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## A Mindful Environmental Jurisprudence?: Speculations on the Application of Gandhi's Thought to MCWC v. Nestlé

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## ARTICLE

### **A Mindful Environmental Jurisprudence?: Speculations on the Application of Gandhi's Thought to *MCWC v. Nestlé***

NEHAL A. PATEL & LAUREN VELLA\*

#### **I. INTRODUCTION**

Gandhi's life and thought captured the imaginations of millions of people around the world. His influence on civil disobedience campaigns and many social movements is well known. He is best known for his application of non-violence to political and social conflict, particularly in the context of oppressed people resisting the will of an oppressor. What is less often acknowledged, however, is Gandhi's persistent attempt to create a comprehensive vision of the world that challenged both empirical and normative assumptions of modern institutions. His eclectic blending of Indian philosophy, Buddhism, world mysticism, and Western social theory created a way of viewing self and society in such a way that functioned as an alternative to Western-only world views for the future of the planet and our species. It is no wonder, therefore, that Gandhi has functioned as

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an intellectual ally for many alternative critical thinkers over the past century, especially those who themselves have challenged oppressive social conditions.

Given the revered status that so many attribute to him, it would be easy to assume that Gandhi has had a profound influence on dominant ways of thinking in law and jurisprudence. However, although Gandhi had much to say—and do—on these topics, his largest influences remain within the social movements of oppressed peoples as well as in counter-cultural movements. His thought today still exists on the margins of academic social theory, despite the fact that his name often is celebrated publicly by dignitaries around the world.

In particular, Gandhi's impact on jurisprudence is negligible. There is virtually no academic scholarship that speculates on a Gandhi-informed jurisprudence. This is intriguing, given that Gandhi spent most of his adult life publicly challenging existing laws and filled hundreds of pages of commentary on people's relationship to law. He inquisitively examined people's duties to both obey and resist laws. Yet, strangely, jurisprudential scholars overwhelmingly are silent on the question of how to engage Gandhi. He remains more of an admired figurehead of peace and non-violence rather than a serious source of legal theory in the mainstream of modern jurisprudence.

We attempt to engage modern legal reasoning with Gandhi's thought. We hope to speculate on what jurisprudence would look like if it were more mindful of the concepts central to Gandhi's thought. By using Gandhi as an intellectual anchor, we hope to take a step toward creating a more "mindful jurisprudence" that implicitly incorporates into its reasoning the needs of environmental stewardship, disempowered populations, and the poverty-stricken. Because Gandhi's thought has been discussed at length in environmental justice campaigns, we begin this effort by examining the relationship between environmental law and Gandhi's thought. Given Gandhi's commentaries on exploitative and oppressive social relationships, we focus on the intersections of law, environment, and economy.

We use the recent suit, *Michigan Citizens for Water Conservation v. Nestlé Waters North America, Inc. (MCWC)*, as a case study to which we apply themes from Gandhi's thought.

Applying Gandhi's thought to *MCWC* is useful for two reasons. First, *MCWC* contains several core legal doctrines that appear regularly in environmental cases (and in case law more broadly).<sup>1</sup> As a result, our applications of Gandhi's thought directly apply to other environmental cases. Second, the case involves a defendant-corporation's encroachment onto a stream used by local plaintiff-civilians.<sup>2</sup> Environmental justice campaigns often involve similar factual circumstances in which local people resist large outsider organizations.<sup>3</sup> Therefore, using Gandhi's thought, we examine the legal reasoning in *MCWC* to identify taken-for-granted assumptions about environment and society that favor outside parties over local residents.

### A. Gandhi's Influence on Environmental Thought

In the domain of environmental thought, Gandhi did not focus purely on parts of the physical environment such as wildlife or natural resources.<sup>4</sup> Instead, Gandhi understood environmental problems through an emphasis on social relations.<sup>5</sup> Therefore, to understand the implications of Gandhi's view of environmental problems, it is important to understand his view of society. We can explicate his world-view by examining his writings.

Gandhi did not strive to write any complete treatise on his thought because he was concerned about addressing immediate

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1. See *Michigan Citizens for Water Conservation v. Nestlé Waters N. Am., Inc. (MCWC)*, 737 N.W.2d 447 (Mich. 2007), *overruled by* *Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.*, 792 N.W.2d 686 (Mich. 2010).

2. *Id.*

3. See, e.g., JONATHAN HARR, *A CIVIL ACTION* (1996) (water contamination in Woburn, MA); *A Brief Introduction to the Narmada Issue*, FRIENDS OF THE RIVER NARMADA, <http://www.narmada.org/introduction.html> (last visited Mar. 18, 2013) (discussing efforts against building a dam along the Narmada River); *THE CORPORATION* (Zeitgeist Films 1996) (water privatization in Bolivia involving Bechtel Corporation).

4. See Ramachandra Guha, *Mahatma Gandhi and the Environmental Movement in India*, in *ENVIRONMENTAL MOVEMENTS IN ASIA* 65, 114 (1998).

5. In this sense, Gandhi seems akin to many schools of environmental sociology. See ALLAN SCHNAIBERG, *THE ENVIRONMENT: FROM SURPLUS TO SCARCITY* (1980).

problems.<sup>6</sup> As a result, Gandhi often wrote letters directly to a person or essays published to the public.<sup>7</sup> His writing often contains both social commentary and appeals to readers to act upon the issues he raised, and they contain themes about what current environmental commentators would call sustainable production and consumption.<sup>8</sup> For instance, Gandhi cautioned India to avoid the industrial production processes of the British Empire:

God forbid that India should ever take to industrialism after the manner of the West. The economic imperialism of a single tiny kingdom (England) is today keeping the world in chains. If an entire nation of 300 millions [sic] took to similar economic exploitation, it would strip the world bare like locusts.<sup>9</sup>

Here, Gandhi noted how unsustainable production will “strip the world bare,” leading to environmental chaos. In addition, he simultaneously acknowledged how the stripping of the physical environment is connected to exploitative social relations. The exploitation of the poor is an environmental justice issue which Gandhi connected to resource conservation.

Gandhi also addressed consumption as a key ingredient of sustainability. Through his own example, he encouraged Indians to live simply and consume mindfully.<sup>10</sup> One of his most well-

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6. MK GANDHI, AUTOBIOGRAPHY OR THE STORY OF MY EXPERIMENTS WITH TRUTH viii (1927); *see also* VENKATRAMAN SUBRAY HEDGE, GANDHI'S PHILOSOPHY OF LAW (1977) (Revision of author's thesis, 1983).

7. *See* MAHATMA GANDHI, COLLECTED WORKS OF MAHATMA GANDHI ONLINE (1999), available at <http://www.gandhiserve.org/e/cwm/cwmg.htm>.

8. *Id.*

9. GANDHI, *September 10, 1928 - January 14, 1929*, in COLLECTED WORKS OF MAHATMA GANDHI ONLINE, *supra* note 7, at 412-13 (“[Factories] ought only to be working under the most attractive and ideal conditions, not for profit, but for the benefit of humanity, love taking the place of greed as the motive. . . . Therefore, replace greed by love and everything will come right.” GANDHI, *August 16, 1924 - December 26, 1924*, in COLLECTED WORKS OF MAHATMA GANDHI ONLINE, *supra* note 7, at 266-67); *see also* Guha, *supra* note 4, at 65.

10. *See* MAHATMA GANDHI QUOTES, <http://www.goodreads.com/quotes/show/427443> (last visited Mar. 18, 2013) (Part of his ethic can be captured by the saying often attributed to him that “[t]here is enough in the world for everyone's need, but not enough for everyone's greed”); GANDHI, *December 14, 1907 - July 22, 1908*, in COLLECTED WORKS OF MAHATMA GANDHI ONLINE, *supra* note 7, at 207 (Gandhi also stated, “[o]ne should bear in mind that greed always begets

known preferences was for middle-class Indians to buy locally-made clothing (khadi or khaddar), which he also made with his spinning wheel.<sup>11</sup> He is also famously known for living with only a handful of material possessions while in pursuit of larger spiritual and social goals.<sup>12</sup> Gandhi's mindful consumption and material simplicity challenge the dominant economic thinking in which the desire to consume is considered by many to be the economic engine of modern growth and often functions as justification for expanding markets.<sup>13</sup>

In contrast to dominant economic theory, Gandhi did not see economic growth as an end in itself, and instead, focused heavily on the means by which social needs could be met.<sup>14</sup> In other words, Gandhi held our intentions as a primary consideration in debating the social good. Rather than using the desire to consume as a moral trump that justifies the production of goods, Gandhi balanced the desire to consume with the question of what and how to consume.<sup>15</sup> Gandhi, therefore, uncompromisingly inserted the requirement of a moral calculus into all economic considerations.<sup>16</sup> In contemporary economic discourse, economic theorists often treat moral questions as being external to economic reality and therefore completely disregard moral

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sin"); GANDHI, *July 22, 1921 – October 25, 1921*, in COLLECTED WORKS OF MAHATMA GANDHI ONLINE, *supra* note 7, at 416 ("Our non-co-operation is neither with the English nor with the West. Our non-co-operation is with the system the English have established, with the material civilization and its attendant greed and exploitation of the weak. . . . Our non-co-operation is a refusal to co-operate with the English administrators on their own terms. We say to them, 'Come and co-operate with us on our terms, and it will be well for us, for you and the world.'").

11. AJIT K. DASGUPTA, *GANDHI'S ECONOMIC THOUGHT* 25-30 (1996).

12. *See generally* LOUIS FISCHER, *GANDHI: HIS LIFE AND MESSAGE FOR THE WORLD* (1982) (The back cover explains the influence of Gandhi's simplicity and a photograph of Gandhi's scarce possessions).

13. *See* MAHATAMA GANDHI, *HIND SWARAJ AND OTHER WRITINGS* (Anthony Parel ed., 1997).

14. DASGUPTA, *supra* note 11, at 21-30, 121-22.

15. *Id.*

16. *See id.* at 21-30 (discussing "ethical preference" to describe Gandhi's inclusion of normative judgment into consumption). I adopt the terms "theory of trusteeship," "theory of rights," and "critique of industrialization" from Dasgupta.

consideration.<sup>17</sup> However, the huge gulf between moral philosophy and modern economics that pervades Western thought was non-existent in Gandhi's thought: economic behavior and moral decision-making occurred in the same human beings and therefore went hand-in-hand.<sup>18</sup>

In terms of its environmental consequences, a call to exercise moral decision-making has been a method to change consumption patterns. Gandhi often associated environmental problems with poverty; therefore, efforts to change consumption focused on the consequences to the poor.<sup>19</sup> In contrast, for some elites and biologists, the reason for the need to change consumption patterns is to protect wildlife.<sup>20</sup> This view has come under attack by commentators who argue that the focus on wildlife produces an imperialistic outcome on native poorer peoples.<sup>21</sup> Commentators criticize preservationists for seeking change in wildlife areas where the poor reside, rather than challenging unsustainable practices in wealthy parts of the world.<sup>22</sup> The commentators focus on social equity and argue that the "wildlands" focus of environmentalism preserves the privilege of

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17. *Id.*

18. *See id.* (one good example is Gandhi's endorsement of khadi as opposed to Indians purchasing Western manufactured clothing. Gandhi viewed this choice as crucial to India's economic and political independence from the British).

19. Gandhi stated:

I venture to suggest that it is the fundamental law of Nature, without exception, that Nature produces enough for our wants from day to day, and if only everybody took enough for himself and nothing more, there would be no pauperism in this world, there would be no man dying of starvation in this world.

John S. Moolakkattu, *Gandhi as a Human Ecologist*, 29 J. HUM. ECOLOGY 151, 155 (2010).

20. Ramaehandra Guha, *Radical American Environmentalism and Wilderness Preservation: A Third-World Critique*, 11 ENVTL. ETHICS 71, 74-75 (1989); *see also* Nehal Patel, *Environmentalism, Consciousness & Schema-Blending: Understanding Activists in the Environmental Movement* (Am. Sociological Ass'n Annual Meeting, July 31, 2008), available at [http://www.allacademic.com/meta/p240729\\_index.html](http://www.allacademic.com/meta/p240729_index.html).

21. Guha, *supra* note 20, at 74-75.

22. *Id.*

elite groups, since the poor are the easiest to displace to protect wildlands.<sup>23</sup>

Despite these criticisms, a common argument in favor of pursuing wildlife preservation is that scientists are the experts who can determine which places are to be protected.<sup>24</sup> However, the consequence of this view is that power shifts from those elites who control business to those who dictate science.<sup>25</sup> The argument is cleverly political as much as it is a plea to save ecosystems, but in the process of shifting power from big business to scientists, the interests of the poor—who often are living in the “protected” area—are compromised or neglected. In this debate between elites, the economic and political structures responsible for labeling the poor areas as “contested” are left entirely intact.

Gandhi spared no effort in pointing out the interests of the invisible masses.<sup>26</sup> His focus on the needs of the disempowered complicate the search for the environmental good; neither the argument for the “greater good” through economic growth nor the one through ecosystem preservation provide any direct resolution to the exploitative characteristics of the debate itself. However, this has not stopped those involved in the “debate between elites” from co-opting Gandhi’s emphasis on people and therefore absorbing his social equity critique.<sup>27</sup> For instance, the claim that deep ecology has eastern antecedents is reflected in Zen teacher Robert Aitken Roshi’s claim that Gandhi is not human-centered, but rather eco-centered.<sup>28</sup> This view has been criticized for reflecting an idea of the “East” as a collection of selected cultural images used by Western commentators to create their

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23. See Sylvia Tesh & Eduardo Paes-Machado, *Sewers, Garbage, and Environmentalism in Brazil*, 13 J. ENV’T & DEV. 42 (2004); see also BARRY COMMONER, *THE CLOSING CIRCLE: NATURE, MAN & TECHNOLOGY* (1972).

24. See SYLVIA TEST, *UNCERTAIN HAZARDS: ENVIRONMENTAL ACTIVISTS AND SCIENTIFIC PROOF* (2000).

25. Daniel Janzen, *The Future of Tropical Ecology*, 17 ANN. REV. ECOLOGY & SYSTEMATICS 305 (1986).

26. See GANDHI, *supra* note 6, at 464.

27. See MICHAEL COHEN, *THE PATHLESS WAY: JOHN MUIR AND AMERICAN WILDERNESS* 120 (1984) (an example of Orientalist conceptions of environmentalism); EDWARD SAID, *ORIENTALISM* (1980) (a critique of Orientalist framing in the West); Ronald Inden, *Orientalist Constructions of India*, 20 MOD. ASIAN STUD. 442 (1986); see also Guha, *supra* note 20, at 63-65.

28. See Guha, *supra* note 20.



own image of the human-nature relationship.<sup>29</sup> Keeping in line with both the orientalist and romanticist views—both of which have an interest in keeping the East looking “mystical” and “exotic”—many contemporary environmentalists continue to view many “eastern” thinkers in a light favorable to, and compatible with, their own views.<sup>30</sup>

Any analysis of nature preservation at the expense of social equity would be a problematic application of Gandhi’s life and teachings. Therefore, when imagining how a mindful jurisprudence would apply to an environmental dispute, we must consider Gandhi’s central ideas about the complex relationships between the rich, the poor, and natural resources. We provide speculations on how Gandhi’s thought can enrich environmental jurisprudence if we begin with his own views on core concepts in social theory<sup>31</sup> as they apply to law.

## B. Gandhi’s Influence on Law

Ironically, the very profession Gandhi undertook as a young man—law—does not seem to have been influenced to the same degree as many other areas of thought. Although his world-view influenced many elites and has had some impact on law in India in areas such as corporate social responsibility,<sup>32</sup> Gandhi has not deeply impacted the method of jurisprudence in India or elsewhere. Despite several calls in the contemporary critical legal scholarship for alternative views of law and legal systems,<sup>33</sup>

29. *Id.*

30. *Id.*

31. Lester R. Kurtz, *Gandhi and His Legacies*, in *ENCYCLOPEDIA OF VIOLENCE, PEACE, AND CONFLICT* 837 (2d ed. 2008).

32. Afra Afsharipour, *Directors as Trustees of the Nation? India’s Corporate Governance and Corporate Social Responsibility Reform Efforts*, 34 *SEATTLE U. L. REV.* 995 (2011).

33. See Yxta Maya Murray, *A Jurisprudence of Nonviolence*, 9 *CONN. PUB. INT. L.J.* 65 (2009); see AJIT ATRI, *GANDHI’S VIEW OF LEGAL JUSTICE* (2007). Professor Jai Narain Sharma remarks in the forward: “[t]he legal profession has produced some of the finest and most independent characters whose names are imprinted on the scroll of history. Mahatma Gandhi is one among them . . . [Atri] has raised several pertinent questions regarding legal justice in general and Gandhi’s view in particular.” *Id.* at xii-xiii; see also HEDGE, *supra* note 6; V.R. KRISHNA IYER, *JURISPRUDENCE AND JURISCONSCIENCE A LA GANDHI* (1976). For existing varieties of legal consciousness in environmental activism, see

few scholars have made any serious attempt to speculate on how jurisprudence can be critiqued and reformed using Gandhi's thought.

Some commentators criticize legal thought as a system of ideas wrapped in its own tradition and unable to examine itself reflexively.<sup>34</sup> Philosopher Wolcher believes "a philosophical work that limits itself to 'law' in the popular or academic sense has already sold its soul, as it were, to conventional ways of thinking."<sup>35</sup> Legal scholarship itself is susceptible to the strong pull of legal doctrines that stress the authority of precedent, and this tendency creates a problem when issues call for innovative or original insight. Tradition can become an impediment to breaking through centuries-old assumptions that deeply shape legal thought, whether it be about the nature of reality, the composition of the self (and therefore the basis of rights), or the goals of social interactions.

Gandhi's thought provides law scholars with an opportunity to question many of the fundamental social assumptions embedded in traditional legal thought. Given that Gandhi operated in both "Western" and "Eastern" paradigms simultaneously, he provides us with a basis for transcending the entrenched "East/West" divisions of our collective colonial past and the manner in which non-Western thought systems have been excluded from serious consideration in social theory.

Gandhi's writings strengthen alternative conceptions of environmental jurisprudence because many of his assumptions about the nature of reality and his conception of ethics do not entirely conform to the dominant philosophical frameworks of the West. Using Gandhi as a building block in the conception of a new jurisprudence gives us freedom to question the basic organizing principles that are treated as conventional wisdom in Western thought. Furthermore, our critique functions as a comprehensive alternative to dominant ways of thinking. Our

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Nehal Patel, *The Consciousness of Legal Mobilization* (Am. Sociological Ass'n Annual Meeting, Aug. 14, 2010), available at [http://www.allacademic.com/meta/p410518\\_index.html](http://www.allacademic.com/meta/p410518_index.html).

34. See LOUIS E. WOLCHER, *BEYOND TRANSCENDENCE IN LAW AND PHILOSOPHY* (2005).

35. *Id.* at x.

view is more than a mere criticism because Gandhi's thought contains a well-developed world-view from which we derive our own solutions and conclusions.

To use Gandhi's thought to reimagine jurisprudence, we must first identify themes that pervade his thought and apply them to legal arguments. We will apply several themes in Gandhi's life and writings to a recent case: *MCWC*. There are two reasons for using this case. First, the case has clear local ecological and legal importance to the state of Michigan and the surrounding area. Second, the case embodies many of the fundamental struggles common in both Gandhi's writings and in the environmental law between wealthy developers and local civilians.

In Part II, we provide a brief summary of the facts and the key legal concepts used in the briefs submitted to the court by Nestlé, Michigan Citizens for Water Conservation, and in amicus curiae briefs submitted by the Michigan Department of Environmental Quality and the National Wildlife Federation. We place special emphasis on the Public Trust Doctrine, Reasonable Use Doctrine, riparian rights, the "ecosystem nexus" theory, and determination of "significant public interest" as they relate to Gandhi's thought.

## II. KEY LEGAL CONCEPTS OF *MCWC V. NESTLÉ*

In *MCWC*, Michigan Citizens for Water Conservation (Citizens) filed a civil action against Nestlé for the illegal use of a waterway in northern Michigan.<sup>36</sup> The waterway consisted of a small river (the Dead Stream), a trio of bodies of water called the "Tri-Lakes," and the Osprey Lake Impoundment and Wetland.<sup>37</sup> Nestlé was granted groundwater rights from Donald Patrick and Nancy Gale Bollman, who were riparian owners living on the property along the Dead Stream.<sup>38</sup> Nestlé obtained "all water rights in and under the [p]roperty" and "the right 'to develop, use, extract, remove, pump and/or consume from any and all water sources thereon'" when Nestlé purchased the subsurface

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36. See *MCWC*, 737 N.W.2d at 447.

37. *Id.* at 450.

38. *Id.*

ground.<sup>39</sup> The Bollmans also “leased to Nestlé the surface of the [p]roperty and granted Nestlé easements of ingress and egress to, from, and across the property.”<sup>40</sup> Nestlé accessed groundwater under the Bollmans’ land via a pumping facility that Nestlé built along the Dead Stream.<sup>41</sup>

### A. The Public Trust Doctrine

The Public Trust Doctrine (PTD) provides that some resources can be held in trust for the public good.<sup>42</sup> Over a century ago, the United States Supreme Court upheld the PTD by declaring that such lands cannot lawfully be conveyed for a private corporation’s profit-seeking use.<sup>43</sup> Michigan courts use a test of “navigability” to determine whether or not a waterway can be protected from corporate use under the PTD.<sup>44</sup> If a waterway is capable of sustaining commercial shipping, then the courts deem the stream navigable,<sup>45</sup> and therefore, the waterway could be protected under the PTD.<sup>46</sup> Michigan courts use a “log-flotation test” to determine whether a stream is capable of sustaining commercial shipping and therefore subject to protection under the PTD.<sup>47</sup> The log-flotation test states that a stream must have the capacity to float a number of large mill logs on the stream or body of water, thus making it navigable and capable of sustaining commercial shipping.<sup>48</sup>

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39. Brief for Defendant-Appellee Opposition to Plaintiffs-Appellants’ Application for Leave to Appeal at 5, *Michigan Citizens for Water Conservation v. Nestlé Waters N. Am., Inc. (Citizens)*, 709 N.W.2d 174 (Mich. Ct. App. 2005) (No. 130802) [hereinafter Defendant’s Opposition Brief].

40. *Id.*

41. *MCWC*, 737 N.W.2d at 450.

42. PHILIP WEINBERG & KEVIN A. REILLY, *UNDERSTANDING ENVIRONMENTAL LAW* 51 (2d ed. 2008).

43. *Id.*

44. *Citizens*, 709 N.W.2d at 218-20.

45. *Id.* at 218; *see also* Plaintiff-Appellant’s Application for Leave to Appeal at 34-36, *Citizens*, 709 N.W.2d 174 (Mich. Ct. App. 2005) (No. 256153) [hereinafter Plaintiff’s Application].

46. *Citizens*, 709 N.W.2d at 218-20.

47. *Id.* at 220.

48. *Id.* at 218. The parties and the court use the term “mill logs” to describe large logs, but the court did not give a description of the weight or length of a mill log.

In the trial court, Citizens moved for summary judgment on the grounds that the “Dead Stream is subject to the public trust doctrine, and that diminishment of the flow of a public trust stream for diversion and sale by a private person for a private profit is unlawful.”<sup>49</sup> The trial court rejected Citizens’ motion for summary judgment.<sup>50</sup> On appeal, Citizens cited *Bott v. Natural Resources Commission*,<sup>51</sup> arguing that the Dead Stream is capable of floating a commercially viable log because the stream is capable of floating a “shingle bolt,” which is defined as a sixteen to eighteen inch chunk of wood.<sup>52</sup> In contrast, Nestlé argued that the Dead Stream did not need protection under the PTD because only the stream’s “public access” points require protection to preserve the public’s interest in the waterway.<sup>53</sup> Nestlé reasoned that a body of water near the Dead Stream called “the Tri-Lakes” provides the Dead Stream with “public access” points which need protection, and therefore, the stream itself does not require protection under the PTD.<sup>54</sup> Furthermore, Nestlé argued that the Dead Stream is not subject to the PTD since they are not withdrawing water directly from the stream.<sup>55</sup> Instead, Nestlé claims it was pumping water from an aquifer that is the source of springs that feed the Dead Stream.<sup>56</sup>

The Michigan Court of Appeals rejected Citizens’ protection of the Dead Stream under the PTD.<sup>57</sup> However, the court of appeals also rejected Nestlé’s public trust reasoning that the area is protected by protection of the “access points” only, as opposed to providing protection to the entire stream.<sup>58</sup> The court cited *Moore v. Sanborne*, in which an entire waterway is navigable, and therefore subject to the PTD, if it will sustain commercial

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49. Defendant’s Opposition Brief, *supra* note 39, at 6.

50. *Id.* at 22.

51. *Bott v. Comm’n of Natural Res. of State of Mich. Dept. of Natural Res.*, 327 N.W.2d 838 (Mich. 1982).

52. See Plaintiff’s Application, *supra* note 45, at 34-36 (discussing *Bott*).

53. Defendant’s Opposition Brief, *supra* note 39, at 34-35.

54. *Id.*

55. *Id.* at 36-39.

56. *Id.*

57. See *Citizens*, 709 N.W.2d 174 (Mich. Ct. App. 2005).

58. *Id.* The court of appeals affirmed the trial court’s dismissal of Nestlé’s claim.

shipping or if its natural state has the capacity to float mill logs.<sup>59</sup> The court of appeals reasoned that *Moore* and *Bott* both require the floating of large mill logs to demonstrate navigability.<sup>60</sup> Under this reasoning, the court concluded that the Dead Stream failed the log-flotation test.<sup>61</sup> Therefore, both the trial court and court of appeals determined that the Dead Stream was not navigable and unable to sustain commercial shipping. Consequently, the stream is not protected under the PTD.<sup>62</sup>

## B. The Reasonable Use Doctrine

The reasonable use doctrine is used frequently, and Michigan uses a “reasonable-use balancing test.”<sup>63</sup> The balancing test for the reasonable use doctrine in Michigan is the same “log-flotation test” applied to the PTD. The “log-flotation test” states that a stream must hold the capacity to float a number of large mill logs to be considered navigable. If the Dead Stream is not considered navigable, then the stream could not sustain commercial shipping.<sup>64</sup> Therefore, since the court of appeals concluded that the Dead Stream was not navigable, the use of the Dead Stream by Nestlé for commercial purposes did not qualify as reasonable use.<sup>65</sup>

The reasonable use doctrine also includes a “fair participation” component which balances the utility of competing parties’ claims to reasonable use.<sup>66</sup> Michigan courts use a fair participation test that takes into account whether the water being withdrawn is used “on-tract” or “off-tract.”<sup>67</sup> In *MCWC*, the dispute over reasonable use compares the plaintiff’s riparian right to the reasonable use of the Dead Stream versus Nestlé’s

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59. *Id.* (citing *Moore v. Sanborne*, 2 Mich. 519 (1853)).

60. *Id.* at 218-19.

61. *Id.* at 219.

62. *See id.* at 222.

63. Defendant’s Opposition Brief, *supra* note 39, at 19; *see also Citizens*, 709 N.W.2d 174 (Mich. Ct. App. 2005).

64. Defendant’s Opposition Brief, *supra* note 39, at 19.

65. *Id.* at 20-21.

66. *Id.* at 10 (“Michigan courts have sought to ensure ‘the greatest possible access to water for all users while protecting certain traditional water uses.’”).

67. *Id.*; *see also Citizens*, 709 N.W.2d at 199.

right to the reasonable use of groundwater from the land it owns in fee simple.<sup>68</sup> Nestlé purchased the subsurface ground from Donald Patrick and Nancy Gale Bollman, who were riparian owners living on the property.<sup>69</sup> When they purchased the land, Nestlé claimed to obtain “all water rights in and under the [p]roperty” and “the right to develop, use, extract, remove, pump, and/or consume from any and all water sources thereon.”<sup>70</sup> In addition, the Bollmans leased to Nestlé “the surface of the [p]roperty and granted Nestlé easements of ingress and egress to, from, and across the [p]roperty.”<sup>71</sup>

The trial court originally ruled that an off-tract, out-of-watershed use of groundwater cannot measurably diminish the flow of surface water to another riparian.<sup>72</sup> In other words, the trial court states that off-tract use is defined as use out of the relevant watershed, or out if its source watershed or groundwater aquifer,<sup>73</sup> and off-tract use cannot reduce the natural flow to the riparian body.<sup>74</sup> The trial court’s emphasis on limiting off-tract use suggests that uses of water off-tract should be treated differently than uses of water on-tract in the relevant watershed or aquifer.<sup>75</sup> Under this reasoning, Nestlé argued that its actions constituted a “reasonable use.”<sup>76</sup> Furthermore, Nestlé employed utilitarian reasoning, arguing that “Michigan courts have sought to ensure ‘the greatest possible access to water for all users while protecting certain traditional water uses.’”<sup>77</sup> Nestlé relied heavily on the interpretation of “fair participation” as “the use of water by

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68. *Citizens*, 709 N.W.2d at 205.

69. Defendant’s Opposition Brief, *supra* note 39, at 4. However, the court repeatedly stated that Nestlé was not a riparian owner regardless of Nestlé’s claim to possessing all water rights.

70. *Id.* at 5.

71. *Id.*

72. *Id.* at 8; *see also* Michigan Citizens for Water Conservation v. Nestlé Waters N. Am., Inc., 2003 WL 25659349, at \*48 (Mich. Cir. Ct. 2003).

73. *Michigan Citizens for Water Conservation*, 2003 WL 25659349, at \*48.

74. *Id.*; *see also* Defendant’s Opposition Brief, *supra* note 39, at 10 (stating, “Michigan courts have sought to ensure ‘the greatest possible access to water for all users while protecting certain traditional water uses.’”).

75. Defendant’s Opposition Brief, *supra* note 39, at 23-43.

76. *Id.* at 24.

77. *Id.* at 10.

the greatest number of users.”<sup>78</sup> It claimed that since there are many non-riparian users who can benefit from Nestlé’s access to the water resource, the riparian owners’ rights should not impede what is in the interest of the greatest good for the greatest number of people.<sup>79</sup>

The court of appeals reversed the trial court’s statement of the law and adopted a different version of the reasonable-use balancing test.<sup>80</sup> Using its own utilitarian reasoning, the court sought to ensure the greatest possible access to water resources for all users while protecting certain traditional water users.<sup>81</sup> Consequently, the court’s reasonable-use test requires a determination of what is considered a “traditional water use.”<sup>82</sup> In making this determination, the court of appeals listed a number of balancing test factors that are to be considered.<sup>83</sup> The factors are not listed in any hierarchy of importance, and the court’s reasoning provides no clear guidance regarding how the several factors are to be weighed should they fail to point to a specific outcome.<sup>84</sup> Presumably, the court’s guidance is vague because of the need to apply the test on a case-by-case basis.<sup>85</sup> In the past, Michigan courts have avoided strict reasonable use interpretations for this reason.<sup>86</sup>

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78. *Id.* at 23.

79. *Id.* at 10-11.

80. *See Citizens*, 709 N.W.2d 174, 201 (Mich. Ct. App. 2005).

81. *Id.*

82. *Id.* at 202-03.

83. *Id.* at 202-05.

84. *See id.*

85. However, the court did give preference to riparian uses:

Further, in order to ensure that the needs of local water users are met first, water uses that benefit the riparian land or the land from which the groundwater was removed are given preference over water uses that ship the water away or otherwise benefit land unconnected with the location from which the water was extracted.

*Id.* at 204.

86. Defendant’s Opposition Brief, *supra* note 39, at 29 (“Michigan has long eschewed such rigid formulations, instead adopting a reasonable-use test allowing courts to ‘consider all the circumstances that are relevant in a given case,’ in order to protect the environment, while at the same time promoting socially and economically beneficial water uses.”) (internal citations omitted).



Although the court of appeals did not provide much guidance for future cases, it entered a final order on February 14, 2006 stating that Nestlé's water removal was unreasonable.<sup>87</sup> The court of appeals cited *Schenk v. City of Ann Arbor*<sup>88</sup> in which there was a dispute between an on-tract user of groundwater and a city that planned to pump groundwater off-tract to meet municipal needs.<sup>89</sup> *Schenk* raised the idea of "material diminishment" in reasonable use, which means an off-tract user cannot cause an interference with an on-tract use.<sup>90</sup> *Schenk* drew a distinction between on-tract and off-tract users, which created different standards of reasonable use for on-tract and off-tract users.<sup>91</sup> Although the court of appeals used reasoning from *Schenk* to limit Nestlé's conduct, it also cited limitations for on-tract users in dicta.<sup>92</sup> The court of appeals cited *Maerz v. U.S. Steel*<sup>93</sup> in support of the proposition that an on-tract user of groundwater cannot unreasonably interfere with a neighbor's on-tract use.<sup>94</sup>

### C. Riparian Rights

The common law of riparian rights recognizes that an owner of streamside, or riparian, property has a right to the absolute, unimpeded flow of water, and the owner can obtain damages or an injunction against an upstream owner for interference with that right.<sup>95</sup> The issue in this case is whether the plaintiff's riparian rights outweigh Nestlé's contractual right to the reasonable use of groundwater from the Bollmans' land.<sup>96</sup> Nestlé purchased from the Bollmans the subsurface ground beneath 139 acres of the Sanctuary.<sup>97</sup> "Nestlé also obtained 'all water rights

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87. *Id.* at 1.

88. *Schenk v. City of Ann Arbor*, 163 N.W. 109 (Mich. 1917).

89. *See Citizens*, 709 N.W.2d 174, 197-98 (Mich. Ct. App. 2005).

90. *Schenk*, 163 N.W. at 112.

91. *Id.* at 112-15.

92. *See Citizens*, 709 N.W.2d at 200.

93. *Maerz v. U.S. Steel Corp.*, 323 N.W.2d 524, 529-30 (1982).

94. *See Citizens*, 709 N.W.2d at 200.

95. *See WEINBERG & REILLY, supra* note 42, at 50.

96. *See generally Citizens*, 709 N.W.2d 174.

97. Defendant's Opposition Brief, *supra* note 39, at 4.

in and under the Property,’ and the right ‘to develop, use, extract, remove, pump and/or consume water from any and all water sources thereon.’<sup>98</sup> Additionally, “the Bollmans leased to Nestlé the surface of the Property and granted Nestlé easements of ingress and egress to, from, and across the Property.”<sup>99</sup> Nestlé argued that this fee gave Nestlé property rights to use the groundwater, a right just as valid and enforceable as the Plaintiff’s riparian rights to use the Dead Stream.<sup>100</sup>

Citizens argued that Nestlé’s purchase of the land did not allow them to obtain riparian rights to the Dead Stream.<sup>101</sup> In addition, Citizens argued that they were successful in meeting their burden of proof regarding harm to their riparian interests.<sup>102</sup> Citizens also argued that an “off-tract user could not cause any interference with a use on-tract.”<sup>103</sup> To support their claim, Citizens cited *Hart v. D’Agostini*,<sup>104</sup> which said the removal, transporting, and consumption of water elsewhere (i.e., to a location other than the original source) is an unreasonable use of the specific land.<sup>105</sup> Moreover, the National Wildlife Federation (NWF) filed an Amicus Curiae Brief and stated that the Michigan Conservations Club, Tip of the Miff Watershed Council, Pickerel-Crooked Lakes Association, and many other organizations have an interest in the Osprey Lake Impoundment and Wetland.<sup>106</sup> The Amici argued that many organization

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98. *Id.* at 5.

99. *Id.*

100. *Id.* at 2.

101. *Id.* Citizens also assert that their use of the stream is a reasonable use worthy of protection.

102. See *Citizens*, 709 N.W.2d 174, 207 (Mich. Ct. App. 2005); Plaintiff’s Application, *supra* note 45, at 2.

103. Plaintiff’s Application, *supra* note 45, at 22. Citizens also cited *Schenk v. City of Ann Arbor*, which involved a public water company intentionally removing water from the original source and transporting it elsewhere for consumption. *Schenk v. City of Ann Arbor*, 163 N.W. 109, 110 (Mich. 1917).

104. 151 N.W.2d 826, 828 (Mich. Ct. App. 1967).

105. See *Michigan Citizens for Water Conservation v. Nestlé Waters N. Am., Inc.*, 2003 WL 25659349, at \*48 (Mich. Cir. Ct. 2003).

106. See Brief for the National Wildlife Federation et al. as Amici Curiae at 1, *Citizens*, 709 N.W.2d 174 (Mich. Ct. App. 2005) (No. 130802) [hereinafter NWF’s Brief].

members had vested riparian property interests that could be affected by the outcome of the case.<sup>107</sup>

The trial court held in favor of Citizens' claim that riparian uses were superior to groundwater uses.<sup>108</sup> However, in this situation, the trial court rejected the correlative rights rule, stating that the rule applies to competing groundwater users, rather than applying to competing uses between an off-tract and on-tract user.<sup>109</sup> Therefore, although the court rejected the correlative rights rule, the court made a clear connection between riparian users, on-tract versus off-tract use, and reasonable use.

The Michigan Court of Appeals upheld the trial court holding that riparian uses were superior to groundwater uses and added that "[t]he loss of recreational use and the physical alteration of the Dead Stream will directly and substantially harm the riparian value of the Dead Stream."<sup>110</sup> The court of appeals also held that the plaintiffs (Citizens) have standing because of their status as riparian owners.<sup>111</sup> As NWF stated in their brief, "[Citizens] are riparian owners who live and recreate in the area negatively affected by Nestlé's pumping."<sup>112</sup> Furthermore, "harms to the Osprey Lake Impoundment and the Enumerated Wetlands negatively affect Plaintiffs' riparian properties, as well as Plaintiffs' ability to exercise their riparian rights, which include recreational and aesthetic interests in maintaining the ecological integrity of the area."<sup>113</sup>

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107. *Id.* at 1.

108. *Michigan Citizens for Water Conservation*, 2003 WL 25659349, at \*47.

109. *Id.* ("The court there uses what it called the "correlative rights" rule, relying on the Restatement of torts, 2nd sec. 858. That tort concept applies to competing users of groundwater, a situation not relevant here.").

110. *Citizens*, 709 N.W.2d 174, 206 (Mich. Ct. App. 2005).

111. *Id.* at 208.

112. NWF's Brief, *supra* note 106, at 14.

113. *Id.*

**D. Ecosystem Nexus Theory**

The basis of standing referred to as “ecosystem nexus theory” was discussed in *Lujan v. Defenders of Wildlife*.<sup>114</sup> Ecosystem nexus theorizes that by “recognizing the complex, reciprocal nature of the ecosystem as well as the hydrologic interaction, connection, or interrelationship between these natural resources . . . [the] negative effects on one part [of an aquifer system is] likely to impact another in such a shallow aquifer system.”<sup>115</sup> In other words, portions of the ecosystem are not to be individually considered when damage has occurred. Rather, when examining injury, the entire ecosystem should be taken as a whole.<sup>116</sup>

Ecosystem nexus theory directly relates to *MCWC* because the theory challenges Nestlé’s implicit contention that each affected body of water should be treated as if it existed in a bubble.<sup>117</sup> Nestlé argued that their pumping along one stream was not reason enough for Plaintiffs to bring suit regarding the Osprey Lake Impoundment and Wetlands.<sup>118</sup> However, in contrast to the basis of Nestlé’s argument, ecosystem nexus theory states that all bodies of water in a contiguous ecosystem are interconnected, and the negative effects of one lake impoundment will inevitably affect the biological character of another interconnected lake impoundment, and so on.<sup>119</sup>

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114. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 (1992); *see also* Brief for Mich. Dep’t of Env’tl. Quality as Amici Curiae at 23-24, *Citizens*, 709 N.W.2d 174 (Mich. Ct. App. 2005) [hereinafter DEQ’s Brief].

115. DEQ’s Brief, *supra* note 114, at 24.

116. *Id.*

117. *MCWC*, 737 N.W.2d 447, 452 (Mich. 2007). Court of Appeals Judges White and Murphy, forming the majority on the standing question, disagreed with Nestlé. Concurring that plaintiffs had standing “with respect to all the natural resources at issue,” Judge Murphy wrote that “plaintiffs have standing because of the complex, reciprocal nature of the ecosystem that encompasses the pertinent natural resources noted above and because of the hydrologic interaction, connection, or interrelationship between these natural resources, the springs, the aquifer, and defendant Nestle’s pumping activities, whereby impact on one particular resource caused by Nestle’s pumping necessarily affects other resources in the surrounding area.” *Citizens*, 709 N.W.2d 174, 225 (Mich. Ct. App. 2005).

118. *Citizens*, 709 N.W.2d 174.

119. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565-66 (1992).

The trial court and court of appeals in *MCWC* acknowledged the definition of ecosystem nexus in *Lujan*<sup>120</sup> and found that the Dead Stream and the Osprey Lake Impoundment are both a part of the Tri-Lakes ecosystem, therefore making them subject to the ecosystem nexus theory.<sup>121</sup> In other words, the court ruled that these bodies of water are part of an aquatic watershed and therefore constitute a contiguous ecosystem.<sup>122</sup> Additionally, the trial court stated that all interconnected bodies of water, including the Osprey Lake Impoundment and Wetlands, are negatively affected by Nestlé's use, and the ecosystem as a whole suffers as a result of Nestlé's pumping.<sup>123</sup> The court further noted that Nestlé's pumping had a negative effect on the level, temperature, and quality of water in the Dead Stream, including adjacent wetlands.<sup>124</sup> The court also noted that eventually, the entire ecosystem's natural and biological character is weakened because it becomes more susceptible to invasive species and changes to the fundamental characteristics of the entire ecosystem.<sup>125</sup> The court noted that Nestlé's pumping has such a negative effect on the Osprey Lake Impoundment and adjacent wetlands that it destabilizes the ecological integrity of the entire ecosystem.<sup>126</sup> Therefore, the court concluded that the effects of Nestlé's pumping were reason enough for the Plaintiffs to bring suit.<sup>127</sup>

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120. *MCWC*, 737 N.W.2d at 457.

121. *Id.*

122. *Id.*

123. *Michigan Citizens for Water Conservation v. Nestlé Waters N. Am., Inc.*, 2003 WL 25659349, at \*13 (Mich. Cir. Ct. 2003). In addition, the court not only stressed that the negative effects on one part likely impacts another, but the damage is worse for such a shallow aquifer system such as the Osprey Lake Impoundment Watershed. *Id.*

124. *Id.* at \*31.

125. *Id.* at \*36.

126. *Id.* at \*41.

127. *See generally id.* For the full reasoning of the trial court as explained by the Michigan Department of Environmental Quality, see DEQ's Brief, *supra* note 114, at 24-26.

### E. Significant Public Interest

The concept of “significant public interest” plays a crucial role throughout the *MCWC*. The trial court and court of appeals both agreed that the Legislature has the authority to provide a means for any citizen to protect their interest in the preservation of the state’s natural resources due to significant public interest.<sup>128</sup> The Michigan Department of Environmental Quality (MDEQ) submitted an amicus curiae brief that suggested specific causes of action for those affected by pollution, impairment, or destruction of natural resources against specific persons who cause such pollution, impairment, or destruction.<sup>129</sup> Moreover, MDEQ’s brief explained the grounds for claims that address significant public interest in matters such as the case against Nestlé.<sup>130</sup> While the Michigan Environmental Protection Act was being enacted, MDEQ wanted to provide for the protection of natural resources by creating a cause of action for an interest reserved by the people. MDEQ argued that the people of Michigan declared in the state’s Constitution that the manner in which natural resources of the state are conserved and developed is of “paramount public concern.”<sup>131</sup> Furthermore, “[t]he conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people.”<sup>132</sup>

The court referenced the Michigan Constitution, which indicates that proper conservation and development of natural resources impacts the health, safety, and general welfare of the citizens of Michigan.<sup>133</sup> The court concluded that the matters raised in *MCWC* are matters of significant public interest.<sup>134</sup>

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128. DEQ’s Brief, *supra* note 114, at 21.

129. *Id.*

130. *Id.* at 10-11.

131. *Id.* at 11.

132. *Id.*

133. Michigan Citizens for Water Conservation v. Nestlé Waters N. Am., Inc., 2003 WL 25659349, at \*52 (Mich. Cir. Ct. 2003).

134. See generally *id.*

### III. SPECULATIONS ON A MINDFUL JURISPRUDENCE OF THE ENVIRONMENT

In Part III, we analyze the legal briefs and court opinion in *MCWC* by applying Gandhi's thought to the concepts central to the case. We highlight Gandhi's view of environmental trusteeship, utility, rights, and industrialization. Through this concrete application of Gandhi's thought, we seek to develop a jurisprudence that is more mindful of its broader implications to the environment and society.

#### A. Connecting the Public Trust Doctrine to Gandhi's Theory of Trusteeship

Gandhi's theory of trusteeship influences certain areas of law and society in India, such as the corporate social responsibility (CSR) discourse.<sup>135</sup> Gandhi's theory of trusteeship when applied to CSR has been called "revolutionary"<sup>136</sup> and had as its foundation a world-view that eschewed the modern acceptance of profit purely for the sake of private owners. He viewed the

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135. Afsharipour, *supra* note 32, at 1012-13; *see also* Timothy L. Fort & Cindy A. Schipani, *The Role of the Corporation in Fostering Sustainable Peace*, 35 VAND. J. TRANSNAT'L L. 389, 426 (2002) ("There is a belief underlying contemporary business strategy that as long as one operates within the bounds of the law, one is free to engage in any business practice that does not harm the self-interest of the company. Implicit in this understanding is the notion that other societal institutions are in place to protect interests that require protecting, so that it is not the responsibility of a corporation to be concerned with these issues."). Gandhi says 90% of people need no governance, only the top 5% constituted by greedy white collar or black market criminals and the bottom 5% comprised of common criminals. VED MEHTA, MAHATMA GANDHI AND HIS APOSTLES 214 (1977).

136. *See* Afsharipour, *supra* note 32, at 1013 ("Gandhi's view of the ownership of capital was one of trusteeship motivated by the belief that essentially society was providing capitalists with an opportunity to manage resources which need to be managed on behalf of society in general.") (citation omitted); *see also* MEERA MITRA, IT'S ONLY BUSINESS! INDIA'S CORPORATE SOCIAL RESPONSIVENESS IN A GLOBALIZED WORLD 20-25 (2007); Interview by Jitendra Singh with R. Bandyopadhyay, Chairman, Indian Ministry of Corporate Affairs, Wharton School (June 17, 2010), *available at* <http://knowledge.wharton.upenn.edu/india/article.cfm?articleid=4488> (the Chairman stated that directors and senior management are "custodians of public money, they are the trustees—if we go to the Mahatma Gandhi concept of trusteeship . . . They are actually the trustees of the nation.").

wealth of the richest individuals and organizations as being part of the nation's wealth, and he viewed the control of that wealth as carrying with it the responsibility to use it for the social good.<sup>137</sup>

Many view Gandhi's view of trusteeship to imply income equality, and Gandhi certainly expressed concern about the wide gaps between the rich and poor.<sup>138</sup> However, it was the use of wealth for meaningful social goals that concerned Gandhi, and this concern did not necessarily imply income equality as an end for its own sake.<sup>139</sup> Gandhi tolerated some amount of inequality provided that the wealthy used their resources for the benefit of society.<sup>140</sup> Equality by itself did not necessarily focus on his ultimate goal: to use wealth for the "social good."<sup>141</sup>

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137. GANDHI, *September 10, 1928 – January 14, 1929*, in COLLECTED WORKS OF MAHATMA GANDHI ONLINE, *supra* note 7, at 413 ("Unless the capitalists of India help to avert that tragedy by becoming trustees of the welfare of the masses and by devoting their talents not to amassing wealth for themselves but to the service of the masses in an altruistic spirit, they will end either by destroying the masses or being destroyed by them.").

138. GANDHI, *July 16, 1940 – December 27, 1940*, in COLLECTED WORKS OF MAHATMA GANDHI ONLINE, *supra* note 7, at 114 (India's economy will "be a structure on sand if it is not built on the solid foundation of economic equality... everyone will have a proper house to live in, sufficient and balanced food to eat, and sufficient khadi with which to cover himself. It also means that the cruel inequality that obtains today will be removed by purely non-violent means.").

139. GANDHI, *September 16, 1934 – December 15, 1934*, in COLLECTED WORKS OF MAHATMA GANDHI ONLINE, *supra* note 7, at 318 (however, Gandhi did believe that his principle of trusteeship would produce more equality than the status quo. He said, "[a]bsolute trusteeship is an abstraction like Euclid's definition of a point, and is equally unattainable. But if we strive for it, we shall be able to go further in realizing a state of equality on earth than by any other method.").

140. GANDHI, *July 16, 1940 – Dec. 27, 1940*, in COLLECTED WORKS OF MAHATMA GANDHI ONLINE, *supra* note 7, at 114 ("Economic equality must never be supposed to mean possession of an equal amount of worldly goods by everyone."); *see also* DASGUPTA, *supra* note 11, at 91.

141. GANDHI, *July 16, 1940 – Dec. 27, 1940*, in COLLECTED WORKS OF MAHATMA GANDHI ONLINE, *supra* note 7, at 133-34 ("[A]t the root of this doctrine of equal distribution must lie that of the trusteeship of the wealthy for the superfluous wealth possessed by them. . . . The rich man will be left in possession of his wealth, of which he will use what he reasonably requires for his personal needs and will act as a trustee for the remainder to be used for the society. . . . As soon as man looks upon himself as a servant of society, earns for its sake, spends for its benefit, then purity enters into his earnings and there is ahimsa in his venture. Moreover, if men's minds turn towards this way of life, there will come about a peaceful revolution in society, and that without any bitterness.").



Gandhi's conception of social good included the proper long-term management of natural resources.<sup>142</sup> His concern that India's adoption of Western economy would "strip the earth bare" shows a strong concern for stewardship.<sup>143</sup> Similarly, in contemporary jurisprudence, the idea of resource management relies on a view of people as "stewards" of the environment. However, American jurisprudence implicitly accepts the Western human-environment dialectic as a foundation of thought. This particular dialectic imagines the world as a place containing resources for people to use; as a result, the notion of humans having dominion over the earth and the right to acquire property for private use has a long history of influence in American jurisprudence.

In contrast, Gandhi's world-view does not accept this human-environment dialectic. Gandhi referred to his life's goal as being "to make myself zero,"<sup>144</sup> and pursuing this goal was his effort to preserve the dignity of the individual and the world. His conception of himself perhaps is best expressed in the Sanskrit maxim "tat tvam asi" (meaning "you are that" or "you are the other"), the full realization of which is life's highest goal. As a result, for Gandhi, the goal of life was to "reduce to zero" the perceived distance between the self and other. This view of the world makes the treatment of the "other"—whether that other is "human," "sentient," or "inanimate" in the Western conception—as important as treatment of oneself. In his conception of the world, violence to one's surroundings was as destructive as violence done

142. GANDHI, *September 10, 1928 – January 14, 1929*, in COLLECTED WORKS OF MAHATMA GANDHI ONLINE, *supra* note 7, at 412-13 ("If an entire nation of 300 millions [sic] took to similar economic exploitation [by the West], it would strip the world bare like locusts.").

143. Even the question of whether "natural" objects can be represented in court has been a point of resource management debate in both India and the United States. See CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?: LAW, MORALITY, AND THE ENVIRONMENT*, n.1 (Oxford Univ. Press, 3d ed. 2010) (discussing the idol case in India and criticisms waged in U.S. jurisprudence at the question of whether trees should have standing).

144. GANDHI, *supra* note 6, at 464 ("I must reduce myself to zero. So long as man does not of his own free will put himself last among his fellow-creatures, there is no salvation for him. Ahimsa is the farthest limit of humility."); see DASGUPTA, *supra* note 11, at 122 (discussing possible theological influences on Gandhi's theory of trusteeship).

unto oneself, and therefore, the world was conceived of as a family.<sup>145</sup>

Gandhi constantly tried to expand the notion of family to include the world and not merely one's immediate kin. He often referred to his life as a series of "experiments with Truth," and the vehicle of Truth was ahimsa, or "non-violence." Through exploring ahimsa, Gandhi concluded that "for a non-violent person, the whole world is one family. He will not fear others nor will others fear him."<sup>146</sup> To Gandhi, it seems that to engulf the entire world in the notion of family was the logical conclusion of ahimsa and the social manifestation of "tat tvam asi." Naturally, then, a life lived through ahimsa led to the view that the wealthy held their wealth in trust for the benefit of their entire family.

Gandhi's expanded conception of the family, therefore, implicitly informs his theory of trusteeship. The theory is grounded in a world-view that recognizes the universe as a single entity, one that is comprised of parts that seem different at first appearance but fundamentally are the same. As a result, all people had a duty to care for the world as one family, with the wealthy playing a significant role due to their unique social position.<sup>147</sup>

Therefore, one way to view the PTD using Gandhi's thought is to view it as incumbent upon wealthy entities to use their

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145. See DASGUPTA, *supra* note 11, at 121-22 (Non-violence not only mattered in terms of the ends of human conduct, but also was significant to the means of human conduct for Gandhi. Therefore, non-violent treatment of others was important not only for the well-being of the other, but also as a practice that both reflected and cultivated a non-violent mind for the practitioner. For a discussion of non-violence applied to trusteeship).

146. MADHU MASKAN, *THE QUINTESSENCE OF GANDHI: IN HIS OWN WORDS* (1984).

147. DASGUPTA, *supra* note 11, at 118-29. This world-view has its roots in a special form of "experimentation" that involves an exploration of the human mind. For an expanded discussion of world-view, see EKNATH EASWARAN, *THE UPANISHADS* 7-30 (1987); EKNATH EASWARAN, *THE DHAMMAPADA* 7-77 (1985). For a cognitive social science discussion of world-view, mind, and environmentalism, see Nehal Ambalal Patel, *Consciousness in the Environmental Movement* (2009) (unpublished Ph.D. dissertation, Northwestern University) (on file with Northwestern University Library); see also Nehal Patel, *Schemas, Cognitive Social Science, and Blending in Social Movements: The Case of Environmental Activists* (Am. Sociological Ass'n Annual Meeting, Aug. 19, 2011), available at [http://www.allacademic.com/meta/p504537\\_index.html](http://www.allacademic.com/meta/p504537_index.html).

wealth in the interests of the public good. In contemporary American jurisprudence and its Roman origins, the PTD views the state as trustee of the land, and therefore, responsibility for the lands falls on the government.<sup>148</sup> It is well established in American jurisprudence that lands held in Public Trust cannot be “conveyed for a private corporation’s profit-seeking use.”<sup>149</sup> Therefore, the common law of the PTD already restrains the profit-seeking of corporations, but American common law does not speak to any role of trusteeship upon the wealthy.

In contrast, Gandhi’s emphasis on the wealth of the rich being held in trust raises the question of how and why our jurisprudence does not raise this sense of responsibility directly onto wealthy organizations. Under Gandhi’s theory of trusteeship, in *MCWC*, a multi-billion dollar corporation such as Nestlé would have to address its responsibility as trustee of the nation’s wealth (in this case, the nation’s wealth is its natural resources such as the Dead Stream ecosystem). Rather than viewing the corporation in the negative—as an entity to restrain—Gandhi’s theory of trusteeship views the corporation in the positive—as an entity whose responsibilities are to be realized and demanded. Therefore, an application of Gandhi’s theory of trusteeship to the law shifts the focus from how to prevent negative corporate behavior to how to unleash positive corporate social responsibility.

## **B. Connecting the Reasonable Use Doctrine & “Significant Public Interest” to *Sarvodaya***

### **a. The Reasonable Use Doctrine**

Gandhi’s thought contains guidelines for reasonable use of goods and resources that are different from most Western views. In classical utilitarianism, for instance, the maxim “the greatest good for the greatest number of people” is used to validate the use of a good or resource. Nestlé used such reasoning when it argued

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148. WEINBERG & REILLY, *supra* note 42, at 51 (Originally from Roman and English Common law, in which the Crown was responsible for the lands as trustee).

149. *Id.* at 51; *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

that its use of the Dead Stream would result in thousands of gallons of bottled water that a large number of people will drink.<sup>150</sup> In other words, Nestlé's use of the stream arguably leads to the greatest good for the greatest number of people.

In contrast to a classical utilitarian view, Gandhi used a view based on "the welfare of all" which he termed *sarvodaya*.<sup>151</sup> Both *sarvodaya* and utilitarianism relate to the reasonable use doctrine because they both contain guiding principles to determine reasonable use. In a standard utilitarian analysis, the question is examined by asking what provides the greatest good to the greatest number; in *sarvodaya*, the question is examined by asking what is in the welfare of all.

Because "use" is the central concept in the Reasonable Use Doctrine, we must engage Gandhi's thought by beginning with guidance he provides on what constitutes proper "use." To determine proper use in Gandhi's thought, we can begin by considering the difference between "want-regarding" and "ideal-regarding" economic behavior. Barry distinguishes between "want-regarding" and "ideal-regarding" principles of economics.<sup>152</sup> In the "want-regarding" principle, people's preferences for certain goods or services are treated as an implicit starting point for economic analysis, in which people's wants are accepted as they are, and markets emerge to provide opportunities to satisfy those wants. In "want-regarding" reasoning, policy is shaped by the question of how people's wants can be attained. This is the dominant perspective in contemporary economic thought. In contrast, the "ideal-regarding" principle considers that some wants are not worth satisfying, and therefore, economic behavior—including what people want—is mediated by human values. In other words, "ideal-regarding" behavior would not place priority solely on what people want; rather, other considerations, such as a person's ethical preferences, are of value in deciding on a proper course of economic action.<sup>153</sup>

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150. Defendant's Opposition Brief, *supra* note 39, at 10.

151. DASGUPTA, *supra* note 11, at 168; *see also* Nirmal Kumar Bose, *The Theory and Practice of Sarvodaya*, in *THE MEANINGS OF GANDHI* 79 (Paul F. Power ed., 1971).

152. BRIAN BARRY, *POLITICAL ARGUMENT* 38 (1965).

153. *Id.*

In *MCWC*, Michigan's reasonable-use balancing test<sup>154</sup> determines what constitutes "reasonable use" for an industry or corporation when its imperatives are weighed against the needs of local users and the ecosystem. Nestlé argued that its selling of bottled water for profit-seeking use would result in the greatest good for the greatest number. It is clear that Nestlé used an explicit utilitarian calculus and even satisfied the expectation of some utilitarian thinkers to quantify the greatest good, since one could conceivably calculate the number of people receiving water and compare it to the number that would not have received it. Within utilitarian thinking, therefore, Nestlé can make such an argument.

However, Nestlé can only make this argument because this overtly utilitarian reasoning does not tackle the question of whether want-regarding reasoning is justifiable in this instance. If Nestlé can simply incorporate self-regarding behavior (profit-seeking) into convenient want-regarding utilitarian reasoning, then the corporation need not do anything except think about what it wants. In *sarvodaya*, however, a party must consider the welfare of all. As a result, Nestlé must consider the harm to the riparian owners and include their loss into the calculus of the greatest good. Furthermore, if we use *sarvodaya* as a starting point, it is not sufficient for Nestlé to argue that people want the bottled water because the ultimate question is what is in the welfare of all, not whose view satisfies a greater good.<sup>155</sup>

Nestlé could argue that the welfare of all means the willingness of the riparian owners to set aside their rights to benefit all of Nestlé's bottled water customers. However, Gandhi saw the proper course of action in terms that lifted the dignity of all parties involved, and he did not view rights in a purely "either/or" confrontational fashion. As was true in his dealings with the British Empire, it may have been tempting to view Indian and British rights as absolutely in contrast; however, to Gandhi, it was possible to achieve freedom for Indians and simultaneously benefit the oppressor. In a similar spirit, the question of Nestlé's use of the waterway must include a calculus

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154. *Id.*

155. See DASGUPTA, *supra* note 11, at 168; Bose, *supra* note 151, at 80.

of how the riparian owners would be benefitted, thus raising the requirement of satisfying the “welfare of all” instead of assuming that riparian rights must be sacrificed for a “greater good,” which only one group allegedly possesses the power to exercise.

With their argument, Nestlé hides its self-interest in a utilitarian garb. Nestlé argues for control over a large portion of the water by including the use of its customers as a part of its “corporate use.” The inclusion of customers can help Nestlé achieve the “greatest number of people” qualification of utilitarianism and can lead to a conclusion where the course of action that benefits the most drinkers is the desirable conclusion. However, this reasoning requires Nestlé’s control to extract, bottle, and sell the water to the drinkers. Therefore, this “greatest number of users” argument is a construction of the social world that merely developed to satisfy Nestlé’s profit-seeking motive.

The court repeatedly stated that Michigan courts have purposefully avoided strict guidelines on this topic.<sup>156</sup> Because the court in *MCWC* did not list the factors in the reasonable-use balancing test in any hierarchy of importance, its opinion provides no clear guidance regarding how the several factors are to be weighed. This lack of guidance allowed Nestlé to frame its conduct as utilitarian and assume that solutions must be competitive and interests must be contrasted to determine reasonable use.

In contrast, if *sarvodaya* replaced utilitarian thinking, then a hierarchy of importance could be based on a single “ideal-regarding” principle: parties are expected to develop a method of action which will raise the welfare of all, not satisfy its own want. This expectation forces parties to include an “other-regarding” view of conflict in which persuasive arguments must be implicitly and subtly collaborative. In other words, parties to a case automatically become intellectual agents of non-harm, rather

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156. Defendant’s Opposition Brief, *supra* note 39, at 29 (“Michigan has long eschewed such rigid formulations, instead, adopting a reasonable use test, allowing courts to ‘consider all the circumstances that are relevant in a given case,’ 269 Mich. App at 55, in order to protect the environment, while at the same time promoting socially and economically beneficial water uses.”); *see also Citizens*, 709 N.W.2d 174 (Mich. Ct. App. 2005).

than actors approaching a case in a pure “want-regarding” fashion. Consequently, the reasonable-use balancing test differs when “ideal-regarding” *sarvodaya* is used as a guiding principle rather than “want-regarding” utilitarianism, and the Reasonable Use Doctrine is fundamentally altered under a *sarvodaya* standard.

#### **b. “Significant Public Interest”**

The court already seems to use reasoning similar to Gandhi’s thought when it determined “significant public interest.” Both the trial court and court of appeals reasoned that Nestlé’s pumping created significant harm during the extraction process.<sup>157</sup> The court implicitly seems to consider ahimsa (non-harm) when evaluating the extraction process. *Sarvodaya*, like other aspects of Gandhi’s thought, implicitly accepts ahimsa as a guiding principle in determining the “welfare of all.” Therefore, the court’s analysis of “significant public interest” already contains within it a consideration of both ahimsa and *sarvodaya*.

#### **C. Connecting Riparian Rights to Gandhi’s Theory of Rights**

There is no shortage of rights discourse in contemporary legal and political theory, and Gandhi certainly participated in discussions of rights. In his thought, rights are of paramount importance, and the dignity of individuals and of oppressed groups depends on the protection of such rights. However, Gandhi seemed averse to the discussion of rights when the discussion did not include an even greater emphasis on duty. Gandhi’s theory of rights asserts that every right has a corresponding duty, and it was the explication of duties that was equally important—if not more important—than a declaration of rights.<sup>158</sup>

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157. Plaintiff’s Application, *supra* note 45, at 8 (“The trial court and the Court of Appeals both reached the factual conclusion that Nestlé’s removal of water has caused and will cause substantial harm to the Dead Stream . . . and that harm will be even greater at Nestlé’s planned increased rate of pumping.”).

158. GANDHI, *January 13, 1897 – July 11, 1902*, in COLLECTED WORKS OF MAHATMA GANDHI ONLINE, *supra* note 7, at 477 (“[A] consciousness that we are

There are several ways that commentators perceive duty. One of the most obvious is in the exercise of restraint to prevent encroachment on the rights of others. In *MCWC*, for example, one can think of a party as having a “right” to use the stream water, which implies a duty among others not to interfere with the party’s right of use. On the other hand, one can view “duty” in the sense that the rights-holder also holds a duty to others to not over-use or abuse his or her right to use the water. Still others view a “duty” to the ecosystem, in the form of a responsibility to protect the integrity of the ecosystem itself, regardless of whether other human parties are directly and adversely affected.<sup>159</sup>

In Gandhi’s thought, recognizing rights as universal moral declarations is not the central issue as it is in many Western conceptions of rights.<sup>160</sup> To understand Gandhi’s theory of rights, we must examine more deeply the differences between his world-view and the purely Western world-view. Gandhi saw the realization of Truth, or self-realization, as life’s highest goal. Rights, therefore, are relevant to life as opportunities for people to further their own realization, not because they were “discoveries” of fixed moral universals that support the rights-holder (and that other parties categorically are duty-bound to follow in the purely Western conception).

Central to Gandhi’s process of self-realization is ahimsa, commonly translated as non-violence, non-injury, or non-harm. Gandhi described ahimsa as the vehicle, or mechanism, by which a person can attain a full realization of Truth (satya).<sup>161</sup> Because non-injury is central to Gandhi’s conclusion of how Truth must be attained, it is self-evident within his system of thought that duty becomes more important to clarify than rights. The manner in which we treat others—through the vehicle of non-injury—is

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doing what we consider to be our duty to the best of our ability is the highest reward.”); *see also* DASGUPTA, *supra* note 11, 44-63.

159. *See* ARNE NAESS, *ECOLOGY, COMMUNITY AND LIFESTYLE: OUTLINE OF AN ECOSOPHY* (1989).

160. In addition, the power to hold and exercise a “right” does not validate itself through rational deduction in Gandhi’s thought.

161. *See* GANDHI, *supra* note 6, at 463 (“[T]his much I can say with assurance, as a result of all my experiments, that a perfect vision of Truth can only follow a complete realization of Ahimsa.”).



crucial to our own advancement toward self-realization. Duty, therefore, is arguably the most important concept to clarify on the path to enlightenment.<sup>162</sup> In contrast, the connection between rights and duties is not widely discussed in contemporary Western social theory of rights, and even in Western law where this connection has historically been discussed at length, duty takes a back seat to rights in current legal discourse.<sup>163</sup>

In *MCWC*, riparian rights were at issue. Citizens' riparian right to the Dead Stream was in direct contrast to Nestlé's reasonable use of the groundwater by virtue of its payment of a fee to the landowners. The struggle over Citizens' riparian rights and Nestlé's "right" to reasonable use became a battle over the meaning and application of the terms "on-tract" and "off-tract" user. Citizens argued that its status as "on-tract" users allowed its riparian rights to place boundaries around Nestlé's "off-tract" use of the groundwater.

In standard legal practice, it is common—and necessary—to create arguments through the language of law. Both sides of this case funneled their arguments deeply into technical language and argued the meanings of that language. While Citizens argued that Nestlé was an "off-tract" user, Nestlé argued they were "on-tract users." A legal formalist may view this argumentative process in a generally positive light. In the process of debating the meaning of the law's language, some formalists may argue

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162. Although the term "enlightenment" can carry several meanings in various traditions, we understand Gandhi's view of self-realization as being parallel to Hindu and Buddhist views of moksha and nirvana, respectively. Regardless of the conception of enlightenment, it is important to note that for Gandhi, the fulfillment of "individual" self-realization and a more enlightened social world went hand-in-hand; effectively, one necessarily followed from the other.

Gandhi is credited with saying, "The difference between what we do and what we are capable of doing would suffice to solve most of the world's problems." Gandhi connected individual duty and social good through cause and effect, explaining that if we all attend to our duties, then peace and a better world will follow. DASGUPTA, *supra* note 11, at 59 ("By exercising their rights individuals are enabled to develop their own potential to the full and by doing so contribute as best they can to the common good which it is their duty to do.").

163. Incidentally, Dasgupta notes that law is the field of Gandhi's formal training, which perhaps explains why he focused his attention on duty. DASGUPTA, *supra* note 11, at 53.

that the law's "deeper meanings" can be brought to light.<sup>164</sup> In this way of thinking, legal reasoning has the potential to unearth profound themes embedded in the concepts of the law. However, environmental law is especially wrought with technicalities so detailed that it requires the input of scientists and engineers. Even when viewed in a formalistic manner, it is difficult to see how arguing the meaning of legal terms unearths any hidden "deeper meanings" in the law. In *MCWC*, the legal arguments analyzed the detail (even minutiae) of the language that regulates property use. Rather than unearthing "deeper meanings" in the law, judges and lawyers focused on details that impeded a discussion of the broader themes the case presented. This case, like cases generally, became a battle over rights in which the victorious party more successfully wove their rights into the law's language.

If one applies Gandhi's theory of rights, one of the glaring omissions in this case is the absence of any discussion of duty. Under a duty-based theory of rights, a central question for the court would be what reciprocal duties both parties have to one another, and also what duties each party has to the environment. Perhaps the strongest argument under this theory of rights lies with *Citizens*: Nestlé owes a duty to use the water only in ways that do not interfere with the riparian owners' uses of the Dead Stream. If Nestlé's use interferes with riparian uses, then Nestlé is not honoring its duty not to interfere with riparian uses. Nestlé may also counter-argue that riparian owners may not interfere with the corporation's use of the groundwater; however, other than the filing of the lawsuit itself, there is no evidence that riparian owners interfered with Nestlé's use of the water.

In a duty-based theory of rights, the duty to the environment is a preexisting obligation for the right to use the land.<sup>165</sup> In

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164. Mark V. Tushnet, *Critical Legal Theory*, in *PHILOSOPHY OF LAW AND LEGAL THEORY* 81 (Martin P. Golding & William A. Edmundson eds., 2005); see also Morton J. Horwitz, *The Rise of Legal Formalism*, 19 *AM. J. LEGAL HIST.* 251 (1975). For a critique of formalism, see OLIVER WENDELL HOLMES, *THE COMMON LAW* (1963); see also JOHN R. SUTTON, *LAW/SOCIETY: ORIGINS, INTERACTIONS, AND CHANGE* 137-42 (2001).

165. This construction of the relationship between duties and rights would be central to a mindful jurisprudence of the environment that incorporates Gandhi's thought.

*MCWC*, there is no evidence of the riparian owner's over-use of the Dead Stream. In contrast, there is ample concern of Nestlé's over-use of the groundwater and its effect on the ecosystem. The trial court and court of appeals noted that Nestlé's pumping would cause "substantial harm to the dead stream"<sup>166</sup> and also the contiguous ecosystem.<sup>167</sup>

Therefore, in Gandhi's theory of rights, there are heavy burdens on Nestlé. Although the trial court ruled that riparian rights outweighed Nestlé's reasonable use, the dictum and the briefs themselves contain an exclusive language of rights in which the parties' "rights" to "use" the water are placed in direct competition with one another. In this highly individualistic design of law, the self-interest involved in protecting rights at the expense of others' rights dominates the legal discourse. The highly adversarial design of legal argumentation itself virtually eliminated any opportunity to discuss duties in this case, and the lawyers and judges seemed stuck in a discourse in which self-interest is the "normal" foundation of legal reasoning. It is no surprise, then, that parties argue their "rights" over the rights of the opponent, and judges view the proper method of analyzing rights purely in competitive and self-interested terms. As a result, balancing tests require comparing rights, with no assessment of duties.

In Gandhi's thought, duties matter in legal analysis because of its focus on responsibilities to others as a basis for peaceful social relations. This "other-regarding" way of thinking is disregarded in modern American jurisprudence for a "self-regarding" disposition, which we believe the *MCWC* case palpably illustrates.<sup>168</sup>

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166. See Plaintiff's Application, *supra* note 45, at 8 ("The trial court and the Court of Appeals both reached the factual conclusion that Nestlé's removal of water has caused and will cause substantial harm to the Dead Stream . . . and that harm will be even greater at Nestlé's planned increased rate of pumping.").

167. *Id.*

168. For a discussion of "self-regarding" versus "other-regarding" behavior, see DASGUPTA, *supra* note 11, at 32.

#### D. Connecting “Ecosystem Nexus” Theory to Gandhi’s Critique of Industrialization

In a narrow legal sense, this dispute involves the plaintiff’s riparian right to the reasonable use of the Dead Stream versus Nestlé’s right to the reasonable use of groundwater from the land it owns in fee simple.<sup>169</sup> In a broader view, this case also represents the struggles to either foster or contain industrial development of pristine ecosystems, and in *MCWC*, the court invoked the “ecosystem nexus theory” to determine the proper balance between ecological preservation and industrial growth. Gandhi left behind extensive commentary on the social consequences of industrialization, and therefore, his thought has much to contribute to understanding the implications of *MCWC*.

Evidence of Gandhi’s skepticism of modern industrialization is legion. As the British Empire pushed to industrialize its production processes, Gandhi warned against India following the Empire’s lead. Commentators often interpreted his arguments against industrialization in India as being based on moral grounds. At times, his arguments were specific to India’s national context in the twentieth century, and at other times, Gandhi made broader sociological points that form a more categorical rejection of industrialization. It is the latter which we focus on here.

Gandhi made two arguments against industrialization that we will apply to *MCWC*. The first argument is that industrialization, due to its heavy reliance on machinery, replaces human labor rather than aiding it. Second, once industrialization takes hold of an area, there is no limit to its encroachment.<sup>170</sup>

First, Gandhi argued that industrialization did not lead to higher employment.<sup>171</sup> Although many industrialists of his time made the argument that machinery would create jobs, Gandhi saw the trend in the opposite direction. Instead, machines

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169. Nestlé further argued they are considered riparian users and not just groundwater users because Nestlé purchased part of the land from the Bollmans’. *Citizens*, 709 N.W.2d 174, 186 (Mich. Ct. App. 2005).

170. For a discussion of these two arguments, see DASGUPTA, *supra* note 11, at 71-76.

171. Mahatma Gandhi, Remarks to Manu Gandhi (Apr. 21, 1947), in DASGUPTA, *supra* note 11, at 71.

replaced human labor and provided no guarantee of replacing people's jobs. Work increasingly done by machines meant less work available for humans. In *MCWC*, Nestlé built a plant solely to extract water from the watershed. The inclusion of this machinery into the area served no purpose but to accelerate Nestlé's water extraction and did not include any conceivable job creation for local populations. Nestlé's interest in implementing the machinery into the watershed is so explicitly void of any local benefit that the corporation itself did not even attempt to make any such job-creation-based argument.

Second, Gandhi's concern of machinery's encroachment into society parallels Citizens' concern of machinery's encroachment into the ecosystem. Gandhi especially condemned modern industrial processes largely because of the manner in which they concentrated wealth and power into the hands of elite oppressors. He says "[o]rganization of machinery for the purposes of concentrating wealth and power in the hands of a few and for the exploitation of the many I would hold to be altogether wrong. Much of the organization of machinery of the present age is of that type."<sup>172</sup>

Nestlé's unprecedented ability to remove 150 gallons of water per minute and 37.5% of the well's total capacity<sup>173</sup> from the Dead Stream watershed presents a clear use of machinery used to concentrate wealth and power in the hands of a few. With the unparalleled ability to take water at such excessive rates, Nestlé exercises the power to take and sell a resource necessary to the integrity of the region for the purposes of expanding its own market share. To take water to the point where the very character of the ecosystem is jeopardized, furthermore, raises the issue of exploitation of not only other riparian owners, but also of the ecosystem itself and all human and non-human biotic life depending on it.

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172. Mahatma Gandhi, Remarks to "American friends" (Sept. 17, 1925), in DASGUPTA, *supra* note 11, at 73.

173. Plaintiff's Application, *supra* note 45, at 4-5. The full capacity of the well is 400 gallons of water per minute, 500,000 gallons per day, and 210 million gallons per year. *Id.* at 2. The court reasoned that even at 37.5% capacity, Nestlé's pumping was unreasonable. Therefore, 100% capacity could result in devastating ecosystemic consequences. *Id.* at 4-5.

In *MCWC*, perhaps the most important check on exploitation of a natural resource by an outside entity is the test that determines “on-tract” vs. “off-tract” users. The reasonable use doctrine contains a “fair participation” test that takes into account whether the water being withdrawn is used on-tract or off-tract.<sup>174</sup> The court of appeals cited *Schenk v. City of Ann Arbor*, in which there was a dispute between an on-tract user of groundwater and a city that planned to pump groundwater off-tract to meet municipal needs.<sup>175</sup> The court uses the idea of “material diminishment” in reasonable use, which means an off-tract user could not cause an interference with an on-tract use.<sup>176</sup> *Schenk* drew a distinction between on-tract and off-tract users, which directly relates to reasonable use.<sup>177</sup> By expecting users to have an on-tract presence, the court implicitly provides a check on industry’s encroachment onto—and potential exploitation of—the environment and other users. Consequently, the court connects the concern of preserving the “ecosystem nexus” with the notion of fair participation, thus making the notion of fairness and Gandhi’s concern of machinery’s encroachment on the environment relevant to justifying further industrial development of an ecosystem.

#### IV. CONCLUSION

Gandhi’s life and thought has deeply influenced millions of people around the world, particularly regarding the struggles of the oppressed and struggles to achieve social justice. His thought has especially been used to achieve social change through civil disobedience, peace, and non-violence. Moreover, Gandhi’s thought has been used to develop practical applications of “alternative dispute resolution” (ADR) because many lawyers see the resolution of conflict as one of law’s primary functions. However, Gandhi’s thought has been lost to those who theorize about jurisprudence. We argue that Gandhi’s thought contains an intricate and comprehensive social theory that should inform

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174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

jurisprudence. This paper is our speculation on how Gandhi's thought connects to American environmental jurisprudence.

Modern law is often criticized for its narrow application of specific legal principles at the expense of larger social considerations.<sup>178</sup> Especially in environmental law, court decisions and legal briefs often dwell on technical details about chemical concentrations or what constitutes a "discharge" of an effluent. When dwelling on detail, it is easy for courts to stray from the law's broader initiatives and leave unaddressed the central issues that exercise environmental policy, such as how to conceptualize property rights and duties, conservation, and beneficial versus consumptive use.

In *MCWC*, the parties invoke several key concepts of law, including the Public Trust Doctrine, Reasonable Use Doctrine, significant public interest, riparian rights, and ecosystem nexus. We have examined these concepts as they may appear when one considers relevant ideas from Gandhi's thought—in particular his theory of trusteeship, his theory of rights, *sarvodaya*, and his critique of industrialization. In the process of invoking Gandhi's thought, we illustrate the inefficacy of certain arguments that are otherwise viable under purely "western-based" approaches to the same legal concepts. We believe that by examining the law from this alternative perspective, we can provide a unique view of the fundamental principles of environmental law and develop a jurisprudence more mindful of encouraging responsibility (duties of the wealthy as trustees), non-injury (ahimsa as a basis for reasonable use and minimizing industrialization's encroachment on the environment), and overall welfare (*sarvodaya*). Gandhi's thought on these issues helps us speculate on what a jurisprudence would look like that treats these principles as meaningful social goals. We call such a legal theory a "mindful jurisprudence."

In this more mindful jurisprudence, the overuse of natural resources is not only the state's responsibility to monitor; it is the

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178. See WOLCHER, *supra* note 34; see generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1996); PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (2011); PHILIP K. HOWARD, LIFE WITHOUT LAWYERS: LIBERATING AMERICANS FROM TOO MUCH LAW (2009).

responsibility of all, especially those with the most wealth. Because corporations are the wealthiest “people” in modern societies, it would be an expectation that corporate use of wealth must be guided by the view that their money is held in trust for society’s benefit. Furthermore, rather than the equalization of wealth being the only issue of social debate, the question of how wealth is used would be a central question. A mindful jurisprudence would demand that corporations function as society’s most important stewards, and valid legal arguments would require corporate behavior in the welfare of all, not merely the greatest number of people.

Furthermore, in a mindful jurisprudence, any discussion of rights would begin with a question of what duty is owed. In *MCWC*, both parties’ legal briefs immediately begin with arguments for how one group’s rights outweigh the other group’s rights. In a mindful jurisprudence, the main question for both parties is what duty they owe to each other, or how their use will not interfere with the other’s use. In this case, that question applies entirely to Nestlé. The central burden for Nestlé is to show how its right to use the water does not interfere with the riparian owner’s use of the same resource. The courts already seem to arrive at this line of reasoning and expect the parties to fulfill the same duty that Gandhi’s thought would require. However, to extend Gandhi’s theory of rights farther, a mindful jurisprudence would contain within it the expectation that Nestlé also must focus its attention on its duty to the ecosystem in order to create a successful argument for its own “right” to use the water.

A preoccupation with “rights” without a well-developed consideration of duty can become purely self-regarding and easily disregard the needs of others, whereas a focus on duty is an easy consequence of the “other-regarding” thought that is mindful of the needs of others. In Gandhi’s thought, duty is central to rights and the most important concept in any discussion of “rights” because the way we regard others is crucial to our own self-realization. According to Gandhi, *moksha*—life’s highest goal in most branches of Indian philosophy—can only be achieved through *ahimsa*. Therefore, *ahimsa* is not only a primary policy of law; rather, it is the mechanism to attain a more enlightened way of



living and situates legal thought into a world-view based on non-injury.

Finally, a mindful jurisprudence would require the debate about reasonable use to invoke *sarvodaya* rather than utilitarianism. The court seriously entertains Nestlé's utilitarian argument even though Nestlé presents no plan to uplift the riparian owners along with its own profit. In a mindful jurisprudence, it would be implicit that Nestlé must show how its water extraction uplifts the welfare of all—including the welfare of the riparian owners. The fact that this perspective is non-existent in the case only underscores the need for an alternative to utilitarian reasoning.

Our contemporary environmental discourse is full of many cries that the earth is dying. Whether we examine the dire consequences from climate change, pollution, or biodiversity loss, it is clear that revolutionary new thinking is needed to immediately combat the perils of modern environmental problems. Gandhi is one of the twentieth century's most recognizable critics of modern development, and his critique of the modern notion of "progress" is as important now as it ever has been. Gandhi's thought contains the promise of an invigorating discussion on the problems that ail us and the planet. Whether our legal community listens—and whether jurisprudence will meet modern environmental challenges—is not a question that time will permit.