EARTH JURISPRUDENCE AND THE ECOLOGICAL CASE FOR DEGROWTH

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If we do not change direction, we are likely to end up where we are going. – Chinese Proverb

Earth Jurisprudence seeks to redefine the relationship between human beings and the environment by abandoning the anthropocentrism of much contemporary legal theory in favour of an eco-centric perspective.[1] This shift in consciousness is seen as necessary because existing legal systems, by generally treating nature as a 'resource' to be exploited for human gratification, have failed to maintain the health and integrity of the ecosystems upon which the entire community of life depends.[2] What is urgently needed, and what Earth Jurisprudence promises, is a deep ecology of law, one normatively grounded on the idea that human law ought to reflect and respect the bio-physical laws of nature.

This paper explores the Earth Jurisprudence of economic growth, an area that has received almost no attention in this new body of literature[3] but one in which the themes and insights of Earth Jurisprudence are highly relevant. I will begin by describing the 'growth model of progress' which is implicit to most

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1 Some leading texts in the small but provocative literature of Earth Jurisprudence include Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (2002); Thomas Berry, *The Great Work* (1999) and *Evening Thoughts* (2006); Vandana Shiva, *Earth Democracy: Justice, Sustainability, and Peace* (2005); Christopher Stone, *Should Trees Have Standing? And Other Essays on Law, Morals, and the Environment* (1996); and Roderick Nash, *The Rights of Nature* (1986). For influential precursors, see Henry David Thoreau, *Walden* (1854); Aldo Leopold, *A Sand County Almanac* (1966); and Bill Devall and George Sessions, *Deep Ecology* (1985).

2 In 2005 the United Nations published a report, compiled and reviewed by over 2,000 leading scientists from ninety-five countries, which revealed that 60% of global ecosystem services are 'being degraded or used unsustainably,' resulting in 'substantial and largely irreversible loss in the diversity of life on Earth.' Millennium Ecosystem Assessment, *Ecosystems and Human Wellbeing: Synthesis* (2005) 1 <http://www.millenniumassessment.org/documents/document.356.aspx.pdf> at 20 June 2009. A number of similar studies are listed and briefly reviewed below.

3 The only study I have found is Joseph H. Guth, 'Cumulative Impacts: Death-Knell for Cost-Benefit Analysis in Environmental Analysis (2008) 11 *Barry Law Review* 23 (arguing that the law must abandon its use of cost-benefit economic analysis to justify individual environmental impacts and instead adopt the goal of maintaining the ecological integrity of the biosphere).

modern political ideologies, whether on the Left or the Right, and which we will see shares certain assumptions with law-and-economics scholarship. Put simply, the growth model assumes that the overall well-being of a society is approximately proportional to the size of its economy, in terms of Gross Domestic Product (GDP) per capita, since more money means that more social and individual 'preferences' can be satisfied via market transactions. From this perspective the answer to almost every problem – including environmental problems – is *more economic growth*. The notion of a macroeconomic 'optimal scale' is all but unthinkable. A bigger economy is simply better.

I wish to unpack the ecological consequences that flow from the growth model and argue that Earth Jurisprudence, by situating itself outside the growth model, has a very important role to play in the critique of growth and in the provision of an alternative conceptualization of 'nature' in law, especially property law where human-centred, economic analysis dominates. I base my analysis on the notion of 'degrowth,' an emerging term that designates a radical critique of economic growth. My basic argument is that when an economy has grown so large that it exceeds the regenerative and absorptive capacities of Earth's ecosystems, then lawmakers ought to initiate a 'degrowth' process of planned economic contraction. Only by doing so, I will conclude, can over-consuming societies begin repaying their ecological debts to the Wild.

The substantive part of the paper begins, as I have said, by outlining the growth model of progress. This dominant model propagates the pernicious myth of an infinitely expanding economy on a finite planet, a myth Earth Jurisprudence serves to undermine. I then cursorily review the credible body of environmental research which shows that the expanding global economy is ecologically unsustainable. Laying the foundations for an Earth Jurisprudence of economic growth, I then offer a brief history of 'growth scepticism,' the view that eventually an economy will reach an 'optimal scale' beyond which it should not grow. Since the scientific consensus firmly indicates that the 'optimal scale' has already been surpassed, I conclude that lawmakers in over-consuming societies ought to initiate a 'degrowth' process of planned economic contraction. I discuss this possibility in the context of property theory, speculating about what might become of the property systems of advanced capitalism should economic growth lose its privileged position as the touchstone of policy and institutional success. I close the paper with a fleeting discussion of 'the Wild,' in the hope of highlighting the ways in which the 'Transcendental' value of nature simply cannot be captured by the anthropocentric equations of economic analysis.[4]

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[4] On 'the Wild,' see Jane Bennett, *Thoreau's Nature: Ethics, Politics, and the Wild* (2002).

Property, Wealth Maximization, and the Growth Model of Progress

Daniel Bell once noted that 'Economic growth is the secular religion of advancing industrial nations,'[5] suggesting that those nations have developed an unconditional faith in the God of Growth and are now prepared to sacrifice everything in its name. More recently, Clive Hamilton has observed:

> Nothing more preoccupies the modern political process than economic growth. As never before, it is the touchstone of policy success… [Political] parties may differ on social policy, but there is an unchallengeable consensus that the overriding objective of government must be growth of the economy.[6]

The defining assumption of our age, in other words, is that despite Western affluence much more economic growth is still needed to improve our lives. It is thought that more growth – and only more growth – can eliminate poverty, reduce inequality and unemployment, and properly fund schools, hospitals, the arts, scientific research, environmental protection programs, etc. Our great social problem, according to this popular narrative, is that even the richest nations do not have enough money to live well. And thus economic growth is heralded across much of the political spectrum as the goal towards which we must direct our collective energy.[7]

According to this 'growth model of progress,' the overriding objective of the property system is to facilitate economic growth as efficiently as possible, [8] a goal which is widely assumed to be best achieved when property rights are traded in 'free markets.' In the context of legal theory, 'free markets' have

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5 Daniel Bell, *The Cultural Contradictions of Capitalism* (1976) 237.

6 Clive Hamilton, *Growth Fetish* (2003) 1-2.

7 Consider the Australian context, for example. In June 2004, in his 'Getting Things Right' speech, then Prime Minister John Howard stated: 'Maintaining a strong dynamic and growing economy is the… overriding responsibility of government.' Similarly, he elsewhere stated, 'The overriding aim of our agenda is to deliver Australia an annual economic growth rate of over four per cent on average during the decade to 2010.' Former labor Prime Minister Paul Keating said that if you could not grow the economy at over four percent a year, 'you might as well give the game away.' Cited in Richard Eckersley, 'The Challenge of Post-materialism' (March, 2005) *Australian Financial Review* 5-10.

8 For a recent, highly nuanced, expression of growth fetishism, see Benjamin M. Freidman, *The Moral Consequences of Economic Growth* (2005).

received their most systematic (and extreme) defence in the scholarship of law-and-economics, epitomized by the work of Richard Posner.[9] Making a representative statement on the economic analysis of property rights and market exchange, Posner writes:

> If every valuable (meaning scarce as well as desired) resource were owned by someone (universality), ownership connoted the unqualified power to exclude everybody else from using the resource (exclusivity) as well as to use it oneself, and ownership rights were freely transferable or as lawyers say alienable (transferable), value would be maximized.[10]

Leaving to one side the dubious assumptions about ownership, notice that 'value maximization' (or 'wealth maximization,' to use Posner's better known phrase) is held out as the proper function of the property system. Posner explains that wealth maximization is achieved when goods and other resources are in the hands of those who value them most, and someone values a good more only if he or she is both willing and able to pay more in money to have it.[11] The most efficient path to wealth maximization is through 'free markets,' Posner argues, in which private property is 'universal,' ownership is 'unqualified,' and ownership rights are 'freely transferable.'[12]

It should be noted at once that 'wealth maximization,' as the phrase is used in law-and-economics, and 'maximizing GDP' are not equivalent. Posner, in fact, has expressly distinguished them in his work, noting that 'wealth cannot be equated to GDP or any other *actual* pecuniary measure of value.'[13] Nevertheless, by looking to 'willingness to pay' (measured by actual pecuniary exchange) as the indicator of how various things are 'valued' in the marketplace,[14] Posner

[9] See generally, Richard Posner, *Economic Analysis of Law* (3rd ed, 1986).
[10] Ibid 32.
[11] See Richard Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8(1) *J Legal Studies* 103 and 'Wealth Maximization Revisited' (1985) 2 *Notre Dame L J* 85 (arguing that 'wealth maximization' provides an ethically attractive norm for social and political choices). See also, Richard Epstein, 'Why Restrain Alienation?' (1985) 85 *Colum. L Rev* 970 (arguing that no deviations from free-market alienability are permitted unless they are required by 'efficiency').
[12] See Posner, above n 10.
[13] See Posner, "Utilitarianism, Economics, and Legal Theory," above n 11, at 120 (emphasis in original).
[14] On 'willingness to pay,' see Posner, 'Wealth Maximization Revisited,' above n 11, at 86.

ends up judging 'the Good' and 'the Right' in terms of dollars,[15] which is what the 'growth model' does by assuming economic growth is the best measure of 'progress.' Accordingly, although it would be a confusion to conflate 'wealth maximization' and the 'growth model of progress,' it is fair to say that the latter is based upon many of the assumptions of the former, meaning that there is some overlap in criticism.[16]

Since human beings are narrowly conceived of as self-interested, rational, independent consumers whose individual 'preferences' can be better satisfied with ever-more money,[17] the economic analysis of property aims to grow the economic pie as big as possible.[18] From this view, where *efficiency* is the governing ethical norm,[19] more economic pie is always better; and efficiency is defined as 'exploiting resources in such a way that "value" – human satisfaction as measured by aggregate willingness to pay for goods and services – is

[15] See, for example, Richard Posner, *Economics of Justice* (1981); and Guido Calabresi and Philip Bobbitt, *Tragic Choices* (1978). Some have argued that the normative theory beneath law-and-economics goes beyond simply being a narration of the political Right in the legal sphere and is also an attempt to resolve (by dressing economics up as a science) the ongoing difficulty of the relationship between law and politics. See Morton J Horowitz, "Law and Economics: Science or Politics," *Hofstra L R* 8 (1980): 905 and Mark Kelman, *A Guide to Critical Legal Studies* (1987) 114-185.

[16] The complex relationship between law-and-economics and the 'growth model' deserves closer analysis, however that task, a work in itself, must be put aside for another occasion. Despite criticizing several key assumptions of law-and-economics, I wish to clarify that the thesis of this paper is directed primarily at the 'growth model.' For an early but important critique of Posner's view, however, see Ronald Dworkin, "Is Wealth a Value?," *Journal of Legal Studies* 9 (1980): 191 and "Why Efficiency?," *Hofstra L R* 8 (1980): 563 (arguing that the normative failures of Posner's theory are so great that they cast doubt on its descriptive claims).

[17] For one formulation of this 'economic' conception of human beings, see Richard Posner, 'The Economic Approach to Law' (1975) 53 *Tex. L R* 757, 761, where he states: 'The basis of an economic approach to law is the assumption that the people involved with the legal system act as rational maximizers of their satisfactions.'

[18] Discussing the 'pie' metaphor, see Lucian A. Bebchuk, 'The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice' (1980) 8 *Hofstra L R* 671.

[19] Richard Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication' (1980) 8 *Hofstra L Rev* 487. Ronald Dworkin, Mark Kelman, and Duncan Kennedy, among many others, have leveled deep criticisms against attempts to construct the notion of 'efficiency' within the theory of law-and-economics as an ethical norm. A principal criticism is that 'wealth maximization' favors the advantaged for no justifiable reason. See, for example, Dworkin, above n 16; Jules L Coleman, 'Efficiency, Utility, and Wealth Maximization' (1980) 8 *Hofstra L R* 509; Duncan Kennedy and Frank Michelman, 'Are Property and Contract Efficient?' (1980) 8 *Hofstra L R* 711; Horowitz, above n 15; Lewis A Kornhauser, 'A Guide to the Perplexed Claims of Efficiency in the Law' (1980) 8 *Hofstra L R* 913; Kelman, above n 15; and Annalise Acorn, 'Valuing Virtue: Morality and Productivity in Posner's Theory of Wealth Maximization' (1994) 28 *Val U L R* 167.

maximized.'[20] The anthropocentrism here is stark and unabashed. Furthermore, the question of *sufficiency* – of how much economic pie is *enough* – does not arise.

This neoclassical perspective accepts that there is an 'optimal scale' at the *micro*economic level – which is to say, it accepts there will eventually come a point where growth in a *firm's* production will cost more than it is worth (and therefore be judged 'uneconomic' growth).[21] However, there is no place in neoclassicism for an 'optimal scale' at the *macro*economic level, no 'optimal scale' of the economy as a whole. This is because technological and allocative efficiency are thought to allow for an infinitely expanding economy, despite the obvious fact that we have but a single, finite planet to 'exploit.' Technological efficiency, it is assumed, will continually allow human beings to consume a finite set of resources more efficiently or, better yet, to consume a set of resources hitherto inaccessible. Allocative efficiency, it is assumed, will ensure that market mechanisms continually move resources into the hands of those who will 'exploit' them best. Upon these assumptions, the growth model purports to show that an economy can and should continue growing indefinitely. Economic growth, one is lead to believe, is always and everywhere the most direct path to increased human well-being.

Let us now consider how the neoclassical/neoliberal growth project has impacted on the life-support system we call Earth. By doing so the need for alternative perspectives on economic growth becomes obvious.

Unsustainable Growth and the Consumption of Natural Capital

There is now an overwhelming consensus within the scientific community that the high levels of economic growth and consumption in affluent societies today are environmentally unsustainable and certainly not universalizable.[22] Bill

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20 Posner, above n 9, 10.

21 The term 'uneconomic' is often attributed to Herman Daly, whose work is discussed below. See Herman Daly, 'Uneconomic Growth in Theory and Fact' (1999) The First Annual Feasta Lecture, <www.feasta.org/documents/feastareview/daly.htm> at 20 May 2009. See also, Ezra Mishan, *The Costs of Economic Growth* (1967), also discussed below.

22 Exemplifying this consensus in 2005 was the panel of over 2,000 leading scientists assembled by the United Nations which issued a 'Millennium Ecosystem Assessment' report, finding that 'human actions are depleting the Earth's natural capital, putting such strain on the environment that the ability to sustain future generations can no longer be taken for granted.' See above n 2. Also, see the Union of Concerned Scientists (UCS), a science-based nonprofit affiliation of scientists/citizens with over 250,000 members. UCS publications include "World

McKibben even believes that the 'consensus' which has solidified over recent decades has transmogrified, in the last 18 months, into a 'panic,'[23] largely out of fear of approaching the ecological 'tipping point' beyond which feedback loops will be irreversible and unstoppable.[24] But even leaving to one side the dreadful possibility of a 'tipping point,' the best available evidence plainly illustrates that the global economy has physically grown to such a size that it now exceeds the regenerative and absorptive capacities of Earth's ecosystems.[25] That is, we are now consuming natural capital and diminishing the capacity of the planet to support life in the future.

A few recent studies will serve to reveal the depth and extent of this ecological crisis. Mathis Wackernagel and his colleagues have measured the 'ecological footprint' of humanity and compared it to the 'carrying capacity' of the planet.[26] They conclude that the global ecological footprint exceeds carrying capacity by approximately twenty percent. In 2006, *Redefining Progress*, a leading public policy think tank, reviewed and updated this claim and the methods used, concluding that the ecological footprint is now exceeding carrying capacity by nearly forty

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Scientists' Warning to Humanity," issued in 1992 by 1,600 of the world's leading scientists, including the majority of Nobel laureates in the sciences, which begins: 'Human beings and the natural world are on a collision course. Human activities inflict harsh and often irreversible damage on the environment and on critical resources. If not checked, many of our current practices put at serious risk the future that we wish for human society and the plant and animal kingdoms, and may so alter the living world that it will be unable to sustain life in the manner that we know. Fundamental changes are urgent if we are to avoid the collision our present course will bring.' Towards the end of this publication the UCS concludes, 'A new ethic is required.' <http://www.ucsusa.org/about/1992-world-scientists.html> at 20 May 2009.

23 Bill McKibben, 'Because the World Needs to Know' (public lecture, University of Melbourne, 11 May 2009).

24 On feedback loops and the tipping point, see New Economic Foundation, '100 Months: Technical Note' (2008) <www.neweconomics.org> at 20 May 2009 (which calculates that 100 months from August 2008, atmospheric concentrations of greenhouse gases will begin to exceed a point whereby it will no longer be *likely* we will be able to avert potentially irreversible climate change).

25 See Mathis Wackernagel et al, 'Tracking the Ecological Overshoot of the Human Economy,' *Proceedings of the Academy of Science*, no 99 (2002).

26 An 'ecological footprint' is a measure of the amount of renewable and non-renewable ecologically productive land area required to support the resource demands and absorb the wastes of a given population or specific activity. See Wackernagel et al, above n 25. 'Carrying capacity' can be defined as the maximum population of a given species that can be supported indefinitely in a defined habitat without permanently impairing the productivity of that habitat. See William Rees, 'Revisiting Carrying Capacity: Area-Based Indicators of Sustainability', (1996) 17 *Population and Environment: A Journal of Interdisciplinary Studies* 3. See also, Donella Meadows et al, *The Limits to Growth: The 30 Year Update* (2004).

per cent.[27] Of similar concern, the United Nations Global Environment Outlook 2007 (GEO4) provides details on, among other things, the reality of climate change, reporting that 11 of the last 12 years (1995-2006) have been the hottest since 1850.[28] Furthermore, in 2005, as noted earlier, the United Nations 'Millennium Ecosystems Assessment' revealed that 60% of global ecosystem services are 'being degraded or used unsustainably,' resulting in 'substantial and largely irreversible loss in the diversity of life on Earth.'[29] Finally, the German Federal Ministry Report released in May 2008, the biggest assessment ever made of the economic impact of environmental damage, reported that the damage is already between 2.1 and 4.8 trillion US dollars per year (although very little of this cost is currently factored into any nation's GDP, meaning that we are not doing as well we might think we are).[30] **This last report and others like it are arguably of particular significance in that they undermine economic growth in ecological *and* economic terms.**[31]

If confronted honestly, reports such as these directly and fundamentally challenge mainstream attitudes to economic growth, because they show (among other things) that the advanced capitalist societies are already significantly over-consuming their share of Earth's resources, and so presumably should not be striving to grow their economies even more. And yet, even as the evidence of environmental degradation mounts, it seems that political leaders on both sides of the political spectrum (to varying degrees) are unwilling or unable to recognize any ecological limits to growth; at least, none that the privatization of nature, deregulation of markets, technological efficiency, or more economic growth will not solve.[32] As George Bush, Sr., expressed it, in words his son could understand and later repeat: 'Growth is the friend of the environment.'[33] The now formidable body of environmental research has rendered this view dangerously false.

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27 Redefining Progress, 'World's Ecological Footprint Exceeds Biological Capacity by Nearly 40%' (2006) <http://www.rprogress.org/press/releases/060323_EFA.htm> at 20 May 2009.

28 United Nations Global Environment Outlook 4 (2007). See: <http://www.unep.org/geo/geo4/media/fact_sheets/Fact_Sheet_4_Climate_Change.pdf> at 20 May 2009.

29 See above n 2.

30 German Federal Ministry for the Environment and the European Commission, 'The Economics of Ecosystems and Biodiversity' (2008) <http://www.teebweb.org/> at 20 May 2009.

31 See also, Nicholas Stern, *The Economics of Climate Change: The Stern Review* (2006) (concluding that the benefits of strong, early action on climate change will considerably outweigh the overall costs). Stern argues that investing one per cent of global GDP must be invested to avoid the worse effects of climate change and that failure to do so could result in global GDP being up to twenty percent lower than it might otherwise be.

32 See generally, T L Anderson and D R Leal, *Free Market Environmentalism* (1991).

33 As quoted in Meadows et al, *Limits to Growth: The 30 Year Update* (2004) 204.

The science which indicates over-consumption in the West is all the more challenging in light of the fact that, in the poorest parts of the world today, almost three billion human beings are, by any humane standard, *under*-consuming.[34] The global challenge, therefore, can be stated as follows: 'To reach sustainability, humanity must increase the consumption levels of the world's poor, while at the same time reducing humanity's total ecological footprint.'[35] To make this situation more challenging still, the global population is expected to exceed nine billion by mid-century.[36] Moreover, we know that the high-impact 'consumer class' is fast expanding into many parts of global society.[37]

In terms of ecological damage, which tends to impact disproportionately on poorer nations,[38] this situation is extremely bleak. Obviously, it is also of deep humanitarian concern, especially when the gaze of future generations enters the equation.[39] My question, then, is this: Will more economic growth in the developed world help *solve* these great problems of our age or only *exacerbate* them? I suggest that the scientific studies, such as those considered above, now support the latter view, and since the existential threat they imply is about as serious as we could imagine, this is not evidence to treat casually.

A Brief History of Growth Scepticism

The sceptical attitude towards growth that I am advocating has its roots at least as far back as John Stuart Mill, who in 1848 asked: 'Towards what ultimate point is society tending by its industrial progress?'[40] This powerful question is significant for three reasons. First, because it acknowledges, implicitly, that

34 World Bank Development Indicators, 'Poverty Data' (2008) at:

<www.siteresources.worldbank.org/DATASTATISTICS/Resources/WDI08supplement1216.pdf> at 20 May 2009.

35 Meadows et al, *Limits to Growth: The 30 Year Update* (2004) xv.

36 United Nations Department of Economic and Social Affairs, 'World Population Prospects' (2007) <http://www.un.org/esa/population/publications/wpp2006/English.pdf> at 20 May 2009.

37 See WorldWatch Institute, *State of the World: The Consumer Society* (2004).

38 Nicholas Stern, *The Economics of Climate Change: The Stern Review* (2006). See also, United Nations Development Program, *Human Development Report* (2007/8) 3 (using the term 'apocalyptic' to describe potential impact on the poor.)

39 Lawrence B. Solum, 'To Our Children's Children: The Problem of Intergenerational Ethics' (2001) 35 *Loyola of LA L R* 163.

40 J.S. Mill, *Principles of Political Economy: With Some of their Applications to Social Philosophy*, (1870).

industrial progress (or economic growth) is only of instrumental value and not of any intrinsic value;[41] second, because it raises the possibility that there might come a time when further economic growth no longer advances any worthwhile purposes; and third, and perhaps most importantly, because it prompts us to consider not only how much economic growth is *enough*, but also the prior question of what we want growth *for*.

Mill believed that if there came a time when economic growth stopped contributing to well-being (or began undermining those things upon which well-being depends), the most suitable form of government would be what he called 'the stationary state.' By this he meant a condition of zero growth in population and physical capital stock, but with continued improvement in technology and in what he called 'the art of living.'[42] Mill was warning posterity – us, it would seem – to respect the limits to growth before the consequences of going beyond those limits compelled respect, in one way or another.

Later, in 1967, the economist Ezra Mishan published *The Costs of Economic Growth*,[43] in which he condemned the growth model for assuming that economic growth could increase infinitely on a finite planet, and for assuming that increased consumption (or a higher 'standard of living') always meant a better 'quality of life.'[44] Mishan highlighted the fact that economic growth had *costs*, and he argued that those costs were beginning to outweigh the benefits. A similar critique, though with a closer environmentalist focus, was advanced in 1972 by the Club of Rome, in their treatise, *Limits to Growth*.[45] In 1976, another critique, this time with a sociological focus, was advanced by Fred Hirsch, in his text, *Social Limits to Growth*.[46]

Since the early 70s, ecological economist Herman Daly has built upon and significantly developed a number of these ideas.[47] Of particular relevance to this paper is the work he pioneered with J.B. Cobb developing a post-growth measure of progress, called the Index of Sustainable Economic Welfare

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41 Ronald Dworkin has expressed a similar point in the following way: 'Money or its equivalent is useful so far as it enables someone to lead a more valuable, successful, happier, or more moral life. Anyone who counts it for more than that is a fetishist of little green paper.' Ronald Dworkin, 'Is Wealth a Value?', above n 16, 191.

42 Mill, above n 40.

43 Mishan, above n 21.

44 For insightful discussions of the notions of 'standard of living' and 'quality of life,' see Martha Nussbaum and Amartya Sen (eds.), *The Quality of Life: Studies in Development Economics* (1993).

45 Donella Meadows et al, *The Limits to Growth: The 30 Year Update* (2004).

46 Fred Hirsh, *The Social Limits to Growth* (1993, revised edition).

47 See Herman Daly, *Steady-State Economics* (1977) and *Beyond Growth: The Economics of Sustainable Development* (1996).

(ISEW).[48] As a model of progress, this index and others like it take into consideration important social and environmental factors that economic growth alone does not reflect. For example, the ISEW makes deductions from GDP for such things as resource depletion, pollution, income inequality, loss of leisure, etc, and makes additions for such things as public infrastructure, volunteering, and domestic work.[49] Merging environmentalist and economic perspectives, Daly argues that sustainable development in the developed world necessarily entails a radical shift away from 'growth economies' towards what he calls a 'steady-state economy.'[50] By this he means (updating and refining Mill) an economy that continues to develop in response to new technologies and changing cultural and market forces, but without growing in a bio-physical sense.[51]

More recently, forceful critiques of growth have come from such theorists as Clive Hamilton, Peter Victor, and Tim Jackson,[52] who variously argue that the process of getting richer is now, paradoxically, causing the very problems that we seem to think getting richer will solve. Attacking the fundamentals of the neoliberal growth project, these authors urge the advanced capitalist societies to begin exploring the possibility of prosperity without growth.

Some of the most rigorous and provocative expressions of growth scepticism have emerged over the last decade out of the Degrowth Movement in Europe. Regrettably, this rich literature has barely made an appearance in Anglo-Saxon academic or public dates,[53] although perhaps the tide may eventually turn as a

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[48] Herman Daly and John Cobb, *For the Common Good: Redirecting the Economy Toward Community, the Environment, and a Sustainable Future* (1989).

[49] Other post-growth measures of progress include the Genuine Progress Indicator and The Human Development Index. These tend to suggest that many advanced capitalist societies have stopped progressing, in terms of genuine human well-being, despite continuing to get richer. For a review of some of the research, see Avner Offer, *The Challenge of Affluence: Self-Control and Wellbeing in the United States and Britain since 1950* (2006). See also, John Talberth, Clifford Cobb, and Noah Slattery, 'The Genuine Progress Indicator' (2006) <www.rprogress.org> at 20 May 2009; and Philip Lawn, 'A Theoretical Foundation to Support the ISEW, GPI, and other related indexes' (2003) *Ecological Economics* (August) 959-983.

[50] Herman Daly, *Steady-State Economics* (1977).

[51] In framing his arguments in biophysical terms, Daly acknowledges his debt to Nicolas Georgescu-Roegen, especially to the seminal text, *The Entropy Law and the Economic Process* (1971).

[52] See Clive Hamilton, *Growth Fetish* (2003); Peter Victor, *Managing without Growth* (2008); and Tim Jackson, 'Prosperity without Growth?' (2009) <http://www.sd-commission.org.uk/publications/downloads/prosperity_without_growth_report.pdf> at 20 May 2009.

[53] As late as 2008 Valerie Fournier noted that there were only three English-language articles on degrowth, beside a few articles by Serge Latouche published in the English Version of *Le*

result of the First International Degrowth Conference in Paris 2008, some of the proceedings from which are freely available online and predominately in English.[54]

Though not a unified doctrine by any means, an emerging consensus within the Degrowth Movement has resulted in a Declaration of Degrowth.[55] This document (to paraphrase) calls for a paradigm shift from the general and unlimited pursuit of economic growth to a concept of 'right-sizing' both global and national economies. At the global level, right-sizing means reducing the global ecological footprint (including carbon footprint) to a sustainable level. In countries where per capita footprint is greater than the sustainable global level, this right-sizing implies a reduction to this level through the process of voluntary economic contraction (i.e. degrowth).[56] In countries where severe poverty still remains, right-sizing implies increasing consumption to a level adequate for a decent life. This will involve increasing economic activity in some cases, but redistribution of income and wealth both within and between countries is a more essential part of the process.[57]

Responding to those 'free-market environmentalists' or 'technological optimists' in the mainstream who claim that there is no conflict between growth and sustainability (i.e. 'development'),[58] the Degrowth Movement points out that although techno-efficiency solutions have been widely applied, flows of material and energy (or *throughput*) are still increasing.[59] This increase in throughput despite the increases in efficiency is largely due to 'rebound effects,' as Francis Schneider neatly explains by way of example: 'a car that consumes less gasoline per km leads to financial savings that may be spent on longer car distances… A so-called secondary rebound exists when a house is better insulated and that reduced expenditure on heating is reinvested in buying a second car or travelling by plane.'[60] In short, efficiency 'creates revenue that can

Monde Diplomatique. See Valerie Fournier, 'Escaping from the Economy: The Politics of Degrowth' (2008) 28 *International Journal Sociology and International Research* 11/12 528-545.

[54] See www.degrowth.net.

[55] Ibid.

[56] Serge Latouche, 'Degrowth Economics: Why Less Should Be Much More' (2004) *Le Monde Diplomatique* (English Ed., Nov.) <http://mondediplo.com/2006/01/13degrowth> at 20 May 2009.

[57] New Economic Foundation, 'Growth Isn't Working: The Unbalanced Distribution of Benefits and Costs from Economic Growth' (2006) <http://www.neweconomics.org/> at 20 May 2009 (showing that First World growth is an ineffective response to poverty.)

[58] Unpacking this view, see Wolfgang Sachs (ed.) *Development Dictionary* (1992).

[59] See Francis Schneider, 'Macroscopic Rebound Effects as Argument for Economic Degrowth' in *Proceedings of the First International Degrowth Conference* (2008) <www.degrowth.net> at 20 May 2009.

[60] Ibid 29.

be spent on the same (primary rebound) or other commodities (secondary rebounds).'[61] Efficiency, for this reason among others, is a fatally flawed solution to the problems of growth and over-consumption.

The tradition of growth scepticism outlined above, from Mill to 'degrowth,' may strike some as an unspeakable heresy and perhaps be dismissed in advance of honest consideration. But what seems clear is that if we are genuinely committed to the idea of a sustainable society – of each generation of life on Earth meeting its needs without jeopardizing the prospects of future generations to meet their needs[62] – then the pursuit of more economic growth by those nations which are already consuming an unsustainable share is ethically objectionable. Time has come, that is, for the over-consuming nations to give up the pursuit of growth, for it is looking ever-more like an unambiguous act of violence.

There have been and are other growth sceptics,[63] arising out of various disciplines and focusing on different issues, but the focal point of this paper concerns various issues that arise when *property rights* are considered within a post-growth framework – the framework that I claim best represents the position implicit to Earth Jurisprudence. With an admittedly broad brush, I will now bring this paper to a head by offering a few thoughts on how the property systems of advanced capitalism might change – and how our thinking about those systems might change – and with what consequences, if economic growth were to lose its privileged position as the touchstone of policy success.

Property beyond Growth

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[61] Ibid.

[62] For international agreements on sustainability, see 'Agenda 21' and the 'Rio Declaration on Environment and Development' (1992), both of which were reaffirmed at the World Summit on Sustainable Development (WSSD) held in Johannesburg, South Africa, in 2002. For an important new discussion of the meaning of sustainability, see Klaus Bosselmann, *The Principle of Sustainability* (2008).

[63] A sample of further examples across various disciplines include, John K. Galbraith, *The Affluent Society* (1958); Robert Theobald, *The Challenge of Abundance* (1961); E.F. Schumacher, *Small is Beautiful: A Study of Economics as if People Mattered* (1973); Richard Easterlin, 'Does Economic Growth Improve the Human Lot? Some Empirical Evidence' in Paul A. David and Melvin W. Reder, eds., *Nations and Households in Economic Growth: Essays in Honor of Moses Abramovitz* (1974); Paul Wachtel, *The Poverty of Affluence* (1982); Ted Trainer, 'Recognizing Limits to Growth: a challenge to political economy' (2002) 50 *Journal of Australian Political Economy* 2, 163-78; Bill McKibben, *Deep Economy* (2007).

We have seen that the 'growth model of progress' assumes that the overriding objective of a property system is to facilitate economic growth as efficiently as possible, a goal which is thought to be best achieved when 'unqualified' property rights are traded in 'free markets.' It is my contention that by neglecting the problems of over-consumption and the costs of economic growth, this neoliberal perspective on property is naively entrenched in an outdated context and dangerously informed by an outdated set of values. The ecological crisis, in particular, as well as unprecedented Western affluence, places us in a context so radically different to that of earlier generations that the justifiability of inherited property rights, shaped for a different age, must not be taken for granted. Indeed, they should be subjected to a fundamental reassessment and, if need be, a fundamental revision. Justification, after all, as historicists from Hegel to Foucault have shown, is context-dependent. And things have changed.

Looking beyond the 'growth model,' a post-growth property system would be one in which property rules, market structures, and tax policies were designed explicitly to achieve welfare-enhancing objectives more specific than the efficient growth of GDP. These more specific objectives would include protecting the environment or eliminating poverty, and in pursuing these objectives the efficient growth of GDP (or lack thereof) would be treated as a by-product of secondary importance.[64] In essence, s*ufficiency* would be privileged over *efficiency*, and in over-consuming regions of the world this would need to involve planned economic contraction, or 'degrowth.'

Reforming Western property systems in the spirit of degrowth could be initiated in a variety of ways. The following proposals, rather than aiming to grow the economy, would aim to promote sufficiency and sustainability, resist over-consumption, foster community and democracy, protect the vulnerable, and distribute wealth more broadly.

Proposed Reforms: (1) Unconditionally guarantee a minimal, state-funded, Basic Income for all; (2) Establish a system of progressive income tax that culminates in a democratically determined 'maximum wage;' (3) Facilitate the emergence of more communitarian and ecologically sensitive corporate structures, such as Worker Cooperatives or Employee Stock Ownership Plans; (4) Regulate, with explicit reference to the common good, powerful and socially

[64] On how growth is an obstacle to achieving mores specific welfare enhancing objectives, see the New Economics Foundation Report, 'Unintended Consequences: How the efficiency agenda erodes local public services and a new public benefit model to restore them' (2007) <www.neweconomics.org> at 20 May 2009. See also P. Victor and G. Rosenbluth, 'Managing Without Growth' (2007) 61 *Ecological Economics* 492.

influential 'private' institutions, such as banks, mass media, and mega-corporations; (5) Impose stricter and more precautionary environmental rules on land use and development, such as prohibiting 'intensive' land use and other forms of unsustainable production/manufacture; (6) Devise land-use rules that are more socially beneficial, such as those which would curtail 'urban sprawl' or protect common spaces and assets; (7) Increase taxes (especially inheritance taxes, luxury taxes, and wealth taxes) as (a) a corrective/redistributive measure; (b) to channel the forces of money toward socially and environmentally beneficial places; and (c) to better fund public services (health, education, public transport, the arts, foreign aid, etc.); (8) Establish more 'green' taxes to internalize externalities and price commodities at their 'true cost.' All this is merely suggestive of a vague (and no doubt controversial) alternative framework. My aim here is obviously not to provide a blueprint.

Although such reforms may well slow economic growth – even to the point of 'degrowth' – and thereby not maximize a nation's material 'standard of living,' my underlying thesis is that the reforms would at the same time increase 'quality of life.'[65] Such a thesis, of course, is incommensurable with the 'growth model of progress,' since that model effectively conflates 'standard of living' and 'quality of life.'[66] But as the ecological (and social)[67] critiques of growth make clear, it is wrong to conflate those very distinct concepts.

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65 It would be proper to insist that we ought to seek sustainability even if this would *reduce* 'quality of life' and involve some uncompensated sacrifice. While that can hardly be denied, I would argue that reducing consumption will lead to an overall benefit to most people embedded in consumer culture. See generally, Samuel Alexander (ed.), *Voluntary Simplicity: The Poetic Alternative to Consumer Culture* (2009).

66 See Nussbaum and Sen, above n 44.

67 See Samuel Alexander, 'Law, Economics, and the Social Critique of Growth: An Inquiry into the Correlation between Material Wealth and Well-being' (unpublished manuscript on file with author). In this manuscript I review the large and credible body of social research which examines the correlation between material wealth and well-being. The research broadly establishes: (1) that individuals in rich nations report higher levels of well-being than individuals in poor nations, but that rich nations are not much better off, if at all, than nations of moderate material wealth (i.e. with per capita incomes of US$10-15,000); (2) that, within a nation, rich individuals report higher levels of well-being than poor individuals, but that rich individuals are not much better off, if at all, than individuals of moderate material wealth; and (3) that, over time, getting richer makes people better off *up to a point*, but once moderate material wealth has been attained, getting richer makes little, if any, difference to well-being. There is also evidence which indicates that, once moderate wealth has been attained, increases in material wealth can, at times, even be *negatively* correlated with well-being. See also, Ed Diener and Martin Seligman, "Beyond Money: Toward an Economy of Well-Being," *Psychological Science in the Public Interest* 5(1) (2004) 1 (reviewing over 150 studies assessing the correlation between financial wealth and well-being); Robert E. Lane, *The Loss of Happiness in Market Democracies* (2000); Tim Kasser, *The High Price of Materialism* (2002); Richard Layard,

I acknowledge that any transition to a post-growth economy would require extensive structural reform of the property system over time. And I accept that this will give rise to the culturally powerful charge of 'inefficiency,' always levelled at those who propose 'interventionalist' or 'regulatory' structural reform of the property system.[68] But I believe that this objection, due to its very nature, loses much of its force when considered in light of the ecological critique of growth. In short, the 'inefficiency' objection is that post-growth reform of the property system would not maximize economic growth, since it would involve interfering in the supposedly 'efficient' operation of so-called 'free markets'. Based on the environmental (and social) science – even based on the economics! – the post-growth response is that not maximizing economic growth is partly or beside the point. In a sense, then, I would respond to the objection by embracing it, not as an indictment but as a defence.[69]

In summary, I have argued that when an economy has grown so large that it exceeds the regenerative and absorptive capacities of Earth's ecosystems, then lawmakers ought to initiate a 'degrowth' process of planned economic contraction. I have tried to show that this argument has particular relevance to the jurisprudence of property, and I hope that my preliminary contribution may provoke some interest in how growth scepticism might impact, not only on property law, but on legal issues more broadly. It is my contention that legal scholars will find in growth scepticism the seeds of much fruitful and important research.

Conclusion: Nature beyond Property

The poet-philosopher, Henry David Thoreau, was deeply troubled by the orthodox economic conception of nature and particularly sensitive to its

Happiness: Lessons from a New Science (2005); Bruno Frey and Alois Stutzer, *Happiness and Economics* (2002). The social research suggests that rich nations have already gone beyond the 'material threshold' beyond which more income does not contribute much to well-being. And this 'social critique' makes growth as an economic policy seem not just wasteful but counter-productive.

68 For example, see Richard Epstein, 'Why Restrain Alienation?' (1985) 85 *Colum. L Rev* 970 (arguing that no deviations from free-market alienability are permitted unless they are required by 'efficiency').

69 I have explored some of these ideas further in 'Property beyond Growth: Toward a Politics of Voluntary Simplicity,' in David Grinlinton and Prue Taylor (ed.), *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (2010).

limitations. 'If a man walk in the woods for love of them half of each day, he is in danger of being regarded as a loafer. But if he spends his days as a speculator, shearing off those woods and making the earth bald before her time, he is deemed an industrious and enterprising citizen.'[70] To treat nature as a 'resource' for human consumption is one way to look at the world. But Earth Jurisprudence, through its Thoreauvian lens, sees nature very differently, as having a value in itself. The Transcendentalist, Ralph Waldo Emerson, expressed this reverential attitude beautifully in his essay 'Nature':

> I see the spectacle of morning from the hilltop over against my house, from daybreak to sunrise, with emotions which an angel might share. The long slender bars of cloud float like fishes in the sea of crimson light. From the earth, as a shore, I look out into that silent sea. I seem to partake its rapid transformations; the active enchantment reaches my dust, and I dilate and conspire with the morning wind.[71]

In the same essay, he noted: 'In good health, the air is a cordial of incredible virtue. Crossing a bare common, in snow puddles, at twilight, under a clouded sky, without having in my thoughts any occurrence of special good fortune, I have enjoyed a perfect exhilaration. I am glad to the brink of fear.'[72]

My point in citing these passages is that there is *something* in the experience of nature, of 'the Wild,' which ought not to be and, indeed, cannot be 'valued' according to its price in the market, or boxed up and traded as a mere commodity. The fact that this *something* defies precise analytical expression or economic valuation does not mean that it is of no 'value.' On the contrary, it may just mean that it is *priceless* and thus deserving of our utmost care and respect; if we can muster the humility, even our reverence.

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[70] Henry David Thoreau, 'Life without Principle' (1854) in Carl Bode, ed., *The Portable Thoreau* (1982) 633.
[71] Ralph Waldo Emerson, 'Nature' (1836) in Carl Bode, ed., *The Portable Emerson* (1981) 14.
[72] Ibid, 10.