that results when one of these perspectives is adopted. Ecological justifications cannot explain the full range of potential stewardship obligations, and nor can anthropological justifications. But this does not mean that a stewardship obligation cannot be justified, and that its content cannot be linked to its justification. As a result, it is necessary to choose, to some extent, which aspect of stewardship to prioritize. The explanation of the various justifications for stewardship simply helps us to understand the content and shape of the relevant obligations and why they might arise.

For the purposes of this Article, then, it will be assumed that at least part of the interests of the future that will be protected are the interests of future man. This approach is also adopted by Barrett and Grizzle who specify that, "we subscribe to the weak anthropocentric view that although humans are not exclusively valuable, as implied by strong anthropocentrism, neither are they of equal value with all other species, as suggested by biocentrists."⁷²

D. Breach of the Moral Obligation to Act According to the Principles of Stewardship

Thus although there is perhaps not one single justification that explains the stewardship obligation, it has been demonstrated that if

⁷² *Id.* at 36.

stewardship is indeed justifiable, the obligation that arises is one which is of value in and of itself, rather than simply being a means to an end. It remains to be seen, however, what, if any, sanction applies if there is a breach of this moral obligation since this would help explain the accountability aspect of stewardship which, as will be seen below, is so central to the legal principle of stewardship. What happens when you are a bad steward? There is no conclusive answer to this question, given the plurality of the justificatory “sources.”

However, there are at least two types of sanction that may be imposed on a “bad steward.” First, there is the sanction of condemnation—that, according to a religious understanding of stewardship, a sanction imposed by God, or in a secular understanding, condemnation by the community of which an individual is part.⁷³ Secondly, there is a more complex type of sanction that arises as a result of failure to confer a benefit on oneself. The steward will be a member of a generation benefitted by the imposition of stewardship obligations onto those in a position to make decisions about the state of land. By failing to comply with the stewardship obligations that fall on him, he acts on his land in such a way that is detrimental to himself as a member of the wider land community.⁷⁴ These potential sanctions will be explained in turn although it should be understood that failure to comply with stewardship obligations could lead to both sanctions arising.

First, there is the sanction of condemnation by others. This sanction is often used to explain the motivation behind compliance with a rule.⁷⁵ Hart, for example, makes clear that rule breaking justifies “hostile reactions”⁷⁶ and as such can be seen as a reason why people follow moral (and indeed legal) rules. As Green highlights, “the normal function of sanctions . . . is to reinforce duties.”⁷⁷ It is clear, however, that this sort of sanction is not necessary in order for the rule itself to be valid.⁷⁸ Thus the rule can exist even if there is no moral condemnation for its specific breach. There may be many reasons why there is no sanction for any

⁷³ See HERBERT L.A. HART, *THE CONCEPT OF LAW* 85; TONY HONORÉ, *MAKING LAW BIND* 32, 49–51 (1987).

⁷⁴ *E.g.*, HART, *supra* note 73.

⁷⁵ *Id.* at 84; see also Andrei Marmor, *The Nature of Law*, STAN. ENCYCLOPEDIA OF PHIL. (published May 27, 2001; substantive revision Aug 7, 2015), <http://plato.stanford.edu/entries/lawphil-nature/> [<https://perma.cc/G5T9-AXAL>].

⁷⁶ HART, *supra* note 73.

⁷⁷ Leslie Green, *Legal Obligation and Authority*, STAN. ENCYCLOPEDIA OF PHIL. (Dec. 29, 2003), <http://plato.stanford.edu/entries/legal-obligation/> [<https://perma.cc/LF5T-YFBS>].

⁷⁸ See *id.* (giving an example of the duty of the highest court to apply the law).

particular breach—impossibility of discovery of the breach; any explanation for the breach lessening the moral condemnation attached to the breach; or indeed simply ambivalence or forgiveness in those who would normally supply the condemnation. Whilst none of these factors mean that there would *never* be a sanction for breach, they do mean that sometimes there would be no sanction and yet there is no doubt that the rule would still exist.

There are two ways out of this difficulty. The first is to suggest that what matters for stewardship is not that there would be a sanction if the obligation was breached, but that there could be. There must be at least the potential for accountability. The second explanation is that the moral stewardship obligation would only exist as long as there was no systematic ambivalence towards the breach. If there was a common attitude that breach of the obligation would not justify condemning the person who committed that breach, the rule would, in effect, no longer be a rule of the particular system or group.⁷⁹ As a result, it seems, there must be at least the potential of social condemnation in order for us to conclude that there is a moral obligation to comply with the requirements of stewardship.

The other possible source of such a sanction arises as a result of the fact that, in addition to being subject to the responsibilities of stewardship, a steward is a member of a generation in theory benefitted by the duties of stewardship.⁸⁰ By failing to comply with his own stewardship obligations, he risks his being a beneficiary of the obligation in others. In brief, he makes it less likely that others will also comply with their stewardship obligations. This will impose a sanction on him because he will not thereby be benefitted by others complying with their obligations. Here, by breaching the stewardship obligation, the steward no longer ensures that his and other land is in a good state for his own future use. He does this because there is a risk that the rule is no longer effective as Honoré outlines.⁸¹ He thus loses a benefit himself in prioritizing his short-term ambitions, or laziness, etc., over his long-term needs as a human being. As a result, we can see that even if there is no mechanism or means of social condemnation in a particular case for breach of the moral stewardship obligation, there is another sanction in the form of a potential failure to benefit.

⁷⁹ See HONORÉ, *supra* note 73, at 39.

⁸⁰ Brown Weiss, *supra* note 1, at 199–200.

⁸¹ See HONORÉ, *supra* note 73, at 39.

II. STEWARDSHIP AS A LEGAL PRINCIPLE

Having discussed the ethical background to the principle, this Article will now examine the nature of stewardship as a legal principle, and in doing so, will outline the hallmarks of stewardship as manifested in law.

- (1) The aim of the regime must, at least in part, be to preserve the quality and state of land for the future.
- (2) The regime must attempt to meet this aim by placing obligations on the person entitled by virtue of their rights in land to make decisions in relation to that land for careful and responsible use and management. This requirement focuses on two separate issues: the first is that the regime must in fact place an obligation on the decision-maker in relation to the land by burdening his decision-making power. The second issue is that this obligation must be to make careful and responsible use and management of the land in line with the environmental guidelines explained above.⁸²
- (3) In considering what constitutes such careful and responsible use and management the landowner must, in part, take account of the needs of future generations and/or the ecosystem with a view to maintaining its quality for the future. It is not necessary that future interests are the only factors considered, but it is necessary that they at least play a part.
- (4) This obligation to make careful and responsible use and management of the land taking into account the needs of future generations must burden the *decision-maker's* power of decision-making in the land. This hallmark calls for the obligation itself to attach to all the landowner's rights of ownership, not simply one incident of the rights of ownership, e.g., the right to alienate the land, and goes beyond their rights in relation to use.
- (5) Not only must the regime call on the owner to do all these things, but he must do them in a certain way. His decision-making process must be altered

⁸² See *supra* Section I.B.

by the regime such that stewardship itself is encouraged rather than merely the outcome of the preservation of land.

- (6) The owner must be answerable for failures to meet his obligations.

A. *Forms of Stewardship as a Legal Principle*

As with the ethical principle, the precise meaning of the legal principle varies hugely according to context and there is little consensus as to the content of the obligations,⁸³ even within one context. There are two key historical forms of stewardship: the steward as akin to a warden, and the steward as akin to a trustee.⁸⁴ The examples here are used to show the different purposes to which stewardship duties can be put, and the range of meanings possible within the wider framework. However, it should be noted that whilst all represent facets of the “stewardship personality,” none is its definitive expression. In this way, the justification which we build for stewardship duties in these forms contains within it enough flexibility to allow for the kinds of variation that we see in practice, which are called for by the ethical principle as discussed above, and which are realistic when considering the flexible role which legal principles can play. Indeed, if we are to take a reasonably pragmatic and pluralistic⁸⁵ approach to stewardship, it would be counter-productive to conceive of its forms in too limited a scope, given that the hurdle of justification must still be overcome in all cases.

1. Steward as a Warden

The first (false) form of stewardship which has been seen in legal history is the steward as “warden” of a house, i.e., the literal translation of the word steward from *waerd* (warden) and *stig* (house).⁸⁶ This extends into the figure of the steward as the agent or land manager for the existing owner of the land.⁸⁷ He was the “arch-administrator of the lay estate.”⁸⁸ Swett succinctly outlines the steward’s role as warden: “[t]he steward was his lord’s agent, paid to serve his interests, please him, and

⁸³ Lucy & Mitchell, *supra* note 3, at 584.

⁸⁴ See *id.*; Paterson, *supra* note 23, at 49–50.

⁸⁵ See generally Barrett & Grizzle, *supra* note 7.

⁸⁶ Paterson, *supra* note 23, at 49–50.

⁸⁷ Robert C. Stacey, *Agricultural Investment and the Management of the Royal Demesne Manors*, 1236–40, 46 THE J. ECON. HIST. 919, 919–20 (1986).

⁸⁸ DONALD R. DENMAN, ORIGINS OF OWNERSHIP 116 (1958).

protect his property.”⁸⁹ This principle looks at stewards as acting for the benefit of another, but for the present only, not for the future (unlike the ethical principle outlined above). Furthermore, this form of stewardship, as Denman makes clear, was a question of administration rather than morality and is not the focus of this Article.⁹⁰ The steward here acts as an agent for the principal landowner.⁹¹ He is not bound by obligations of stewardship as explained in the hallmarks outlined here, but must act for the benefit of the principal by virtue of his acting as agent. This historical form of stewardship is now more appropriately understood as being a form of agency, and will not be discussed further here. It is useful to consider briefly however to rule out similar kinds of trust or agency-based roles which do not sufficiently satisfy the hallmarks of stewardship to meet its modern conceptualization.

2. Steward as Trustee

The second strand is the steward as the trustee for the unidentified or future owner of land. There is historical precedent for this form of stewardship in historical Scottish land holdings, in Roman law, and, in a more contemporary sense, in the operation of property rights in relation to sacred Maori sites in New Zealand.⁹² The operation of these systems gives us some insight into the forms which stewardship as akin to trusteeship (and the limitations of this analogy are considered below) can take. It is here that we begin to see the true nature of stewardship finding its place within more or less contemporary land owning structures.

Historical Scottish Clan Ownership

First, this second strand can be seen in Scottish clan structures with the chief of the clan for the time being charged with improving the land for the good of the clan for now and in the future.⁹³ The concept of *dùthchas*, or trusteeship, highlighted this duty on the part of the clans

⁸⁹ Katherine Swett, *Review of Stewards, Lords and People: The Estate Steward and His World in Later Stuart England*, 26 THE SIXTEENTH CENTURY J. 686, 687 (1995).

⁹⁰ DENMAN, *supra* note 88.

⁹¹ Swett, *supra* note 89, at 687.

⁹² See generally ALLAN I. MACINNES, CLANSHIP, COMMERCE AND THE HOUSE OF STUART, 1603–1788, 3, 5–6 (1996); Jown W. Cairns, *Craig, Cujas, and the Definition of feudum: Is a Feu a Usufruct?*, in NEW PERSPECTIVES ON THE ROMAN LAW OF PROPERTY 75, 80–81 (Peter Birks ed., 1989); and Christopher Rodgers, *A new approach to protecting ecosystems: The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*, 19 ENVTL. L. REV. 266, 270 (2017).

⁹³ MACINNES, *supra* note 92, at 3, 5–6.

to maintain the stock of their property.⁹⁴ This duty “had no force in law, [but] nevertheless had the force of custom behind it”⁹⁵ and, as Dodgshon highlights, the boundary between law and custom at this point in Scottish history was difficult to draw.⁹⁶ In terms of accountability, the clan chief would be accountable to his clan members, and in practice a clan chief who did not act in accordance with this principle would struggle to maintain the allegiance of his extended family group.⁹⁷

Certainly it is known that consenting to a clan’s eviction from the land amounted to a breach of the duties associated with the *dùthchas*, and alienation of the totality of the land, too, would constitute such a breach.⁹⁸ The role of each individual tenant farmer was as maintainer and manager of the land for the benefit of the clan as a whole, both for now and in the future. The notion of stewardship underpinned Highland land holding until the demise of the clan structures.⁹⁹ In fact, Hunter argues that it was the abandonment (an abandonment strengthened perhaps by the advent of land registration) of this concept of landholding that prompted the demise of the clan structure: “[a]ll concept of the kindred’s interest in the land was consequently cast aside, while the encouragement thus given to former chiefs to become landlords on the southern model virtually shattered the already weakening paternal affection which the traditional chief had felt for his clan.”¹⁰⁰

Thus, to foreshadow the arguments presented below, we see that the duties associated with decision-making in the land were integral to the community structures built around that land.

Roman Law of Usufruct

A further aspect of stewardship is also arguably prevalent in the Roman law of *usufruct*. Although the “steward” in this case was only entitled to use the land and never came into ownership of it as such, the extent of his rights can be compared to the rights and duties of the feudal tenant.¹⁰¹ Whilst the *usufructuary* had the right to take the fruits of the

⁹⁴ *Id.*

⁹⁵ ROBERT A. DODGSHON, LAND AND SOCIETY IN EARLY SCOTLAND 5 (1981).

⁹⁶ *See id.* at 3–6.

⁹⁷ *Id.* at 110.

⁹⁸ MACINNES, *supra* note 92, at 40–41.

⁹⁹ *See id.* at 19.

¹⁰⁰ *See* JAMES HUNTER, THE MAKING OF THE CROFTING COMMUNITY 13 (3rd ed. 1995).

¹⁰¹ Cairns, *supra* note 92, at 75.

thing,¹⁰² he had to maintain it and make no alterations to the object of the *usufruct*.¹⁰³ The standard of care in the *usufruct* was that of the *bonus paterfamilias*.¹⁰⁴ This standard, i.e., that expected of a good head of a family, ties in with the notion of the *usufructuary* as a quasi-steward: he was expected to maintain the property with which he was entrusted to the standard that a person maintaining his property for the benefit of his family and its future and he was accountable to the bare owner if he failed to do so.¹⁰⁵

The importance of this example lies in the distinction to which we return below¹⁰⁶ between use of land, and ownership of rights in that land, and the place which decision-making occupies on that spectrum. Whilst rights of use and rights of ownership are often distinguished—indeed, it is this distinction which forms part of the explanation for the rules of nuisance within the contemporary takings jurisprudence¹⁰⁷—in fact the two are not a strict dichotomy, but exist on a broader spectrum referred to as the decision-making spectrum.

Maori Sites

In 2017, the Te Awa Tupua (Whanganui River Claims Settlement) Act gave the Whanganui river in New Zealand's North Island legal personality.¹⁰⁸ Of course this is significant in itself, but it is notable for this Article because of the form which that legal personality took. The Act establishes a trust, and the trustees of the river are given rights not only in relation to its management, but also duties to ensure its ongoing integrity.¹⁰⁹ Rogers explains the legal structures which emerge:

The Act establishes the office of Te Pou Tupua. This will carry out functions analogous to those of a trustee, with an overriding duty to uphold the Te awa Tupua status, to promote and protect the health and wellbeing of Te awa Tupua, to carry out landowner functions on land held by the Te awa

¹⁰² *E.g.*, DIGEST OF JUSTINIAN, D.7.1.1 (Paul); D.7.1.59 (Paul); D.7.1.62 (Tryphoninus).

¹⁰³ *Id.*, D.7.1.44 (Neratius).

¹⁰⁴ See Herbert Hausmaninger, *Diligenta Quam in Suis: A Standard of Contractual Liability From Ancient Roman to Modern Soviet Law*, 18 CORNELL INT'L L.J. 179, 180 (1985).

¹⁰⁵ DIGEST OF JUSTINIAN, D.7.1.44 (Neratius).

¹⁰⁶ See *infra* Section II.B.3.

¹⁰⁷ See, e.g., Jason Jordan, *A Pig in the Parlor or Food on the Table: Is Texas's Right to Farm Act an Unconstitutional Mechanism to Perpetuate Nuisances or Sound Public Policy Ensuring Sustainable Growth?*, 42 TEX. TECH L. REV. 943, 948–49 (2010).

¹⁰⁸ *Te Awa Tupua Act (Whanganui River Claims Settlement)*, § 14(1) (2017).

¹⁰⁹ *Id.* at §§ 71–72.

Tupua . . . A distinctive facet of the trusteeship role of the Te Pou Tupua is their obligation to uphold the Tupua te Kawa. This is a broad concept that encompasses both the physical and spiritual aspects of the environment . . . The concept encompasses the Maori belief system that regards people and their environment as one indivisible, mutually interdependent, whole. Traditional Maori concepts of stewardship reflect a different relationship between kinship groups and the land to that in most Western legal systems. The relationship of people to the land and its resources, and the associated customary concept of stewardship, are reflected in the Maori understanding of kaitiakitanga. This is a concept that has been developed through the need to articulate Maori spiritual and cultural concepts in the process of settling claims in the Waitangi Tribunal claims process.¹¹⁰

The proprietary rights, which are conferred onto the trustees as part of this process of establishing legal personality for the river, are, in the sense explained here, intimately connected with the purpose for which those rights were granted, with the interests and needs of others (particularly the indigenous community), and with the land and environment itself. Thus, whilst the legal structures utilized are labeled as that of the trust (becoming parasitic upon a familiar form of land holding in the common law heritage), as we shall see below when we compare the trust with a more robust stewardship duty, it becomes clear that the New Zealand example is more one of stewardship than it is of a trust, notwithstanding its apparent legal form.¹¹¹ The reason for this lies primarily in the diffuse group of both present and future beneficiaries, and in the recognition that action can be on the basis of the “needs” of the environment, an entity incapable of holding the rights of the beneficiary of a trust (even if the environment can be said to have rights of a certain form, they certainly are not the kinds of proprietary rights of which interests under a trust are made up).

The Trust Analogy

As a general outline then, stewardship as a background principle in legal regulation generally demands that the owner of property use and manage that property for the benefit of something or someone else, but

¹¹⁰ Rodgers, *supra* note 92, at 270.

¹¹¹ *Id.*

also allows the owner to do so. As Brown Weiss argues, “[e]ach generation is thus both a trustee for the planet with obligations to care for it and a beneficiary with rights to use it.”¹¹² The steward is the beneficiary of rights and is burdened with obligations, a characterization which is central to our later discussion. He is, above all, a decision-maker directed to take into account certain considerations whether he is charged with acting for the benefit of the future, or for the benefit of his principal, and it is these features that appear in the examples of stewardship as a legal concept discussed here.

Brown Weiss’s analogy to a trust is important and deserves greater attention here since it is both instructive, and limited. Brown Weiss suggests that we should regulate our relationship with the planet through a “planetary trust” which is akin to a charitable trust of the sort found in Anglo-American trust law.¹¹³ Although Brown Weiss argues that the resulting concept is still a trust,¹¹⁴ it is suggested here that what she describes is not a trust, but is stewardship, and that the differences she highlights between “the planetary trust” and a charitable trust are the differences between trusts and the notion of stewardship.¹¹⁵ First, she highlights that trusts have a moment of creation: they are established as a result of an act, be that deliberate or unknowingly.¹¹⁶ They do not just exist as the obligation to act as a steward could be said to exist. Of course, as Brown Weiss herself highlights, “while no affirmative action need to be taken to create the planetary trust as a moral obligation, to have legal force it must be effectuated by positive law.”¹¹⁷

This does not mean, however, that the stewardship is created by an active step on the part of the steward, nor can it be so created. Rather it is an obligation that is part and parcel of the ability to make decisions about land.

Secondly, fiduciary duties as understood in Anglo-American trust law have detailed rules relating to value and ensuring the financial integrity of the trust.¹¹⁸ There is no such fiduciary duty associated with stewardship.¹¹⁹ Instead, the provisions relate to a specific aspect of maintenance of the property—i.e., ensuring the land is in a particular

¹¹² Brown Weiss, *supra* note 1, at 200.

¹¹³ Brown Weiss, *supra* note 3, at 503.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 502–04.

¹¹⁶ *Id.* at 504.

¹¹⁷ *Id.*

¹¹⁸ BEN MCFARLANE, *THE STRUCTURE OF PROPERTY LAW* 552–53 (2008).

¹¹⁹ Brown Weiss, *supra* note 3, at 504.

state—rather than ensuring that the property keeps its financial value.¹²⁰ Furthermore, the trustee in a traditional trust is able to sell the relevant property, transferring the trust interest into substitute property. This is not the case with stewardship because the interest of future generations in the land will remain regardless of any sale, etc. Thus not only are the duties associated with stewardship different to those seen in a traditional trust situation, but they also interact with the property in a different way.

A third and much more fundamental difference is the beneficiary of the trust and the stewardship obligations. With a trust, even a charitable trust, the class of beneficiaries is limited.¹²¹ With the stewardship obligation, this is not the case. The beneficiaries are all those in the land community (a concept explored below), i.e., all those who rely on the land for survival and to thrive (in the sense of human flourishing). That is, at the very least, all humans are beneficiaries of the stewardship obligation (animals may also be such beneficiaries, but the controversy over the ability of animals to hold rights is enough to make one pause rather than committing to animals being beneficiaries of this obligation¹²²). Furthermore, the trustee of a trust will not always be a beneficiary of that trust, and in the case of a charitable trust, he will not be, at least not “with his trustee hat on.” By contrast, with stewardship, the steward is necessarily also a beneficiary. The role of beneficiary and steward are inextricable. There are therefore crucial differences between a trust and stewardship, although the analogy is an instructive one.

B. Nature and Content of Stewardship as a Legal Principle

From these historical and contemporary forms, and from unpacking the analogy to the concept of trusteeship, we can start to discern the essential features of stewardship as a legal principle. In this Section, we consider some aspects of stewardship in its legal form in more detail.

1. Is a Steward Primarily a Duty-Bearer or a Rights-Holder?

This question gets to the heart of what role a legal system would assign to a person acting as steward and to what extent he is made accountable for breach of any duties associated with his stewardship role. In order to determine this, it is necessary to understand more about the

¹²⁰ *Id.*

¹²¹ *See id.*

¹²² *See supra* text at note 53.

interaction between the steward's property rights in the land and his obligations that derive from his role as steward. Once this is understood, it is possible to examine, first, the content of the obligation in more detail, and then second, the rights required in order to be a steward.

Lucy and Mitchell argue that the steward is primarily a duty-bearer.¹²³ Although he holds rights, the *raison d'être* of the steward is to ensure that the property is maintained for the benefit of future generations (on their conception).¹²⁴ The effect that this would have on our analysis is that we would have to conclude that the steward's primary role was as "guardian" of his land. A distinction is drawn with the *usufructuary* for whom the *raison d'être* of his rights in the land is to benefit himself—to use the land and take the fruits—not to benefit future owners.¹²⁵ As a result, although he must maintain the land and ensure that the overall resource level on the land is not diminished over the duration of his rights, the essence of the *usufructuary* is that he is a rights-holder.¹²⁶

Lucy and Mitchell argue that a steward, on the other hand, is only given rights as a means to allow him to perform his duties as a steward.¹²⁷ Whilst it is true that the steward is obliged, it is impossible to get away from the fact that he must have rights in the land concerned, and, most importantly, that we may only conclude that it is just to make him responsible for managing the land *because* he has rights to enjoy that land (as we explain below).

We should not conclude, however, that as a result of being the person entitled to use and manage the land, the role of the steward is primarily as someone who holds rights over land. He is more than this precisely because he is the steward. The dichotomy between rights-holder and duty-bearer is circular: it is simply two sides of the same coin. The rights that the steward has over land, to enjoy it himself, and to make use of the land in such a way that manages it for the benefit of the present and the future, are critical to his ability to be steward.¹²⁸ It is for this reason that the test for who is the steward below relies on having rights over land.¹²⁹ To be a steward one must have both duties and rights.¹³⁰

¹²³ Lucy & Mitchell, *supra* note 3, at 584.

¹²⁴ Caldwell, *supra* note 3, at 766.

¹²⁵ DIGEST OF JUSTINIAN, D.7.1.1 (Paul), D.7.1.6 (Gaius).

¹²⁶ *See id.* at 228.

¹²⁷ Lucy & Mitchell, *supra* note 3, at 584.

¹²⁸ *Id.*

¹²⁹ *See infra* Section II.B.3.

¹³⁰ *See* Brown Weiss, *supra* note 3, at 499; Lucy & Mitchell, *supra* note 3, at 584.

There is then another way of characterizing the essence of the steward. The steward is the person most entitled to manage the land in question: he is the decision-maker in relation to that land.¹³¹ Having the decision-maker over the future of land burdened with obligations when making their decisions is a hallmark of a system based on stewardship. This is not often acknowledged in the literature, but it is argued here that this role is what is most crucial about the steward. The steward's rights in relation to the land can be exercised by him, but must be exercised in such a way as to comply with his obligation to manage the land for the benefit of future generations, as well as for his own benefit and for the benefit of other members of the current generation.¹³²

It is actually this aspect of stewardship which causes some from an ecocentric perspective to reject stewardship since they argue that it implies that man has dominion over nature if he is entitled to take decisions over its future. Palmer for example argues that stewardship symbolizes despotism, and this is precisely because the steward has such a central role as decision-maker.¹³³ Attfield rejects this argument, stating that a steward, whilst being a decision-maker, is subordinate in many ways to those whose interests he is charged with serving, in the manner of a trustee and his beneficiary.¹³⁴ It is this subordination that leads to the answerability for the steward.¹³⁵ This complex relationship of decision-maker and beneficiary, and of answerability, is a more accurate representation of the role of the steward than one which focuses on dominion.

The role assigned to the steward as individual representative of present and future generations is a complex and, at times, apparently a contradictory one. He is not simply a servant of future generations; he is also at times their mouthpiece in the decision—a decision for which he will be answerable.¹³⁶ He is the initial arbiter of what happens to the land at the present time, but he is also the arbiter of what characterizes the *interests* of the future generations. Is it possible to be both? It is submitted that it is possible to in this sense represent the future generations, because he is part of the intergenerational community discussed here. If we take the idea that as a result of his role as a member of the

¹³¹ Terry W. Frazier, *The Green Alternative to Classical Liberal Property Theory*, 20 VT. L. REV. 299, 320–21 (1995).

¹³² Caldwell, *supra* note 3, at 766.

¹³³ Clare Palmer, *Stewardship: A Case Study in Environmental Ethics*, in *THE EARTH BENEATH* (Ian Ball et al., 1992), discussed in ATTFIELD, *supra* note 14, at 48.

¹³⁴ ATTFIELD, *supra* note 14, at 194–95.

¹³⁵ *Id.* at 49.

¹³⁶ *Id.* at 47.

land community he is able to assess what might be in the interests of future generations, it makes perfect sense for him to then make his decision on this basis. This decision will of course be potentially subject to review and in this review the state may act as proxy to represent the interests of future generations—but he is able to both decide their fate and decide the interests of the future generations with which his stewardship obligation is concerned.

It is this central role in the fate of the land which is key to the notion of the steward. In this sense the steward is neither primarily a rights-holder nor a duty-bearer, but he is, by virtue of his rights and the obligations attached to the exercise of those rights, a decision-maker. Demsetz describes the position of private property where the owner of the land acts as a broker taking into account competing claims of the present and the future.¹³⁷ He argues that: “future generations might desire to pay present generations enough to change the present intensity of land usage. But they have no living agent to place their claims on the market.”¹³⁸

The steward, it is submitted, must act as this living agent and act on the basis of uncertain or unknowable information. This fact should color every aspect of a system of stewardship. The position of the steward is summarized by Attfield: stewards can be curators, trustees, guardians and wardens.¹³⁹ Each of these persons is a decision-maker.

In the steward’s role as decision-maker, however, there is no doubt that in order for stewardship to function as a legal principle the steward must be accountable. This accountability can be explained in a number of ways. The first explanation arises from the fact that the legal principle is grounded in morality.¹⁴⁰ It was argued above that the moral principle entails sanction for breach.¹⁴¹ The legal principle would also contain such a sanction. Unlike with the moral principle, however, the nature of legal norms is such that the sanction would not be imposed by the steward upon himself, or even by a deity, but by the community of which he forms part, i.e., the state. This sanction would of course not always be applied, but the possibility of such a sanction is central to the concept of stewardship as a legal principle.

It seems then that whilst the stewardship principle will affect decision-making, it does not in itself always tell us what the correct

¹³⁷ Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 355 (1967).

¹³⁸ *Id.*

¹³⁹ ATTFIELD, *supra* note 14, at 61.

¹⁴⁰ *Id.* at 47.

¹⁴¹ *See supra* Section I.D.

decision will be. To use a hypothetical example from a situation of contaminated land, the steward may have to decide between a costly but speedy clean up, and a cheaper but slower method. By employing either of these methods he will manage the state of the land for the benefit of future generations. This is exactly what he intends to do. Would a system of stewardship dictate between these two options? Stewardship would not tell us which option was better in and of itself. The justifications behind stewardship might help, but this means considering more than simply the obligation to make decisions to manage land in accordance with the interests of the future. The reason for this is that simply stating that we should act for the benefit of the future does not tell us to what extent the needs of the present generation should be ignored where two possible routes will lead to the same benefit for the future.

As a result it is possible to argue that stewardship is linked to a more decentralized mode of decision-making.¹⁴² As Attfield highlights, "depicting humanity as in a position of trust with respect to nature does not involve understanding society or government as either undemocratic or unrepresentative; if anything it commends democratic debate, so that the members of society can jointly discover or decide how to exercise their role."¹⁴³

The adoption of the attitude of stewardship as a legal principle has benefits beyond the effects that it has in improving the state of land for the future, or maintaining a healthy ecosystem, etc. Adopting stewardship as a legal principle could potentially change the method of decision-making within a local or national area.

2. What Does the Stewardship Obligation Entail?

In making decisions about the future of land, then, the steward is burdened with obligations, and will be accountable for any breach of these obligations, so the final part of the picture of stewardship is what obligations bind this decision-making power. He has an obligation to consider and take into account interests of future generations. We must ask whether this obligation to take account of future generations prevents the steward from taking account of the interests of current generations. It is submitted that it does not.¹⁴⁴ Caldwell in his assessment of the meaning of stewardship includes an obligation to take into account the

¹⁴² The Duthchas Project, *Act Local: Community Planning for Sustainable Development*, THE DUTHCHAS HANDBOOK, June 2001.

¹⁴³ ATTFIELD, *supra* note 14, at 48–49.

¹⁴⁴ Caldwell, *supra* note 3, at 766.

needs of present generations when making decisions about the land.¹⁴⁵ However, the two needs may conflict. How should this conflict be resolved? This is especially relevant in relation to land use since the needs of the present generation can clearly be detrimental to the future, without either use being irresponsible.

The answer to this question lies not in a dichotomy between the present and the future, but rather in the types of current and future interests that should be taken into account. Stewardship as a legal principle does not allow all future interests to be sacrificed for the benefit of the present, but it does not mean that the present interests cannot also be served.¹⁴⁶ Since the steward is decision-maker, he must be equipped with criteria to determine whose interests prevail where the interests of the present generation come into conflict with the potential interests of future generations. It is suggested that the source of this solution lies in the moral justifications for stewardship, in questions of intergenerational justice and ecological ethics, and in the legal justification. These both aim at balance: balance between the needs of the generations, and balance within the biosphere. The tools to assist the steward are to be found in these considerations, and as such economic advantage in the short term to the few should be discounted, but gradual rather than sudden improvement can be encouraged within stewardship since this achieves the balance that justice and ecological principles demand.

The interests of future generations can therefore be balanced with the needs of the current generations, and given a lesser priority, where it is possible to conclude that the need of the current generation is greater and more pressing. The stewardship duty, as a result of its foundation in ethics, is above all else about finding a balance between what is currently needed and what will be needed in the future. It is not about excluding one interest.

3. Who Is the Steward?

As far as the identity of the steward is concerned, it is suggested that it need not be the “absolute owner” of the property in the sense of an unburdened freehold owner (see, e.g., the Whangangui river provisions).¹⁴⁷ At the very least, it will be very rare that a freehold owner of a parcel of land finds his land entirely unencumbered. This is not a barrier to the

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See *supra* Section II.A.2.

imposition of stewardship obligations. What this does mean, however, is that the "owner" in this broader sense, i.e., someone with sufficient rights to act as a steward generally, may not be able to take a particular decision that he believes is necessary to protect the interests of a future generation. One example might be that he is not entitled to allow some trees to grow since his land is burdened by a neighbor's right to light. In this case, the owner would not have the right to grow trees, and there is no right to be burdened by his stewardship obligation. The owner cannot decide to grow trees, and so there is no decision-making process into which considerations of the interests of future generations can be fed. Sound environmental policy may suggest that the rules regarding the rights to light in this example be changed, but that stewardship duties do not themselves achieve this.

This does not mean that no one is capable of being a steward, however, simply because their ownership rights are restricted in other ways. The person capable of being steward will simply be the person who is best placed to make decisions about the future of the property, i.e., the person who is *capable* of being steward.

Often it will not even be the person that we might commonly call "the owner" of the land who is best placed to make the decisions over the land. In relation to long leases, as is discussed below,¹⁴⁸ if the freeholder can make decisions he may fall under a stewardship obligation, but, depending on the terms of the lease, he may not have any such power. The long leaseholder however is unlikely to have freedom to do whatever he wishes with the land. The incidents of ownership are divided. The position where there are multiple owners is discussed below.¹⁴⁹ The steward will, however, probably need to have a certain minimum threshold "quota" of rights before we can truly conclude that he is the steward. These rights would include, for example, the rights to decide the use to which the land is put; whether buildings can be erected on the site; whether the site can be used for excavation; if there is to be demolition of buildings; and the right to make decisions about the bringing in of wastes or other toxic materials onto the site that may cause harm to nature or lead to contamination on the site, amongst others.

Furthermore, Sheard argues that the content of a property right bounded by the principles of stewardship will vary according to the type of property we are dealing with since the manner and needs for management of it for the preservation of future generations will depend on what

¹⁴⁸ See *infra* Section II.B.4.

¹⁴⁹ *Id.*

the actual thing is.¹⁵⁰ As a result it is not possible to outline definitively in advance what rights are needed, hence the circular nature of the test employed. It is not argued that the test is necessarily helpful in practical terms, but it is suggested that it does clarify what is crucial about the person whom we are to label steward. It is not the person who would be most able to make the relevant decision as a result of his knowledge of ecological science, or the person with the most resources to put into managing land; it is the person who is best placed to manage the land given the rights that they have. It is for this reason that stewardship attaches to the owner of rights in land.

Finally, we must ask what impact on this analysis is made by the fact of rights of alienation. The owner of land can sell his land. Is this right bound by the duty of stewardship, or does it fall without the scope of the stewardship concept? It is suggested here that since it falls under the decision-making powers in relation to the land, the landowner will be bound to consider the needs of future generations and his obligation to manage the land to that effect when deciding to alienate his land. He could therefore be in breach of his stewardship obligations by transferring his land to another whom he knows will not act responsibly in relation to their own management of the land. It may also be that the person to whom the land is transferred does not comply with their stewardship obligations without the original owner being in breach. All will depend on the facts, but the existence of a right of alienation does not prevent the owner of land from being considered its steward. He is simply able to resign from this post. Stewardship then is intimately connected with ownership and the rights associated with that ownership.

4. Multiple Owners

What happens, however, where different persons are authorized to make these decisions? There is an essential distinction in cases like this between those who are in general entitled to make decisions by virtue of their own rights in the land in question (such as the grant of a lease), and those who have been authorized by another to make decisions but do not have rights in the land. The latter category is the idea of the land agent in the sense used in the 19th century.¹⁵¹ This person is not the steward in the sense used here. The key to this lies in the fact that the authorization

¹⁵⁰ Murray Sheard, *Sustainability and Property Rights in Environmental Resources*, 29 ENVTL. ETHICS 390, 392, 396 (2002).

¹⁵¹ See *supra* Section II.A.1.

for such a person to make decisions springs from somewhere, and in most cases, this will be from the freehold or long leasehold owner. The freeholder or leaseholder have chosen to delegate their decision-making, but have not limited their own property rights in the process. As a result they would remain a steward. The land agent is simply an extension of the landowner himself. Where, however, the landowner grants out some of their own property rights, as with the grant of a lease, they may surrender enough of their own decision-making powers so as to no longer be the person most able to make those decisions necessary to be a steward.

It is in theory possible, however, that two or more people may be the steward of the property. There are two situations where this might happen. First, there may be joint tenants of a long lease, or holders of the freehold as a joint tenancy.¹⁵² These people hold under the same title and as a result have identical rights over the property.¹⁵³ Where there was more than one person with the same title, the stewardship would then operate in the same manner as a trust since there can of course be more than one trustee, but they hold rights in the property identical to all other trustees.¹⁵⁴ It is only at this point that factual possession will become relevant since where there are multiple owners the person in possession may in fact be best placed to decide the future of the property. This does not affect the character of the steward, simply their knowledge and practical ability. This position in terms of the stewardship obligation is relatively straightforward. The parties are owners of a single, unified estate, and are therefore jointly obliged to manage their land in such a way as to advance the interests of future generations.

Secondly, there may also be two or more "owners" of the land, for example under the relationship of landlord and tenant.¹⁵⁵ In these cases the individuals have different rights and decision-making powers.¹⁵⁶ It is argued here that although in some of these cases there will be more than one steward (in the case of certain landlord and tenant relationships) this will not always be the case.

There are, of course, some situations where the rights of the tenant under the particular lease arrangement will be such that it is not possible to conclude that they have any stewardship obligations. In short residential

¹⁵² 2 TIFFANY REAL PROPERTY § 418 (3d ed.).

¹⁵³ *Id.*

¹⁵⁴ ENCLAVEA ET AL., AM. JUR. § 321 (2d ed.).

¹⁵⁵ SCHERER & FISCHER, RESIDENTIAL LANDLORD TENANT LAW IN N.Y. § 2.1 (the landlord, who owns the land, grants rights of exclusive possession, akin to temporary ownership, to the tenants).

¹⁵⁶ *Id.*

leases, although the tenant will have an estate in the land, this estate will not have been granted with the power to make any decisions over the state of the land.¹⁵⁷ In this case, although it would be possible to conclude that there is a stewardship obligation in one sense, since the tenant is an owner of an estate in land, the obligations would not “bite” as there would be no rights to decision-making that would be limited by the stewardship obligation. In longer leases, and in leases where more extensive decision-making powers are granted, the stewardship obligation will bind the tenant to the extent of his estate. As a result, in a lease of ten years in relation to a commercial building, for example, the company tenant would be obliged to manage their use of the building in such a way as to ensure that they were acting for the benefit of future generations. The extent of the obligation would relate to the extent of the rights.

There is a problem with this analysis in that leasehold estates are, by their very nature, limited as to time, and the right over the land is limited accordingly. The freehold interest is, by contrast, theoretically indefinite. Does it matter that the rights of the leaseholder are limited in time and that the leasehold estate can disappear? It is submitted here that because stewardship can be justified by wide considerations of justice not related to the relationship between successive land owners *per se* as explained above, it does not depend on the idea of the chain of ownership. The steward is not just managing his land for the benefit of future *owners* but for the benefit of future generations in general.

Similarly, it could be argued that the very philosophy of the lease, as ownership limited in time, is contrary to the idea that the estate should be managed for the benefit of the future. It might be that whilst the freeholder has responsibilities to the future, one of the great advantages of being a leaseholder can be to remove the responsibility to maintain the property. Instead, the property can be used as desired, within the terms of the lease, with the freeholder left with any remaining responsibilities to ensure that the land is managed responsibly, etc. In short, it could be argued that the lease arrangement is the entire extent of the obligations that will fall on the leaseholder.

This cannot be true. A leaseholder, as occupier of the land, can fall under numerous duties that are not outlined in the lease document, e.g., in relation to nuisance.¹⁵⁸ The lease does not outline the total extent of the duties that fall on a leaseholder.¹⁵⁹ Thus, if the leaseholder has rights

¹⁵⁷ *Id.*

¹⁵⁸ *See* AM. JUR. LEGAL FORMS § 80:28 (2d ed.).

¹⁵⁹ *See id.*

which allow him to make decisions over the future of a particular area of land, then he will fall under stewardship obligations when making such decisions. He may not have such rights, but if he does have such rights, the fact that he is a leaseholder as opposed to a freehold owner should make no difference to the conclusion that he falls under an obligation to manage the land for the benefit of future generations.

This analysis can be demonstrated by an example. The provisions of a lease stipulate that whilst the lessee is able to develop the property, he must obtain the consent of the freeholder. How would the stewardship obligations operate in this situation? It is suggested that the correct way to analyze this is as the lessee having the primary decision-making right but this right is limited by his obligations to manage the land for the benefit of the future. So, he would only be able to propose a development where that development met with his stewardship obligations. His rights are limited both by the obligations contained in the lease and the obligations that are imposed on him by the principle of stewardship. The freeholder does not have the right to build on the land but he does also have an important decision-making right and he too must act in such a way as to comply with his stewardship obligations.

C. *Justifications of the Legal Duty of Stewardship*

We come now to the heart of the matter. The moral principle of stewardship is susceptible to a wide variety of justifications, depending upon one's world view. So too, one may argue, is the legal principle depending on how one conceives of legitimate legal action. However, almost all explanations for the normative power of legal obligations allow for the law to step in to prevent harm to others. This Section explores whether the legal principle of stewardship can be justified on the basis that the obligations thus imposed prevent harm to others. Intuitively, we may say that much environmental damage does indeed cause such harm, but the problem with explaining stewardship on this basis is that the stewardship duty may "bite" where only the future owners or users of the relevant land would be affected, and, by definition, such persons do not exist at the time. How does this interact with the principle of legislation on the basis of preventing harm?

The justification advanced here is that the relevant harm is harm to the "land community"—the collective of those who depend upon the land for their human flourishing, for whom the land represents an investment in the form of capital, labor, emotion, etc. The steward's decision-making is restricted and guided by the obligations that fall on him, and

his rights facilitate it.¹⁶⁰ He is the primary decision-maker in reference to the land and becomes part of the land community¹⁶¹ as a result of these obligations and duties because his future as a human actor depends, in part, on the decisions which he makes in relation to that land. This means that he becomes part of the community of landowners who as a whole are obliged to act in furtherance of their stewardship obligations. By his membership in that community he also becomes a beneficiary of the ensuing approach to the management of land. Attfield outlines how a stewardship obligation “owed” for future generations must operate in practice and it is clear that in his model the “proxies” (i.e., those who become the individual representatives of future generations—in our model, the owner of the land and the steward) would become primary decision-makers answerable to “as representative a body as could be devised, granted the nature of the interests in question.”¹⁶² Thus not only is the steward a decision-maker, he is a decision-maker who will be accountable to the state under a legal system that is based on stewardship as part of the land community. His accountability is a hallmark of stewardship, and the existence of the ensuing land community explains why the state ought to be the body that carries out this task of calling stewards to account.

1. Limitations on Rights and the Harm Principle

The starting point for this discussion is the harm principle. The harm principle, as originally articulated by Mill, is the idea that the state should not use legal means to restrict an individual’s liberty unless acting in order to prevent harm.¹⁶³ Under Mill’s formulation of the principle the relevant harm is harm to others.¹⁶⁴ Some have argued that harm to the actor himself can be included within the scope of the harm principle such that the principle can justify paternalism.¹⁶⁵ The principle cannot, however, justify legal moralism whereby the only justification advanced for regulation is that it ensures that the subjects of the rule are acting in accordance with morality.¹⁶⁶ In this way, justifications for the translation

¹⁶⁰ See Caldwell, *supra* note 3, at 766.

¹⁶¹ Frazier, *supra* note 131, at 320.

¹⁶² ATTFIELD, *supra* note 14, at 195.

¹⁶³ JOHN STUART MILL, UTILITARIANISM, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 73 (Dent ed., 1993).

¹⁶⁴ *Id.*

¹⁶⁵ John Stanton-Ife, *The Limits of Law*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 27, 2006), <http://plato.stanford.edu/entries/law-limits/#cand> [<https://perma.cc/3ZZF-ZAVX>].

¹⁶⁶ *Id.*

of stewardship from an ethical principle into a legal one must go beyond the justifications for the ethical principle and must instead explain why the state is justified in enforcing the ensuing duties.

The harm principle, and its apparent focus on individualism and liberty (and the consequential problems with justifying state limits on liberty) has been regularly the subject of criticism. However, recent defenses of the harm principle have been made by Feinberg,¹⁶⁷ and along very different lines, by Raz.¹⁶⁸ Feinberg's formulation here is particularly useful:

It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is probably no other means that it equally effective at no greater cost to other values.¹⁶⁹

It not only defines the harm principle, but also situates the harm principle within a general framework of state action. That is, as we explained above, the harm principle on this formulation is not necessarily the *only* form of justification which can be made for state action, but rather that it is a particularly strong justification. Furthermore, Feinberg makes clear that criminal sanctions (as present in many environmental protection regimes) especially require this type of justification: "the harm and offence principles . . . between them exhaust the class of good reasons for criminal prohibitions."¹⁷⁰

It is of course very difficult (if not impossible) to articulate a precise definition of harm that will always give a "bright line"¹⁷¹ between justified and unjustified regulation. Indeed, such a bright line is not really needed for the harm principle to act as a useful guide. Nonetheless, Feinberg does attempt a definition of harm¹⁷² which has been rearticulated in a useful way by Warner:

[W]e can restate the harm principle as follows: it is always a good reason in support of penal legislation that the

¹⁶⁷ JOEL FEINBERG, HARM TO OTHERS 25–26 (1984).

¹⁶⁸ JOSEPH RAZ, THE MORALITY OF FREEDOM 412–13 (1986).

¹⁶⁹ FEINBERG, *supra* note 167, at 26.

¹⁷⁰ *Id.*

¹⁷¹ Richard Warner, *Liberalism and the Criminal Law*, 1 S. CAL. INTERDISC. L.J. 39, 41 (1992).

¹⁷² FEINBERG, *supra* note 167, at 105–06.

legislation would probably be effective in preventing the setbacks to interest—where: (1) there is no justification of [sic] excuse for the setback; (2) the setback violates a right of B's (that is, there is a certain sort of justification for not setting back another's interest in that way); and (3) there is probably no other means that is equally effective at no greater cost to other values.¹⁷³

The key to this approach to harm is in recognizing that harm contains within it notions of justification and value.¹⁷⁴ It ought not to be considered an objective question. Furthermore, the notion of harm relies on the idea of a setback to interests. A legal system would not be justified in intervening to prevent the removal of options for an individual which are neither of interest to him, nor valuable as morally worthy options.

The acceptance that the harm principle depends upon value judgments explains why the criticisms of the harm principle advanced by Levine¹⁷⁵ and Aagaard¹⁷⁶ do not pose a problem to the usefulness of the principle as a potential justification for the imposition of stewardship duties. They argue that we cannot define harm because harm depends on what people perceive to be harmful to their interests according to their own personal perspective.¹⁷⁷ However, this definition fails to grapple with what interests really means in this context, as we explain below. Furthermore, we can use the subjectivity of the harm principle to our advantage. If the notion is context-dependent, then it means we can fine-tune it to the particular context with which we are concerned—here, land use and environmental degradation—thus allowing us to tailor the justification in the harm principle to the specific case at hand.

2. Environmental Harms

To substantiate this further, it is essential to examine the nature of environmental harm as we can begin to see here how the nature of such harms justifies the imposition of stewardship duties against the

¹⁷³ Warner, *supra* note 171, at 45.

¹⁷⁴ Todd S. Aagaard, *Environmental Harms, Use Conflicts, and Neutral Baseline in Environmental Law*, 60 DUKE L.J. 1505, 1507 (2011).

¹⁷⁵ ANDREW LEVINE, ENGAGING POLITICAL PHILOSOPHY: FROM HOBBS TO RAWLS 161 (2002). See also Panos Mavrokonstantis, *A Critical Evaluation of Mill's Proposed Limits on Legitimate Interference with the Individual* 8 L. & SOC'Y J. 87, 87 (2009).

¹⁷⁶ Aagaard, *supra* note 174.

¹⁷⁷ *Id.*

background of the “land community” explained below. There is no denying that environmental harms are complex. They are (especially) collective, disparate, cumulative, and uncertain. When understood simply as harm to the environment, Aagaard is perfectly correct that harm is useless in assisting our understanding in what is and what is not justified legal intervention.¹⁷⁸ The challenge, as Lin discusses, is that the concept of harm “has expanded beyond physical and economic injuries”¹⁷⁹ and this is certainly true. However, Lin seems to assume that we should make our concept of harm cover what we want to regulate, rather than the other way around.¹⁸⁰ Lin concludes that “[e]nvironmental problems, however, often cause harm that is latent, less direct, and less obvious.”¹⁸¹ Yet it could be argued that environmental damage is not *harm* within the scope of the harm principle at all. The crucial step to make, however, is to conclude that although harm to the environment understood from the ecological perspective is *not* harm under the harm principle (because it does not in itself constitute a set back to an individual’s interests without more), the effects of environmental problems on the community of land owners *is* a recognizable form of harm that the harm principle can cover. In this sense, it is the very collectivity of environmental harm which becomes the linchpin for justifying restrictions on liberty on an individual in terms of the ways in which they must make decisions in relation to their land.

The next step is to ascertain how, in tending to address the *risk* of harm, rather than harm itself,¹⁸² risk-based regulation can be interpreted in line with the understanding of harm advanced here. Because “[r]isk-based regulation . . . is premised on collective harms and operates to prevent harm before it occurs,”¹⁸³ it is suggested that we must draw together this idea of collectivity and uncertain harm to the environment and develop a coherent concept of harm that is sensitive to and reflective of the specific nature of environmental problems.¹⁸⁴ We do this by relying not on the idea of harm to the environment, but harm to individuals. Lin’s approach therefore is the starting point, but it is certainly not the end.

When one begins to unpack the concept of harm in this context, a pattern begins to emerge. There is a difference between damage to the

¹⁷⁸ *Id.*

¹⁷⁹ Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, WIS. L. REV. 897, 905 (2006).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 907–08.

¹⁸² *Id.* at 910.

¹⁸³ *See id.* at 911.

¹⁸⁴ *Id.* at 907–08.

environment itself and harm to a person's interests. One's interests are not simply one's rights, but also one's liberties. Not only does one have these individual interests, but one also has a generalized interest in the upholding of the system that gives effect to these rights, interests, liberties, etc. So, it is against A's interests for B's property rights to be taken from him without due process and for B to have no recourse in this situation because it weakens A's faith in the system protecting his own rights. This understanding, as will be seen, allows us to get to the bottom of the problem of collectivity, but it also provides much-needed stable normative content to the harm principle in the context of environmental degradation.

3. The Land Community

The first step is to take the concept of harm beyond environmental harm and tie it instead to the interests of people. This is not to say that morally we cannot aim to protect the environment for its own sake. It is saying that when seeking to explain stewardship of land on the basis of the *harm principle*, we ought to look to the interests of landowners and users to help stabilize the definitions used. If this is accepted it does not mean that we need to lessen the stringency of our environmental law, rather that we must look at the meaning of harm in the context of individuals to determine what it is about environmental degradation that can cause harm to individual interests when seeking to give content to the stewardship obligations which inhere in the concept of property under the conception outlined here.

In order to understand how this works in practice we must look at the concept of the land community. This notion relies heavily on Honoré's explanation of group obligations.¹⁸⁵ The land community, as defined here, is the collective both of rights-holders in land and of those whose flourishing depends upon the land in the vicinity (in this sense, they have a direct and identifiable interest in the land).¹⁸⁶ The land community, as a group, in order to maintain the group, has to ensure that the obligations and rights that make up the rules of that group are enforced. If these rules are not enforced then the group will fall apart.¹⁸⁷ Thus the group is justified in obligating its members to keep the rules of that group. This is concerned with the coordination rules of the group. For example, the group is justified in using coercion to ensure that the land

¹⁸⁵ HONORÉ, *supra* note 73, at 33.

¹⁸⁶ *Id.*

¹⁸⁷ *See id.*

boundaries in place in that group are maintained because this is a prerequisite for membership of the group.

Thus, we can summarize the justification for the imposition of stewardship through law as follows:

- (a) The community of landowners and users depends on the mutual reinforcement of the integrity of rights in land for its existence. The members of the group have an interest in the maintenance of that group.
- (b) Thus, any action by a member of the community that threatens the integrity of those rights is detrimental to the existence of the group.
- (c) The integrity of those rights depends not only on the fact of ownership, but also on the quality of that ownership and on the maintenance of land which does not threaten the health and safety of those who hold rights in that land. Similarly, land which threatens neighboring landowners land is detrimental to the integrity of those rights.
- (d) Any action, then, which undermines the quality of land, even if only to person A's land, poses a setback to B's interests, not because of the environmental harm done *per se* but because it makes it more likely that C, D, E, and F may also undermine the quality of their land such that B's right in his own land is under threat from the misuse of neighboring land.
- (e) It is therefore harmful for B through his justified interest in being a member of a thriving community of landowners and users for A to mistreat A's own land where that mistreatment threatens the overall integrity of the rights that B possesses. This threat comes from the generalized threat posed to the group and B has a continuing interest in the flourishing of the group.

Taken together, these steps explain how the constraining of rights in land can be justified on the basis of preventing harm. Before we move on to consider what the consequences of this justification are for the shape of the ensuing obligation and for stewardship in general, it is important to consider two aspects of this justification: First, with its roots in liberalism (in its traditional sense), does this justification, in taking such an

anthropocentric approach, undermine the ethical duties of the steward and the wider environmental benefits? Second, is this justification exclusionary in the sense that it explicitly cannot take account of the interests of those who are unable to use or have rights in the relevant land? In this sense, the justification outlined here could be said to be privileging those who have rights in land, to the detriment of those who are already disadvantaged by their disenfranchisement from the land community.

Anthropocentrism and the Environment

The justification given here is explicitly, and indeed necessarily, anthropocentric. The harm principle by its very nature demands anthropocentrism. The result of this is that even in imposing duties to maintain the natural environment, this justification still puts the interests of human beings at the core of the duty, thus making the environmental protection susceptible to limitation in the face of supervening or superior interests of persons. Anthropocentric-focused protection of the environment thus risks being no protection of the environment all.

On one level, this criticism is entirely correct. However, to explain why this does not undermine the project undertaken here, at no point is the claim made here that this is the only possible justification for legally imposed stewardship duties. Rather, it is a particularly strong justification, and, in Feinberg's words, an almost irrefutable justification.¹⁸⁸ From a deep green or ecocentric perspective, therefore, it is possible to make a justification for stewardship which does not depend upon identifying a harm to human interests, but the justification presented here cannot be denied on the basis of the prevention of harm, meaning that for those who advance liberty in relation to property in the face of environmental degradation, this explanation and justification of stewardship acts as a counter-argument to those who would argue that limitation on property rights in the way explained here cannot be justified.

Exclusionary Effect

The second criticism is that in taking a traditionally liberal perspective, this justification inherently prioritizes the interests of those who already have an existing stake in the land in question thanks to the their social and legal status in other respects. For the displaced, this

¹⁸⁸ FEINBERG, *supra* note 167.

justification gives them nothing, and in this sense, the imposition of stewardship duties justified on the basis of the maintenance of “the land-owning class” is itself propping up the private property system which has caused so much trouble in the first place. Indeed, this criticism has been made forcefully in respect of some articulations of both stewardship and sustainability more generally, so that the principles ensure protection of the privileged in the present and the future, leaving the poor and dispossessed to remain victims of infringements of environmental justice.¹⁸⁹

Again, this is a justified criticism. However, we ought to acknowledge that the justification given here allows for the imposition of stewardship duties *even with the contours of private property remaining in place*. Without seeking to explore this in detail, it could even be said that the imposition of stewardship duties as explained here could be introduced under the takings clause without engaging constitutional protections precisely because these limitations are articulated as existing in order to prevent harm to the land owning and using community, and in this sense perform a similar role to the rules of nuisance.

D. Consequences

The final issue to be considered is the consequences of the justification outlined above for the nature and content of the stewardship obligation. We consider two here—the fact that the justification above means that in a sense, stewardship inheres in property; and that the legal principle justified on the basis of harm entails accountability in law.

1. Stewardship Inhering in Property

Sheard highlights that “[s]uch stewardship rights are restricted property rights offering rights of use over land and its fruits but no right to damage it or to modify its nature in ways that put the basic interests of others, both current and future, at risk.”¹⁹⁰

The other way of phrasing this is to say that stewardship obligations restrict property rights. Is such a notion inconsistent with our understanding of private property, or is it necessary to it as suggested above? Indeed, is the concept of private property so “endemically problematic”¹⁹¹ that it should be abandoned altogether, with stewardship seen not as

¹⁸⁹ Barrett & Grizzle, *supra* note 7, at 26.

¹⁹⁰ Sheard, *supra* note 150, at 392.

¹⁹¹ Lucy & Mitchell, *supra* note 3, at 566.

obligations “bolted onto” the private property paradigm, but rather as a radical alternative to it?¹⁹²

Stewardship property is often contrasted with private property and there is a long-running dispute as to whether private property as a notion is compatible with duties of stewardship. The essential point that advocates of this argument make is that once an owner of land is restricted in the content of his rights to the extent that stewardship obligations demand, he can no longer truly be considered as owner of the land.¹⁹³ It is not simply that his ownership has been curtailed, but that it is meaningless to say that he is owner at all. Only an outline of this debate will be given here for the purposes of highlighting certain aspects of stewardship. It is argued that there is no necessary conflict between ownership in private and a system that subjects private owners to certain duties based on the legal and ethical principle of stewardship. Furthermore, when we examine those claims that private property and stewardship should be seen as alternative paradigms, very often this conflict is highlighted because stewardship would be “better” from an ecological or justice perspective—it suits a certain policy goal.¹⁹⁴ But private property is what we have, and any movement from that position to encompass a generalized duty of stewardship would need justification beyond its simply achieving certain ends.

A starting point is in Waldron’s definition of private property: “in a system of private property, the rules governing access to and control of material resources are organized around the idea that resources are on the whole separate objects each assigned and therefore belonging to some particular individual.”¹⁹⁵

A similar definition is used by Demsetz: “private ownership implies that the community recognizes the right of the owner to exclude others from exercising the owner’s private rights.”¹⁹⁶

Using this definition Lucy and Mitchell have argued that “the existence of a duty of stewardship cannot be compatible with a claim to have private property in land.”¹⁹⁷

This argument does not stand up to scrutiny, however. Duties of stewardship do not alter the organization of access to and control of land.

¹⁹² *Id.*

¹⁹³ *Id.* at 570.

¹⁹⁴ *E.g.*, Caldwell, *supra* note 3, at 766.

¹⁹⁵ Jeremy Waldron, *What is Private Property?*, 5 OXFORD J. OF LEGAL STUD. 313, 327 (1985).

¹⁹⁶ Demsetz, *supra* note 137, at 354.

¹⁹⁷ Lucy & Mitchell, *supra* note 3, at 586.

The power to make decisions of access and control still lies with the owner of the land. The difference that the stewardship duties make is that the steward can be called to account for these decisions and that certain factors must be taken into account when making such decisions. The decisions can be reviewed as to whether they comply with his obligation to maintain the property for the benefit of the future. His decision-making power remains; it is simply that this decision-making power is constrained by the fact that private property is a *network*, and that network can demand certain action in order to maintain the existence of the network, even if it means that one individual's liberty in relation to their land is not optimized.

For the same reason, Gray's argument—that where there is legislation which imposes restriction in the interests of public protection, the property has thereby become quasi-public and can no longer be considered as private property¹⁹⁸—cannot be sustained in relation to restrictions which arise from the very nature of the land community. He argues that in such cases “[t]he state itself becomes a vital factor in the ‘property’ equation: all ‘property’ has a public law character. Private ‘property’ is never truly private.”¹⁹⁹ Certainly there is some scope within Waldron's text for concluding that stewardship property is not private property when he states: “[the owner's] decision is to be upheld by society as final”²⁰⁰ in a system of private property. Arguably the steward does not have the final decision since his decision-making can be subject to review.

There is no difference between this and normal property rules, however, and it is suggested that Waldron here is not excluding the possibility of review of decision-making, which, as we have highlighted, is an essential part of a system of stewardship. He is simply highlighting that the decision of the landowner is not to be taken as simply part of the equation of determining what is to happen to his land. There is a difference between the possibility of reviewing a decision and treating that decision as only one stage in a multi-stage process. It is only the latter which is incompatible with Waldron's definition.

The power to review decisions in the courts at the suit of an organ of the state does not mean that the property is not held as private property and so this possibility in a regime based on stewardship does not mean that the property is not held in private. The question is not whether the decision is subject to review, but whether the owner of the land has a right

¹⁹⁸ Kevin J. Gray, *Property in Thin Air*, 50 CAMBRIDGE L. J. 252 (1991).

¹⁹⁹ *Id.* at 304.

²⁰⁰ Waldron, *supra* note 195, at 327.

to decide at all. In cases of stewardship the very essence of the principle is that he has a right to decide and a duty to decide in a certain fashion.

It is clear, then, as Karp highlights, that “[s]tewardship can be imposed on private property ownership whilst preserving the important characteristics of private ownership, such as shared expectations, stability, fairness and liberty,”²⁰¹ and it has been argued here, with decision-making power vesting with the owner. It is crucial to recognize that the notion of stewardship relates to rights and duties—the content of the “bundle of rights”²⁰² that makes up ownership. It tells us nothing about whether or not private ownership should be permitted. Stewardship property would not fall under Waldron’s category of “collective property”²⁰³ since use and access to the property will not be determined by society as a whole for the benefit of society as a whole, but rather by an individual for a specified set of future interests.²⁰⁴ As a result, stewardship systems are compatible with the idea of private property; they just restrict private property rights and oblige the owner of the land to behave in a certain way.

The point which those who contrast private and stewardship property are getting at can, however, be useful. They are attempting to highlight the differences between owning in a system of stewardship, and owning within a system where the right to use and abuse the land and to exploit it for the owner’s own benefit forms part of the “bundle of rights” making up, in Honoré’s terminology, the incidents of ownership.²⁰⁵ It is perhaps no surprise against this background that there is no general principle that a landowner cannot use his rights in land in order to abuse his land. Frazier labels this theory, which sees the starting point for ownership as “absolute ownership,” the “classical liberal property theory.”²⁰⁶

Although absolute rights of ownership have never existed in the sense that one person has *all* the incidents of ownership outlined by Honoré and unlimited liberty to do what he wants with an on his land, this idea does form the foundational philosophy of much worldwide regulation of ownership, especially in the USA²⁰⁷ and UK.²⁰⁸ Nonetheless,

²⁰¹ Karp, *supra* note 3, at 735.

²⁰² Tony Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 370 (A. G. Guest, 1961).

²⁰³ Waldron, *supra* note 195, at 328.

²⁰⁴ *See id.*

²⁰⁵ Honoré, *supra* note 202, at 370.

²⁰⁶ Frazier, *supra* note 131, at 300.

²⁰⁷ Karp, *supra* note 3, at 736.

²⁰⁸ Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1553 (1989).

Caldwell is correct to state that “[t]he right to hold, enjoy, develop, and protect land, as well as to profit from its use, was never absolute.”²⁰⁹ Lucy and Mitchell agree with this assessment: “[the] undeniable truth about existing Western societies [is] that our rights of exclusion, control and alienation in relation to land are severely constrained.”²¹⁰ This admission seems to detract from their argument that stewardship is incompatible with private property. Private property does not demand absolute rights. Caldwell accurately describes the attitude which is characteristic of systems of private property: “as owner of land he owed no obligation to neighbor or posterity, and very little to the state.”²¹¹ The attitude that an owner of land has no obligations to his neighbors of the future would be incompatible with stewardship, but there is no reason to adopt this attitude even if one does subscribe to a system of private property.

As a result of this attitude, however, regulation which could be said to reflect stewardship will struggle to be accommodated within a system whose structures evolved on the back of such a philosophy.²¹² A system of stewardship can then be contrasted with prevailing systems of private property in so far as the content of the rights, and more particularly the attitudes associated with ownership, will be different. This has led some to comment that “environmental rules of this kind are arguably a new species of property rule in that they impose positive obligations as an attribute of the exercise of ownership privileges.”²¹³ This seems to overstate the position. Environmental rules do not necessarily impose a new species of ownership. Ownership is still private. They simply impose a new attitude that must accompany this ownership. The change is one in philosophy, not in the structure of ownership.

This change in philosophy does not mean that the notion of private property must be abandoned in favor of ownership on the basis of duties of stewardship. In fact, if individuals are to act as stewards it is necessary to retain a concept of private ownership. The relationship between stewardship and ownership of land is therefore not only a close one but also a critical one. In order to act as steward in the sense outlined here, the individual must have rights in the land in question in order to be able to make those decisions that are so central to his role.

²⁰⁹ Caldwell, *supra* note 3, at 762.

²¹⁰ Lucy & Mitchell, *supra* note 3, at 570.

²¹¹ Caldwell, *supra* note 3, at 761.

²¹² Rodgers, *supra* note 92, at 761.

²¹³ *Id.* at 569.

2. Accountability

Our starting point is that the steward becomes a member of the land community through his ability to make decisions over the future of land; that is, he is obliged by the rules of that community and benefits from others' compliance with those rules. This community is a legal community. Membership of this community is part and parcel of becoming a steward. In Honoré's language, the notion of stewardship is the "shared understanding" which defines the group, but this group can only exist as long as "the prescriptions to which the understandings related [are] broadly . . . effective."²¹⁴ In other words, the group understanding that landowners will comply with the requirements of stewardship will only define the group as long as the obligations are enforced. The land community can only exist as long as the obligations of stewardship are effective, and since the land community forms a necessary part of the notion of stewardship, the disintegration of the group would mark the end of the legal principle of stewardship. The two notions are mutually reinforcing. As a result, the stewardship obligation must be, at least to some extent, upheld by the group—"there must be a substantial measure of compliance."²¹⁵

In addition to the existence of the group, however, as Honoré makes clear, the group relationship is necessary to the existence of the legal obligation *per se*.²¹⁶ This goes beyond the continuation of the land community, and into the continued existence of the law following the disintegration of the community: "all law is the law of a group of individuals or of groups made up of individuals. No one can make a law purely for himself The existence of a group is therefore a necessary and arguably a sufficient condition of the existence of laws or something like them."²¹⁷ Therefore, not only is the continued enforcement of the rule holding the group together necessary for the continued existence of the group, i.e., the land community, and the mutuality of benefit and burden associated with that group, it is also necessary for the continued bindingness of the rules associated with the group—in this case, the obligations of stewardship.

Thus, accountability can be seen to form a part of the notion of stewardship as a legal principle, and although the steward is accountable to other members of the land community, this accountability is enforced by the state as proxy. The consequences of being called to account for

²¹⁴ HONORÉ, *supra* note 73, at 38.

²¹⁵ *Id.* at 39.

²¹⁶ *Id.*

²¹⁷ *Id.* at 33.

failure to comply with the duties of steward should be a sanction strong enough to ensure compliance, as Honoré outlines,²¹⁸ but also a sanction which goes some way to redressing the wrong committed. This can be seen when once again we look at the analogy with a trust. The duty of a trustee is to personally account for what his beneficiary is due and he does this by either providing substitute performance or by paying money from his own account. As a result, not only must the steward be accountable for any failure to comply with his obligations but this accountability must also lead to consequences designed to achieve the same end result as if he had complied with his duties in the first place. This type of accountability is therefore an essential element of a stewardship regime.

CONCLUSIONS

If we combine the threads of this discussion, then the following becomes apparent. First, stewardship is a conclusion—it is an obligated mode of behavior which requires that persons with control and responsibility in relation to land act in a certain way. They will be accountable for any breach of those obligations. Second, to justify that conclusion, we must examine the source of the penalty for breach. If the penalty is to be found in the “court of public opinion” or in the perpetrator’s conscience, then the moral obligation can be justified by reference to both anthropocentric and ecocentric considerations, from secular and religious perspectives. If the penalty is imposed by the legal system—through an institutionalized form of state power—then an additional justification is needed. This must explain why it is legitimate to impose an obligation onto a person. Such justifications in the literature are typically composed either of references to obligations emerging in respect of countervailing rights, or by reference to limitation of harm to others. Relying on this sort of justification for stewardship duties is rendered problematic by the fact that it is challenging to identify any countervailing rights (when the stewardship duty is, in effect, one with an eye on future generations—in whom would such rights vest) or any harm where harm is understood as a setback to the identifiable interests of others. Whilst polluting acts which extend beyond the borders of an individual’s land can easily be justified on the basis of harm to neighbors, it is much more challenging to justify an obligation to one’s own land in a good condition.

Of course, many if not all legal systems around the world will demand that landowners do fall under obligations in respect of certain

²¹⁸ *Id.* at 39.

substances—hazardous waste in particular is heavily controlled so that landowners cannot simply dispose of such substances onto their land without a licensing system in place—but such is a specific obligation justified by the *risk* of harm to existing individuals.²¹⁹ A stewardship obligation goes beyond this. It not only introduces an obligation to *not damage* property, thus risking such harms, but to maintain, and even improve. It is in the obligation to maintain and improve—the very essence of stewardship, and the reason why it is called upon to form part of our understanding of private property—which appears on its face impossible to reconcile with either the rights-based or the harm-based justification for obligation.

This fear is considered by Lin. He argues that “environmental law has developed as a series of responses to demonstrations of harm”²²⁰ and highlights that “if harm is present or anticipated, the harm principle provides a well-established justification for a legal response.”²²¹ He continues, “[i]f harm is absent, one implication might be that the situation in question is beyond the proper reach of the law.”²²² However, the justification, as explained here, arises from the fact that property rights in land do not exist in isolation. Indeed, their value and potency is explained only by the fact of their being part of a network. Inherent within membership of this network is the maintenance of the network. In this view, as explained, stewardship is justified not by reference to harm to *others*, but by reference to harm to the group, of which a property owner is by necessity a committed member (for, without the group, there would be no property). This justification operates so as to explain why stewardship obligations can (must) inhere in private property, but it also has consequences not only for the who will be the steward, but for the precise content of the legal obligations that will rest on their shoulders as a result.

²¹⁹ Lin, *supra* note 179, at 899–900.

²²⁰ *Id.* at 898.

²²¹ *Id.*

²²² *See id.* at 900.

