

NEIL HAMILTON, ALDO LEOPOLD, AND THE ETHICS OF CONSERVATION

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Neil Hamilton loves books. His office, stuffed to the gills with books, resembles nothing more than one of those delicious used bookshops where one would love to spend a rainy Saturday morning, browsing through everything from ancient history to Italian cookbooks.

One of Neil's most endearing qualities is he loves to share books that excite him, and there are many. He has popped into my office on countless occasions with a book he has just read, offering to loan it or buy me a copy, urging me to join him on his journey of enlightenment. And, I have to say, in a large way he has curated my development as a scholar by providing new ways of seeing the world through these books.

Because of our mutual interest in the environment, many of the books he proffered had that focus. He introduced me, for example, to the world of Ding Darling, the great Des Moines Register cartoonist whose work in conservation was legendary. He loaned me his copy of *The Monkey Wrench Gang*—Edward Abbey's rollicking tale of eco-terrorists.¹ That book affected me deeply, causing me to think about what constitutes legitimate environmental protest in defense of the planet and the moral responsibilities of citizens who believe humans are destroying the world.² John McPhee's *Encounters with the Archdruid*³ acquainted me with the philosophy and conflicts inherent in the world of conservation, and the monumental *Cadillac Desert*⁴ turned out to be the guiding work of my water law teaching for the next twenty years.

Most importantly, perhaps: I will never forget, in my first year of teaching at Drake, when Neil converted me into a disciple of Aldo Leopold. Because my undergraduate Business Administration degree apparently left me woefully deficient in environmental philosophy and literature, I had only a vague notion of whom Leopold was. Neil would not rest until I was thoroughly indoctrinated with *A Sand*

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1. See generally EDWARD ABBEY, *THE MONKEY WRENCH GANG* (1975).

2. *Id.*

3. See generally JOHN MCPHEE, *ENCOUNTERS WITH THE ARCHDRUID* (1971).

4. See generally MARC REISNER, *CADILLAC DESERT* (1986).

*County Almanac*⁵ and *Round River*.⁶

It did not hurt that Leopold grew up in Burlington, Iowa.⁷ Neil's ethical framework, like those of Leopold and Darling, is deeply rooted in his experience growing up close to, and developing an enduring love for, the land in Iowa. Neil grew up on a farm in Lenox, Iowa, and he continues to own land and grow vegetables in the state's good soil. Leopold, like Neil, studied forestry in college; in fact, Neil was first introduced to Leopold's writings while he was a forestry student.⁸ Their ethics therefore are informed by hard science and actual experience, rather than the ivory tower philosophy of people who wouldn't know a white oak from a white pine. Iowans have the reputation of being "grounded," which I believe is true, and in Neil's case, as in Leopold's, that means the actual *ground*—that they have dirt under their fingernails from working the land, and a deep and abiding relationship with the natural world from daily experience living with it.

Leopold is perhaps best-known for his promotion of a "land ethic." He described a land ethic as "a limitation on freedom of action in the struggle for existence. An ethic, philosophically, is a differentiation of social from anti-social conduct."⁹ He boiled his ethical principles regarding nature down to a very simple formula: "A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise."¹⁰

Professor Hamilton expounded on Leopold's land ethic in his article, *Feeding Our Greening Future*,¹¹ choosing this quote from Leopold to encapsulate his view of what the ethic is: "A land ethic, then, reflects the existence of an ecological conscience, and this in turn reflects a conviction of individual responsibility for the health of the land. Health is the capacity of the land for self-renewal. Conservation is our effort to understand and preserve this capacity."¹²

5. See generally ALDO LEOPOLD, A SAND COUNTY ALMANAC (1949).

6. See generally ALDO LEOPOLD, ROUND RIVER: FROM THE JOURNALS OF ALDO LEOPOLD (Luna B. Leopold ed., 1972).

7. Aldo Leopold, ALDO LEOPOLD FOUND., <https://perma.cc/4KWE-52GJ> (archived Apr. 29, 2019).

8. Neil D. Hamilton, Essay, *Moving Toward Food Democracy: Better Food, New Farmers, and the Myth of Feeding the World*, 16 DRAKE J. AGRIC. L. 117, 136 (2011) [hereinafter *Moving Toward Food Democracy*].

9. *Id.*

10. ALDO LEOPOLD, *The Land Ethic*, in A SAND COUNTY ALMANAC 201, 224-25 (1949).

11. Neil D. Hamilton, Essay, *Feeding Our Green Future: Legal Responsibilities and Sustainable Agricultural Land Tenure*, 13 DRAKE J. AGRIC. L. 377, 394 (2008).

12. LEOPOLD, *supra* note 10, at 221.

In his article, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, Hamilton highlighted Leopold's ethical issue as one of the central determinants of our relationship to the land:

Leopold noted mankind's history reveals an ethical sequence, first in relations between individuals and then between individuals and society. What concerned Leopold was society's failure to develop a necessary third ethical dimension, that between man and the land. It was this land ethic which Leopold described as "an evolutionary possibility and an ecological necessity." The issue today is whether American society is moving toward recognizing a duty of stewardship. If it does, how will the duty be established and implemented?¹³

As Hamilton pointed out: "One value of framing the issue of land stewardship in terms of ethics is how it broadens the mechanisms society has for enforcement, including social disapproval for wrong behavior."¹⁴ Leopold himself, Hamilton noted, indicated the mechanism of ethical enforcement was: "social approbation for right actions: social disapproval for wrong actions."¹⁵

Hamilton was profoundly moved by what he called Leopold's "most powerful metaphor":

Leopold wrote, "when the logic of history hungers for bread and we hand out a stone, we are at pains to explain how much the stone resembles bread." He then described some of the stones we serve in lieu of a land ethic: an economic system that values little other than production, an educational system that teaches no ethical obligation to the land, and a political system that promotes conservation based primarily on economic self-interest. From a legal perspective, the way our society answers Leopold's call to stewardship is central to establishing the relations between man, society, and the land. These relations are also a reflection of our belief in democratic institutions, which balance private actions and ownership with responsibility to the public and the social welfare of the community.¹⁶

Leopold's writing, and Hamilton's applications and explications of it, greatly impacted my teaching and scholarship, encouraging me to ponder more often the ethical and moral dimensions of our conservation policy. To what extent, for example, is the Clean Water Act or the Endangered Species Act motivated by our

13. Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 225 (1993).

14. Hamilton, *supra* note 11.

15. LEOPOLD, *supra* note 10.

16. *Moving Toward Food Democracy*, *supra* note 8.

perceived ethical duty toward wildlife and the earth rather than human self-interest? How would emphasizing the ethical policy behind the law influence how the law is interpreted or enforced? Can a conservation law alone really be effective without broad public acceptance of the underlying ethical basis for protecting nature?

In the broad sweep of environmental law history, there is no doubt the foundational laws enacted in the 1970's were in large part motivated by morality and a growing acceptance of our ethical duty of stewardship. Along with civil rights, the late 1960's engendered a feeling that saving the Earth was "the right thing to do." On the first Earth Day in 1970, when 100,000 people, many of whom had read Rachel's Carson's *Silent Spring*,¹⁷ marched down New York's Fifth Avenue, they were motivated not by self-interest, but by moral fervor.¹⁸ On the second Earth Day, the famous "Keep America Beautiful" anti-pollution television ad did not focus on the health concerns of contaminated water; instead, it featured a Native American (Iron Eyes Cody) paddling through an industrial dystopia and weeping in front of a pile of litter.¹⁹ The tag line was: "People Start Pollution. People can stop it."²⁰ We wanted to do something about the environmental havoc we were wreaking on the Earth, not solely because it harmed us, but because it harmed the earth of which we were stewards, and we knew we were violating this fiduciary duty.

The 1980's, however, brought a new focus on economics. We recognized we could not afford to eliminate all risk; some environmental impact had to be tolerated as the inevitable consequence of the economic development on which human existence depends.²¹ Cost-benefit analysis became the required method of judging the appropriateness of all government mandates, including environmental regulation.²² The environmental community naturally reacted by emphasizing how nature provides "ecosystem services" that should be calculated on the benefit side of conservation measures to ensure an accurate accounting.²³

17. See generally RACHEL CARSON, *SILENT SPRING* (1962).

18. See *The History of Earth Day*, EARTH DAY NETWORK, <https://perma.cc/7STH-Y92E> (archived Aug 15, 2019).

19. See *Pollution: Keep America Beautiful – Iron Eyes Cody*, AD COUNCIL, <https://perma.cc/XD48-YG8Z> (archived Apr. 22, 2019).

20. *Id.*

21. See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981) (mandating the use of cost benefit analysis in the regulatory process).

22. *Id.*

23. NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS 29-44 (Gretchen C. Daily ed., 1997).

Thus, modern environmental scholarship tends to scoff at the moral argument for environmental protection as unsophisticated, naïve, or uninformed. My fear is that, in the zeal to engage with economists, we have lost sight of the crucial insight that Leopold expressed: sometimes you have to do what's right—even when you can't quantify the economic benefit, even when you know, in fact, that the sums don't add up.²⁴ Injecting a little Leopold into our regulatory process would require us to shed our hubris, our certainty that we can reduce everything to dollars and cents, and to place a large thumb on the scale on the side of conservation.²⁵

Professor Hamilton, who probably has examined the problem of land tenure and its effect on agricultural land more closely than any other professor in the world, has often lamented the lack of evidence that Leopold's land ethic is in force:

We ask little of the land, that is, other than to yield without resistance to our decisions and to return us the largest sum possible. In exchange we expect the land to ask nothing of us — perhaps other than to pay the taxes, record the deed and cash the checks. There is no expectation we will care for the land at least if caring means love, respect, attention, or foregoing a harmful action. What care we do provide is driven by a calculus it will pay off in the near term — or help us meet an oppressive government rule, one we obey grudgingly, if at all. The truth is we do not expect anyone to ask us to do anything for the land — certainly not the government, the neighbors or nosey environmentalists and do-gooder professors. “If they care so much for land — then they may buy some of their own!”²⁶

Hamilton's lament rings true, as current statistics of soil loss, habitat destruction, and pollution runoff amply demonstrate—we have not embraced, on the whole, Leopold's ethical principle. Nevertheless, we also have to acknowledge Leopold's simple ethical admonition does not provide a workable regulatory test. We do have to live, after all, and it seems to me impossible to imagine a human economy that never disturbs “the integrity, stability, and beauty of the biotic community.”²⁷ There is not much left of the biotic community of lower Manhattan, except to the extent that stockbrokers and hedge fund managers have created their own ecosystem. And yet, we can't all be organic farmers.

24. See FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 1-12 (2004) (lamenting the new emphasis on cost-benefit analysis that ignores morality and social values).

25. *Id.* at 234 (“Cost-benefit analysis of health and environmental policies trivializes the very values that gave rise to those policies in the first place.”).

26. Hamilton, *supra* note 11, at 396.

27. LEOPOLD, *supra* note 10.

I often posit a thought experiment to my Natural Resources class in which we imagine that we are shipwrecked on a remote island in the Indian Ocean. We have contacted a rescue ship, but it will not arrive before we starve to death. If we can procure a day or two of sustenance, we will make it. We scour the island for possible food sources, but find nothing. Finally, one person in our party discovers a bird nest, with a nesting pair of strange-looking, but meaty fowl. The naturalist in our group exclaims with excitement that they are a pair of Dodo birds, thought to have gone extinct in 1662. Therefore, it is probable that killing and eating this pair of birds will jeopardize the continued existence of a species.

So, I ask the class this question: “Would you kill the Dodo?” After all, saving a few more of the billions of *Homo Sapiens* on Earth is surely not as important, from a moral viewpoint, as saving an entire species from extinction. And yet, most of my class admits that they would probably be munching on Dodo rather than sacrifice themselves.

Even those who think they would make a self-sacrifice to save a species waver if I ask whether they would kill the Dodo to save their child, who was also on board and needs to eat. The point of the exercise is simple: it is easy for us to be in favor of conservation measures until our human needs become acute. We all have a different measuring stick, perhaps, and are willing to give up to a greater or lesser extent some creature comforts in order to altruistically protect the biotic community, as Leopold directs. But at some point, we have to recognize that we are all built with the instinct for self-preservation and propagation of our species, so that even the most ardent environmentalist may feel compelled to have a Dodo bird sandwich in order to survive. If you’re willing to admit that, isn’t it just a slippery slope to building the superhighway through the nature preserve?

We can take from this that ethical considerations may give way to the self-interest promoted by economists, at least until we have a full stomach. Is it possible, nevertheless, to ensure that the ethical dimension of conservation policy is properly considered? Can we somehow combine the economic and ethical elements into a workable regulatory framework?

In other areas of law, we readily accept that moral or ethical considerations are the sole basis of our legal norms. For example, we don’t require a cost-benefit analysis to prohibit murder or theft. Economists in the past have even argued in favor of the economic benefits of child labor and slavery, but moral considerations thankfully prevailed. So, recognizing that moral considerations may not solve every regulatory choice does not mean they should be ignored.

Our project going forward should be to reinvigorate the ethics of Leopold—and Hamilton—as an important driver of our environmental regulations. We should be able to articulate a more nuanced framework for consideration of our

environmental stewardship responsibilities, one that places these legitimate concerns within the context of our economic self-interest. I, for one, believe we do not have to eschew either consideration. Once we accept the principle that both economics and ethics are relevant, the challenge will be to develop a functional regulatory structure including both elements in the calculus.

Professor Hamilton has never been afraid to point out the failure of modern agriculture to live up to Leopold's admonition. Hamilton has been, in fact, one of the most powerful voices in agricultural law reminding us landowners have a responsibility that goes beyond economic self-interest. He has strikingly admonished us to think carefully about this choice:

The question we will have to face: Are Iowa's landowners willing to accept responsibility or acknowledge their social duty to protect the land and the water? I believe that many of them are, but . . . there are some who believe Iowa's "new" test for land stewardship should be unless the public pays me, I can do whatever is in my economic interests regardless of the effect on the land or water. If this is the answer we choose, then we should not wonder why Iowa's water quality continues to decline, our soils erode, and our natural resources disappear.²⁸

Notably, Professor Hamilton has also offered words of hope that things may be changing. He sees consumers, more concerned about where their food comes from and how it is produced, having a striking impact on agricultural practices, in effect using Leopold's vision of social disapprobation to effect changes in behavior.²⁹ In what he calls the new Food Democracy, he finds the public's concerns about the food system providing us with a powerful agent for real improvement in our relationship with the land:

All across the nation people are questioning the direction our food system is headed and are asking if there is a different path, if a healthier food future is possible, one that builds on these connections and uses them to create stronger, more satisfying relations involving food. They see a food future where informed consumers understand the role of food in health, where farmers produce and sell fresh food in communities, and where public policy supports efforts to strengthen local food systems. Like Grant Wood, another son of the Iowa soil, I am an optimist by birth and nature. Where he found beauty, I see hope, and where he painted harmony, I envision strength and opportunity. Food is too important for us to accept a diminished role for it in our

28. *Moving Toward Food Democracy*, *supra* note 8, at 138.

29. Neil D. Hamilton, *Food Democracy II: Revolution or Restoration*, 1 J. FOOD L. & POL'Y 13, 40 (2005).

lives or for us to leave the future of America's food system for others to determine.³⁰

So I, too, embrace my friend's optimistic vision. Unquestionably, Aldo Leopold would be appalled at what industrialized agriculture has wrought in the last half century, the disconnect between the farmer and the land that it necessarily engenders, and the terrible toll it has taken on our soil, water, and wildlife. Yet, he might also find reason to hope that the public is finally becoming sick of the autocracy of economics and may finally understand that unless we also consider the ethical dimension of our land use, our untrammelled destruction of the earth will carry with it dire consequences for us all.

Moreover, I know if Aldo Leopold were here today, he would fervently thank his acolyte Professor Neil Hamilton for his unceasing, passionate project to never let us forget the Land Ethic. No one writing and speaking today has done more to keep Leopold's vision alive and make it relevant to our current situation. Leopold would be justifiably proud of Professor Hamilton, another son of Iowa soil, who has so nobly carried on his legacy.

30. Neil D. Hamilton, Essay, *Food Democracy and the Future of American Values*, 9 DRAKE J. AGRIC. L. 9, 11 (2004).