

COMMENT

**CLEARING THE PATH FROM TRAILHEAD TO SUMMIT
WITH A LEAVE NO TRACE LAW**

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Record numbers of people are visiting the country's national parks and wilderness areas. This volume increase places a greater strain on these natural places. This increase in visitors, coupled with a National Park Service maintenance backlog and budget deficit for maintaining existing facilities in parks, illustrates the need for additional measures to adequately maintain the national wilderness system. The status quo in wilderness maintenance is insufficient.

Leave No Trace is an informal set of principles for wilderness users to follow to minimize their impact when traveling through these areas and has been around for decades. However, an increasing number of first-time wilderness users means a growing population unfamiliar with Leave No Trace principles. Additionally, there is evidence that those arguably most aware of the principles are choosing to ignore them. The informal nature of these principles has outlived its usefulness; a heavier hand must now accompany them.

This Comment argues that the Leave No Trace principles should become law, replacing the current regulations governing recreational activities in federal wilderness areas. Decades of development allowed the principles to reach their current final form and to gain familiarity and consensus among those whom the law would affect most. Additionally, the simple and coherent structure of the principles would replace the current scattered regulations and a messy body of law in general. Finally, Leave No Trace possesses certain traits that can address resource and enforcement issues unique to wilderness settings. A Leave No Trace law can be a concrete step in preserving our wilderness system and ensuring the viability of the natural world for generations.

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I. THE NEED TO BEGIN A NEW ADVENTURE

As the winter thaw turns to spring, many begin to look towards the summer and their seasonal rambles into the wilderness. Imagine a one-week trip into the mountains of the American West. Months in advance you choose your mountain range and route. You scour Google Maps seeking hidden gems such as high alpine lakes that seem likely few people have reached. As the adventure approaches, REI becomes almost a second home as countless trips are made each time you remember something new not yet in the pile—a trowel, a tent repair kit, a sleeping bag. The anticipation of leaving stress behind and clearing your mind in the quiet of the mountains reaches its peak. The trip begins.

By the third night of the trip, you have not seen another person since day one. The jitters and nerves of solitude have worn off as you begin to feel truly relaxed and at home in the mountains. With this peaceful feeling, you begin to slowly drift off to sleep in the tent. Then, you hear what sounds like shouts and loud bangs. You peer across the lake to see the neon colored shape of a tent and . . . fireworks? Although you had lost track of the date you quickly put together that it must be the 4th of July. The sudden presence of other people snaps you back to reality: where you are, the date, your home, and the pile that is likely waiting on your desk for Monday morning. You struggle to drift off in a symphony of pops, crackles, and stress.

The next morning the firework group is gone. You pack up and hike to the other side of the lake on your way to your next mountain pass where you stumble on the group's campsite. You see a plastic bag caught on a rock, and a makeshift fire-ring with what looks like two half-charred beer cans in the middle. A few thin wisps of smoke rise from the embers that were not completely extinguished. As the responsible wilderness traveler you are, you pick up the bag and charred cans, dump your water bottle over the burning embers, and

disperse the fire-ring. So much for solitude and all that planning to have what you thought would be a true wilderness experience.

Unfortunately, experiences such as this are becoming more common for wilderness visitors as more people flock to unpopulated areas for camping and recreation. Popularity in camping and wilderness recreation has soared in recent years due to its inexpensive nature in light of a recently lagging economy.¹ Increased numbers of visitors place a greater strain on wild areas, and means “traces” of other visitors are felt more.² One program in place to help combat this strain is Leave No Trace (LNT). LNT is a set of seven informal guidelines on how one can minimize his or her impact while traveling through wilderness areas.³ Those that frequent wilderness areas the most know LNT well. But, there is evidence the principles of minimizing human impact are less known among those who are new to the outdoor community.⁴

This Comment argues that the LNT principles should replace current regulations and stiffer penalties should be implemented to combat the degradation of wilderness areas due to neglect of the informal principles by wilderness users new and old. One approach to problems of increased volume and degradation could be to designate more areas to be wilderness lands, which may disperse the negative impacts of increased use. But, the finite amount of federal land available and current congressional gridlock make this approach

1. Callum Borchers, *The Great Outdoors is Still a Great Bargain*, BOS. GLOBE (May 28, 2013), <https://www.bostonglobe.com/business/2013/05/27/popularity-outdoor-activities-keeps-growing-even-vacation-budget-crunch-eases/mz04COA0ZCXBMfCeA1shKO/story.html> [https://perma.cc/MH35-FBCP]; see also Steven Verburg, *Wisconsin State Park Camping Increasingly Popular*, WIS. ST. J. (Oct. 25, 2015), http://host.madison.com/wsj/news/local/environment/wisconsin-state-park-camping-increasingly-popular/article_95abcd61-5226-51ee-bb08-f1cba931c45e.html [https://perma.cc/ZWW3-YRUE].

2. While the most common or easiest example to imagine is littering, a trace can also mean anything from trampled vegetation to heavy air traffic in the skies above. See Bill Briggs, *National Parks Feel the Effects of Human, Environmental Threats*, NBC NEWS (Aug. 30, 2010, 11:35 AM), http://www.nbcnews.com/id/38883753/ns/travel-active_travel/t/national-parks-feel-effects-human-environmental-threats/#.Vo08i5MrJE4 [https://perma.cc/2XNQ-9UPA] (“The unnatural footprint left by hundreds of millions of park visitors is growing Tourists leave behind water bottles and other scraps of litter.”).

3. *Infra* notes 44–45 and accompanying text.

4. See, e.g., Mia Taylor, *Trash in Our National Parks - Why It's Your Problem, Too*, THESTREET (Oct. 8, 2016, 12:40 PM), <https://news.thestreet.com/independent/story/13837668/1/trash-in-our-national-parks-why-it-s-your-problem-too.html> [https://perma.cc/DZ9G-3PVE] (noting efforts in certain national parks to deal with an increase in waste from an increase in visitors, including the need to educate visitors on the impact of the waste they leave behind at the park).

unlikely. Additionally, there is some evidence that historically, even if Congress designated more federal land, management and maintenance of existing parks ends up being neglected.⁵ This is the backdrop under which the existing problem developed.

What is required is better management and enforcement of current wilderness areas to combat the negative impacts of increased wilderness use. Congress and the National Park Service (NPS) have largely neglected to maintain current federal lands. Consequently, the NPS is now digging out of a major maintenance backlog coupled with a large budget deficit, and is struggling to ensure acceptable facilities within existing parks.⁶ An approach of designating more wilderness areas would further exacerbate this problem by creating even more facilities for the NPS to maintain on top of the current backlog.⁷ While these needed changes toward better management will undoubtedly require additional resources to reach acceptable conditions, stricter rules regarding visitor actions can greatly slow the rate with which this wear and tear continues. The current impacts on wilderness areas will greatly jeopardize the purposes of a federally protected wilderness system unless a heavier hand hangs over wilderness user conduct.

In Part II, this Comment will discuss the development of the national wilderness preservation system and the subsequent

5. See Jenna McLaughlin, *Parks and Wreck: The Feds Need \$11.5 Billion to Fix Our Public Lands*, MOTHER JONES (Mar. 25, 2015, 5:15 AM), <http://www.motherjones.com/politics/2015/03/national-parks-underfunded-billions> [<https://perma.cc/PKE6-M89C>].

6. In 2014, the National Park Service estimated a need for roughly \$11.5 billion dollars to catch-up on deferred maintenance costs, or maintenance not performed when needed to acceptably maintain facilities. NAT'L PARK SERV., NPS DEFERRED MAINTENANCE BY STATE AND BY PARK 1, 12 (2014), https://www.nps.gov/subjects/plandesignconstruct/upload/FY14-DM-by-State-and-Park_2015-10-20.pdf [<https://perma.cc/7T6X-N4W2>]. By comparison, the total National Park Service enacted budget for year 2014 was roughly a quarter of that \$11.5 billion deficit at \$2.98 billion. *Frequently Asked Questions*, NAT'L PARK SERV., <https://www.nps.gov/aboutus/faqs.htm> [<https://perma.cc/HM2L-XHHS>] (last visited Apr. 12, 2017).

7. An important clarification must be made early on: "Wilderness area" is a separate designation for certain parts of already protected, and perhaps more commonly known, types of public lands like national parks and national forests. See *America's Public Lands Explained*, U.S. DEP'T INTERIOR (June 13, 2016), <https://www.doi.gov/blog/americas-public-lands-explained> [<https://perma.cc/QQ96-DKPJ>] ("Wilderness areas can be part of national parks, national wildlife refuges, national forests or public lands managed by the Bureau of Land Management."). Over half of the land in the National Park System under the control of the NPS is designated as wilderness. *Visiting Wilderness*, NPS WILDERNESS, <https://wilderness.nps.gov/visiting.cfm> [<https://perma.cc/N7DX-LZQ2>] (last visited Apr. 12, 2017). Therefore, while the LNT law advocated for in this Comment would apply to all designated wilderness areas under the National Wilderness Preservation System, at times I will make more general references to the NPS for simplicity.

development of LNT to its current form. Part III will address the attributes of LNT that make it particularly attractive for a law and will present a proposed final LNT regulation. A legally enforceable LNT regulation is necessary to fill the current void in effective wilderness area management by replacing the current regulations on prohibited acts in wilderness areas and carrying a stiffer penalty.

II. THE TRAIL THAT LED TO TODAY

The concept of a federally protected wilderness system was born out of the Wilderness Act of 1964 (the Act).⁸ The Act passed during a period of heightened consciousness towards environmental stewardship.⁹ Within the Act, management of these designated areas was delegated to federal agencies, and rules were promulgated to maintain the pristine nature of these wilderness areas. Around this time, LNT principles were also first conceived. Over the following decades, the LNT concept grew into its current form. Modern developments indicate these rules and the LNT principles are losing their efficacy.

A. The Trailhead: The Wilderness Act of 1964

On September 3, 1964, President Lyndon Johnson established a national wilderness preservation system by signing the Wilderness Act into law.¹⁰ The Act defines wilderness in part as “an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.”¹¹ At the time of passage, 9.1 million acres of land were designated as wilderness.¹² This law has been viewed as a high-water mark for land preservation,¹³ and over the years courts have upheld the integrity of the law by strictly construing the statute.¹⁴

Today, over 109 million acres of land in the United States are designated as federal wilderness.¹⁵ Both the Department of Agriculture and the Department of the Interior are charged with the management of

8. Wilderness Act, Pub. L. No. 88-577, § 1, 78 Stat. 890 (1964).

9. See *infra* notes 73–78 and accompanying text.

10. Wilderness Act, 78 Stat. at 890.

11. *Id.* at 891.

12. *Fast Facts*, WILDERNESS.NET (Sept. 21, 2015), <http://www.wilderness.net/NWPS/fastfacts> [https://perma.cc/KRJ2-ZSHK].

13. Kevin Hayes, *History and Future of the Conflict Over Wilderness Designations of BLM Land in Utah*, 16 J. ENVTL. L. & LITIG. 203, 208 (2001).

14. John Copeland Nagle, *Wilderness Exceptions*, 44 ENVTL. L. 373, 375 (2014) (citing Peter A. Appel, *Wilderness and the Courts*, 29 STAN. ENVTL. L.J. 62 (2010)).

15. *Fast Facts*, *supra* note 12.

the national wilderness system.¹⁶ These departments have further delegated management of wilderness areas to their four internal land management agencies: the National Park Service, the U.S. Forest Service, the U.S. Fish and Wildlife Service, and the Bureau of Land Management.¹⁷ These agencies oversee specified wilderness areas and enforce restrictions on certain acts set forth in the statute. These statutorily restricted activities include various commercial activities, constructing permanent or temporary roads, operating motorized vehicles or equipment, and building any structures or installations.¹⁸

Each of the four land management agencies promulgates its own rules, adding to the list of restricted activities in the areas they manage. The prohibitions promulgated by the Bureau of Land Management focus more on commercial-scale activities and largely mirror those set out in the Act¹⁹ with a couple specific additions, such as a prohibition on cutting trees.²⁰ A person who engages in a prohibited activity can be prosecuted criminally, with a fine up to \$100,000 and up to a year in prison, as well as be subject to civil liability.²¹ The U.S. Fish and Wildlife Service regulations speak more generally and state, “[a]ll persons entering a wilderness unit will be required to remove such materials as they carry in.”²² The agency does govern human behavior directly affecting the natural environment within the National Wildlife Refuge System.²³

Additionally, the NPS and the U.S. Forest Service promulgated rules restricting more individual-scale, recreational and camping activities within these areas.²⁴ For example, the NPS prohibits “digging or leveling the ground at a campsite,” leaving equipment or waste at a campsite upon leaving the site, being too loud at a campsite after 10:00 p.m., and “camping outside designated sites or areas.”²⁵ Certain actions

16. 16 U.S.C. § 1132 (2012).

17. *Open Spaces: A Talk on the Wild Side*, U.S. FISH & WILDLIFE SERV. (Aug. 23, 2012), <http://www.fws.gov/news/blog/index.cfm/2012/8/23/Wilderness-Act-Preserves-Where-the-Wild-Things-Are> [<https://perma.cc/7XPW-BF7X>].

18. 16 U.S.C. § 1133(c).

19. For example, operating a commercial enterprise and building temporary or permanent roads are prohibited. 43 C.F.R. § 6302.20(a)–(f) (2015).

20. *Id.* § 6302.20(g).

21. *Id.* § 6302.30.

22. 50 C.F.R. § 35.6(b) (2015).

23. For example, in these refuges “[d]isturbing, injuring, spearing, poisoning, destroying, collecting” or an attempt to do any of those things to any plant or animal in the refuge is prohibited. *Id.* § 27.51(a).

24. *See generally* 36 C.F.R. §§ 1.1–3.19, 261.1–.23 (2015).

25. *Id.* § 2.10(b)(1)–(10).

regarding campfires and disposal of waste are also prohibited.²⁶ The U.S. Forest Service also prohibits improper disposal of waste,²⁷ improper maintenance of fires, improper use of campsites, and loud noise past 10:00 p.m.²⁸ Penalties for violating these rules range from simple revocation of a permit²⁹ to a fine and up to six months imprisonment.³⁰

These rules can be difficult to enforce. Courts appear to only become involved when individual conduct affects other visitors, not necessarily when human conduct harms the natural environment, unless the harm is on a more commercial scale.³¹ When the violation is by an individual, behavior affecting the natural environment—including wildlife—appears to be handled much more with a simple warning or a minor fine.³² It is likely difficult for the NPS to track the number of violations in such minor instances or remote areas, and tracking the most common violations and penalties administered across the board of wilderness areas may be equally difficult. Since it is easy for the NPS to administer a citation of less than say \$100, there is the potential that the NPS will issue a higher number of these minor citations. Further, the fairly inconsequential nature of the small monetary penalty likely makes tracking of these citations difficult or unimportant. Finally, as previously mentioned, warnings are another way for the NPS to enforce violations.³³ Warnings presumably carry no paper trail or sophisticated tracking mechanism. Therefore, it may be difficult to analyze the most common violations and enforcement mechanisms on a large scale.

B. The Final Stretch to Base Camp: Leave No Trace

Despite these regulations, additional, non-binding rules have developed among communities that frequent wilderness areas. The best

26. For example, leaving a fire unattended or disposing of human waste within 100 feet of a water source. *Id.* § 2.13–.14.

27. *Id.* § 261.11.

28. *Id.* § 261.16.

29. *Id.* § 2.10(c).

30. *Id.* § 1.3(a).

31. See, e.g., *United States v. Statler*, 121 F. Supp. 2d 925 (E.D. Va. 2000) (defendant charged under 36 C.F.R. § 2.34 for disorderly conduct and indecent exposure); see also *Pathfinder Mines Corp. v. Clark*, 620 F. Supp. 336 (D. Ariz. 1985) (declaring a mining company's claim within a wildlife preserve void).

32. See, e.g., Martin Kidston, *Improper Food Storage 2nd Most Common Violation in Glacier National Park*, MISSOULIAN (July 25, 2013), http://missoulian.com/news/state-and-regional/improper-food-storage-nd-most-common-violation-in-glacier-national/article_b6edadd4-f581-11e2-80e9-001a4bcf887a.html [https://perma.cc/J7UP-P3L8].

33. *Id.*

example of these rules are the LNT principles, a well-known set of informal rules among the outdoor recreation community.³⁴ LNT was developed not long after passage of the Wilderness Act and with similar goals in mind: to avoid negative human impacts on natural areas.³⁵ LNT developed in the 1960s and 1970s in response to increased use of wilderness areas and concerns of aggregate human impacts on the natural environment.³⁶

At this time, many policymakers believed that impacts on the wilderness were because people were insensitive “to the consequences of one’s actions” and because they lacked knowledge of appropriate practices to minimize one’s impact on the natural areas.³⁷ Over the course of the 1980s, the U.S. Forest Service began an educational program to teach these no-impact practices, with a goal of connecting with users in a humanistic way instead of an antagonistic way.³⁸ In the late 1980s, the U.S. Forest Service, NPS, and Bureau of Land Management together developed and disseminated pamphlets entitled “Leave No Trace Land Ethics.”³⁹

These early efforts by the agencies to promote no-impact practices had limited effect, thus the need for a national program developed.⁴⁰ In the early 1990s, the U.S. Forest Service made an agreement with the National Outdoor Leadership School (NOLS) to develop a more formal curriculum and training program around the Leave No Trace principles.⁴¹ To further focus fundraising efforts and dissemination of LNT principles, NOLS—in combination with other outdoor organizations—developed LNT, Inc., a 501(c)(3) non-profit organization.⁴²

Today, LNT, Inc. (more formally known as the Leave No Trace Center for Outdoor Ethics) is the main custodian of the Leave No Trace principles.⁴³ The organization has narrowed the LNT concept into seven copyrighted principles of how to utilize wilderness areas with minimal

34. *See About Us*, LEAVE NO TRACE CTR. FOR OUTDOOR ETHICS, <https://lnt.org/about> [<https://perma.cc/P8LJ-CRLB>] (last visited Mar. 12, 2017).

35. JEFFREY L. MARION & SCOTT E. REID, LEAVE NO TRACE CTR. FOR OUTDOOR ETHICS, DEVELOPMENT OF THE U.S. LEAVE NO TRACE PROGRAM: AN HISTORICAL PERSPECTIVE 1 (2001), https://lnt.org/sites/default/files/Leave_No_Trace_History_Paper.pdf [<https://perma.cc/8KCG-LDLM>].

36. *Id.* at 2–3.

37. *Id.* at 3.

38. *Id.* at 2–3.

39. *Id.* at 3.

40. *Id.*

41. *Id.*

42. *Id.* at 4–5.

43. *About Us*, *supra* note 33.

impact.⁴⁴ These principles are: (1) Plan Ahead and Prepare; (2) Travel and Camp on Durable Surfaces; (3) Dispose of Waste Properly; (4) Leave What You Find; (5) Minimize Campfire Impacts; (6) Respect Wildlife; and (7) Be Considerate of Other Visitors.⁴⁵ Each of these seven principles includes further guidance on how one can best achieve that principle.⁴⁶ For example, under (2) Travel and Camp on Durable Surfaces, the organization provides examples of what constitutes a durable surface and suggests more specific actions such as “walk single file in the middle of the trail, even when wet or muddy” and “disperse use to prevent the creation of campsites and trails.”⁴⁷ These sub-points help minimize ambiguity in the more general principles and can relieve confusion on how to comply with each principle.

LNT principles have been integrated into a number of programs and organizations, thus increasing the number of people the principles reach. LNT is a prominent feature of the NOLS curriculum.⁴⁸ The curriculum includes a “Master Educator” course, a five-day training to develop educators to practice and teach the LNT principles.⁴⁹ The principles are also heavily integrated into the Boy Scouts of America outdoor programs.⁵⁰ Despite the significance of programs, organizations, and people’s behavior incorporating the principles, evidence shows that these principles have to reach an ever-growing number of wilderness users given modern recreation trends.⁵¹

After the economic downturn in 2009, many families turned to camping for vacation and recreation because of its low cost and easy access.⁵² As a result, the volume of visitors to wilderness recreation

44. *Seven Principles Overview*, LEAVE NO TRACE CTR. FOR OUTDOOR ETHICS, <https://lnt.org/learn/seven-principles-overview> [https://perma.cc/F6RQ-6TU9] (last visited Mar. 12, 2017); *Use of Logo, Seven Principles and More*, LEAVE NO TRACE CTR FOR OUTDOOR ETHICS, <https://lnt.org/about/use-logo-seven-principles-and-more> [https://perma.cc/U95Q-3KPC] (last visited Apr. 12, 2017).

45. *The Leave No Trace Seven Principles*, LEAVE NO TRACE CTR. FOR OUTDOOR ETHICS, <https://lnt.org/learn/7-principles> [https://perma.cc/DP66-24KT] (last visited Apr. 12, 2017).

46. *Id.*

47. *Id.*

48. *Curriculum*, NAT’L OUTDOOR LEADERSHIP SCH., <https://www.nols.edu/en/about/curriculum/> [https://perma.cc/LBY2-CLDL] (last visited Mar. 12, 2017).

49. *Leave No Trace Master Educator*, NAT’L OUTDOOR LEADERSHIP SCH., http://www.nols.edu/lnt/master_educator.shtml [https://perma.cc/L5QD-GGKB] (last visited Apr. 12, 2017).

50. *Leave No Trace*, BOY SCOUTS OF AM., <http://www.scouting.org/Home/OutdoorProgram/LeaveNoTrace.aspx> [https://perma.cc/D4GZ-UULH] (last visited Apr. 12, 2017).

51. *See infra* notes 51–53 and accompanying text.

52. Borchers, *supra* note 1.

areas increased.⁵³ As more and more people utilize natural areas for recreation, a significantly higher strain is placed on these protected and natural areas as human traces are left.⁵⁴ Therefore, despite LNT's presence and integration across many outdoor programs and organizations over the last twenty years, there is evidence this informal program is not meeting the demand of current wilderness use. Indeed, when the mainstream media reports an issue such as Mount Everest being overrun with human feces, it is clear even the outdoor community's most "hardcore" wilderness users are starting to ignore the LNT principles.⁵⁵

Therefore, despite its successful development and integration within the outdoor community and land management agencies, it is time to re-evaluate the efficacy of LNT principles. What began as a well-intentioned, informal educational program may now need to carry a heavier hand with the increasing neglect of human impacts on wilderness areas. Legal consequences may be necessary to persuade users of wilderness areas that these LNT principles are crucial to the continued viability of these areas. Fear of legal sanctions can have a direct and indirect impact on human behavior to compel wilderness users to take no impact travel and camping seriously for generations to come.

III. THE JOURNEY TO THE SUMMIT

Barriers to designating new wilderness areas require a renewed focus on wilderness area management. LNT has certain inherent advantages that would make it a successful and viable law to manage

53. *Id.*; see also Verburg, *supra* note 1.

54. See, e.g., Brent Bishop, *Peak Poop: The Feces Problem on Everest Needs a Solution*, OUTSIDE (Apr. 7, 2015), <http://www.outsideonline.com/1965696/peak-poop-feces-problem-everest-needs-solution> [https://perma.cc/C4EA-ZTJM].

55. Even the most remote places on Earth, such as Mount Everest, are not immune to increased visitor volume. With ever more climbers neglecting to bury human waste as proper etiquette and LNT require, not stepping in a pile of human waste while on the mountain may now be more difficult to accomplish than reaching the summit. See *id.*; see also Associated Press, *Too Much Human Faeces on Mount Everest, Says Nepal*, GUARDIAN (Mar. 3, 2015), <http://www.theguardian.com/world/2015/mar/03/too-much-human-poo-on-mount-everest-says-nepal> [https://perma.cc/3Z9G-6GYV]. This issue is also present in the lower forty-eight in the United States. For example, certain areas of the Big Horn National Forest in Wyoming are so overpopulated with human solid waste that the waste must be packed out of these areas by the waste producer. See *Recreation: Rules & Ethics*, U.S. DEP'T AGRIC. FOREST SERV., <http://www.fs.usda.gov/detailfull/bighorn/recreation/?cid=stelprdb5312215&width=full> [https://perma.cc/52RE-6CFG] (last visited Apr. 12, 2017).

these areas. Its principles have an environmental ethic basis that would serve as a strong foundation for a law. Additionally, the simplicity of the principles serves to clean up a complex and messy body of law. Finally, the familiarity of the principles among those whom the law would affect most and the consensus surrounding the principles serve to increase LNT's viability as an enforceable law, and would minimize political opposition to passage of an LNT law. Part A discusses the need for a change to active wilderness management. Part B explores the inherent advantages of LNT for becoming law. Part C compares traits of LNT to those of other successful environmental laws. Finally, Part D addresses issues and potential solutions regarding the enforcement of LNT, and Part E presents a final proposed LNT regulation.

A. Shedding Dead Weight: Wilderness Act Stagnation

The Wilderness Act of 1964 was a major step forward for land conservation, and the Act has achieved great success in its lifetime by increasing the amount of protected acreage by roughly 100 million acres.⁵⁶ But, the Wilderness Act alone and simply designating wilderness areas is insufficient on its own to protect these areas. Further management of activities within these wilderness areas is necessary to maintain the original objectives of the Act, which is to create areas "where man himself is a visitor who does not remain."⁵⁷

Furthermore, it is not likely that Congress will pass any new substantial environmental legislation or designate many new wilderness areas because of congressional deadlock. Indeed, evidence suggests that Congress cannot even seem to agree on how to manage existing designated wilderness areas, such as the Arctic National Wildlife Refuge (ANWR) in Alaska.⁵⁸ Congressional motivation to designate wilderness areas is perhaps waning because, since the Act was adopted, Congress has decreased its annual wilderness designations significantly.⁵⁹ Also, logically, at a certain point, the finite amount of

56. *Fast Facts*, *supra* note 12.

57. Wilderness Act of 1964, Pub. L. No. 88-577, § 2, 78 Stat. 890, 890-891.

58. *See* Nagle, *supra* note 14, at 381-83 (discussing the, at this point, well-documented debate over whether to open ANWR to mineral production or to strictly maintain its wildlife refuge status).

59. *See* Kate Sheppard, *Will Congress Go Another Year Without Designating New Wilderness?*, HUFFINGTON POST (Jan. 3, 2014, 8:08 AM), http://www.huffingtonpost.com/2014/01/03/wilderness-congress-public-lands_n_4509730.html [<https://perma.cc/K7TV-2Y9P>]. During the period of 2010-2015, there were zero designations in 2010, 2012, and 2013 and a high mark of only five designations in 2014. For comparison, 175 designations were made in 1984 alone. *Wilderness Statistics Reports*, WILDERNESS.NET (Sept. 21, 2015),

land in the United States will make additional designations impossible.⁶⁰ These facts suggest wilderness designation is no longer a viable option for having any significant impact on reversing degradation from human actions in natural areas.

An LNT law can accomplish the needed change from simple wilderness designation to more active management of existing wilderness areas and individual behavior within them. A plethora of rules currently regulate activities within wilderness areas.⁶¹ But, these regulations are spread out over multiple chapters of the Code of Federal Regulations (CFR) and administered by multiple different agencies.⁶² If LNT were law, it would create a simplified, coherent set of principles to manage activities within designated wilderness areas. As law, this unified set of principles and its sub-points could successfully meet the need for management of current wilderness areas, and would maintain the goals set out in the Wilderness Act to protect “area[s] where the earth and its community of life are untrammelled by man.”⁶³ In fact, the goals of the Wilderness Act and LNT are exactly the same—to minimize the impacts of humans in wild areas. The two simply aim to achieve these goals in primarily different ways: one through designating more land, the other through regulating individuals’ activities within these areas. More of the latter is required to combat modern trends.

B. Gathering Partners for the Climb: The Path to Legitimacy

Fear of the unknown may impede Congress’ desire to implement completely new laws. Laws stemming from informal codes can experience more legitimacy once codified due to familiarity of the code built over time among a community.⁶⁴ Time spent as an informal code allows for debate among a community that in turn strengthens the code.⁶⁵ As time and debate proceeds, familiarity with the code develops and consensus within the community regarding the informal code begins to solidify.⁶⁶ After this process, formal codification becomes more viable and potential success of the law increases.

<http://www.wilderness.net/index.cfm?fuse=NWPS&sec=chartResults&chartType=UnitsByDesigYear> [<https://perma.cc/D2GQ-2TMK>].

60. See Sheppard, *supra* note 59.

61. See *supra* notes 19–30 and accompanying text.

62. See *supra* notes 19–30 and accompanying text.

63. Wilderness Act of 1964, Pub. L. No. 88-577, § 2, 78 Stat. 890, 891.

64. See Steven R. Salbu, *True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities*, 15 U. PA. J. INT’L BUS. L. 327, 353–57 (1994).

65. *Id.*

66. *Id.*

The chances of familiarity and consensus among a community regarding a code may also be increased if that code is grounded in some sort of underlying or fundamental moral. Some scholars argue that law and morals are separate because there can be laws considered immoral.⁶⁷ But, the two cannot be separated entirely.⁶⁸ For example, many judicial opinions justify rules by articulating notions of social utility and individual rights.⁶⁹ There is a general expectation that laws can be defensible on moral and normative grounds.⁷⁰ In other words, norms and moral principles in part define legal rules.⁷¹

The general field of environmental law, including conservation laws like the Wilderness Act, provides an excellent example of the relationship between law and morals. In the early 1970s, environmental issues began to creep into the forefront of American consciousness.⁷² The societal activities at the time, and their budding ramifications, created a general consensus that something should be done, that laws should be enacted to protect the environment.⁷³ Starting in this period, beginning with the National Environmental Policy Act (NEPA), a flurry of environmental laws were passed to address societal concerns that unregulated human activities were causing significant environmental harm.⁷⁴

The volume of environmental laws stemming from this period could indicate that society shares common values governing the human relationship with the natural environment, but this is not entirely accurate.⁷⁵ The lawmaking activity of the 1960s and 1970s, which included the Wilderness Act and NEPA, can be said to have resulted from the momentum of the philosophical field of environmental ethics that rapidly gained traction during that era.⁷⁶ This field was largely kicked off by Aldo Leopold in his 1948 work *A Sand County Almanac*, in which he decried humans' views of the natural world and its negative

67. Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 914 (2009).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Alyson C. Flournoy, *In Search of an Environmental Ethic*, 28 COLUM. J. ENVTL. L. 63, 77 (2003).

73. *Id.* at 64. One well-publicized event that occurred around this time was the polluted Cuyahoga River in Ohio catching fire in the summer of 1969. The event spurred public outrage and calls for changes to environmental quality standards. In the field of environmental law, this event certainly “act[ed] as a catalyst for change.” Keith H. Hirokawa, *Disasters and Ecosystem Services Deprivation: From Cuyahoga to the Deepwater Horizon*, 74 ALB. L. REV. 543, 546 (2010).

74. Flournoy, *supra* note 72, at 64.

75. *Id.* at 65–66.

76. *Id.* at 77–79.

effect on conservation.⁷⁷ Writings and views such as Leopold's continued to develop among academic circles through the 1970s when environmental laws began to appear.⁷⁸

Yet, as time went on, environmental law and environmental ethics seemed to diverge. Instead of a focus on ethics and philosophy in regards to environmental issues and laws, focus shifted to more practical efforts of conducting cost-benefit analyses and discussing the economic ramifications of environmental actions.⁷⁹ Some argue this divergence has grown to the point that law provides no basis for challenging actions as violating environmental ethics, even for ardent environmental advocates.⁸⁰ For this, there is a call for environmental laws and decisions to return to an ethical basis present in the Wilderness Act era, and not bases solely grounded in economic or practical concerns.⁸¹

While most agree that informal codes that remain in communities over time allow for debate and strengthening of those codes, not everyone agrees that therefore those informal codes or beliefs should combine with law.⁸² Supporters of this view focus on the different functions of law dating back to Martin Luther.⁸³ These functions are the theological function to reveal human limitations, the civil function to establish order, and the didactic function to reveal human potential.⁸⁴ One scholar argues that when moral aspirations become obligatory, the civil function of law reflects what is desirable and not what is achievable to keep order, and states "it would be an unacceptable option . . . to mandate through civil laws the didactic aspirations embodied in the mantra 'leave no trace.'"⁸⁵

LNT as law has the potential to address all of the scholarly agreements and concerns above. LNT has served as an informal code in the outdoor community for decades. Its principles have been redeveloped, discussed, and disseminated in multiple mediums—from

77. *Id.* at 77 (quoting Aldo Leopold: "We abuse land because we regard it as a commodity belonging to us").

78. *Id.* at 77–79.

79. Jedediah Purdy, *Our Place in the World: A New Relationship for Environmental Ethics and Law*, 62 DUKE L.J. 857, 859–60 (2013).

80. Heidi Gorovitz Robertson, *Seeking a Seat at the Table: Has Law Left Environmental Ethics Behind as it Embraces Bioethics?*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 273, 278 (2008).

81. *Id.* at 279.

82. Erin Englebrecht, *Three Fallacies of the Contemporary Legal Concept of Environmental Injury: An Appeal to Enhance "One Eyed Reason" with a Normative Consciousness*, 18 TUL. ENVTL. L.J. 1, 32–35 (2004).

83. *Id.* at 33–34.

84. *Id.*

85. *Id.* at 34.

pamphlets to the NOLS Master Educator course—by multiple different organizations—from the U.S. Forest Service to the Leave No Trace Center for Outdoor Ethics.⁸⁶ Outdoor enthusiasts have encountered these principles for decades through postings at trailheads or through introductory talks by park rangers at campgrounds across the country. In other words, LNT is a fully developed and familiar code among outdoor enthusiasts and therefore, those most affected by the law would not likely challenge the law’s legitimacy and viability.

Additionally, LNT at its heart can be seen as a conservation measure aimed at protecting the natural world.⁸⁷ This foundation could be seen as a moral concept that the natural world is an equally important member of a community as the humans within it.⁸⁸ This concept of land and humans belonging to the same community, on equal footing, was a prominent focus of Leopold’s *A Sand County Almanac* that birthed the environmental ethics movement.⁸⁹ An LNT law would thus be fundamentally rooted in an environmental ethic serving to appeal to those desiring a reunification of ethics and law in the environmental field.

In response to the assertion that an LNT law would be “unacceptable,”⁹⁰ this argument places too much weight on the didactic character of LNT. It is true that a lofty, aspirational moral, if turned to law, may exceed what is achievable under the law’s civil function to maintain order.⁹¹ But, LNT is not such a lofty and aspirational moral pushing the bounds of human potential.⁹² This was likely an accurate characterization in the beginning days of LNT through the 1980s. Since then, LNT has been formalized into a concrete educational curriculum by NOLS.⁹³ Additionally, there is strong indication LNT has lost its inspirational muster as described previously with many users of popular outdoor areas ignoring the seven principles and leaving a significant trace.⁹⁴ Therefore, a codification of LNT would not be an instance of the “civil function becom[ing] a reflection of what is desirable rather than what is achievable.”⁹⁵ In a sense, LNT has lost effectiveness as a didactic tool; it has run its didactic life cycle, so to speak. Therefore,

86. *Supra* notes 39–42 and accompanying text.

87. *See infra* notes 114–120 and accompanying text.

88. This concept has been labeled as the “Land Ethic Impulse.” Flournoy, *supra* note 72, at 86–87.

89. *Id.* at 77.

90. Englebrecht, *supra* note 82, at 34.

91. *Id.*

92. *Id.*

93. *Leave No Trace Master Educator*, *supra* note 49.

94. *See supra* notes 54–55 and accompanying text.

95. Englebrecht, *supra* note 82, at 34.

LNT no longer reflects what is desirable or a moral aspiration. LNT, as illustrated by its longevity, is achievable and increasingly necessary to maintain order in wilderness areas, and thus more comfortably comports with the civil function of law than this argument characterizes.

C. A Break in the Weather: The Potential to Shine as an Environmental Law

An LNT law would possess a number of characteristics that would make it an effective environmental law. An LNT law would not be a large, canonical piece of environmental legislation. An LNT law would be simple (containing only seven basic principles with guiding sub-points for each), would target specific but potentially broadly applicable actions, and would possess familiarity and consensus with the public as described above. These features work to LNT's advantage in the legal realm.

The simplicity of LNT would ensure coherence with the existing federal legal framework. This simplicity better ensures an enacted LNT law would not conflict with existing laws, a desirable and often difficult to achieve outcome for new laws.⁹⁶ Additionally, the LNT principles target specific actions that could potentially be broadly applicable to areas other than environmental law.⁹⁷ In other words, the LNT law can be embedded within existing or future laws instead of serving as its own stand-alone environmental law.⁹⁸ This feature of an LNT law makes it more politically attractive for passage due to lower stakes, and possible mitigation of major debates that can surround a large piece of stand-alone environmental legislation.⁹⁹ Additionally, this low-key or embedded capability and avoidance of the full-fledged animosities of political debate can make an LNT law a sort of "sleeper" in that it would experience its full potential once enacted, and thus face less overall resistance or skepticism than traditional environmental laws.¹⁰⁰ The familiarity and consensus among those whom the law would affect most as described in the previous section would also likely add to the

96. See Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 IND. L.J. 1239, 1270 (2014).

97. For example, the principles target planning as "plan ahead," travel by encouraging travel on durable surfaces, and waste disposal. *The Leave No Trace Seven Principles*, *supra* note 45. These types of actions are not specific to the environmental or wilderness context.

98. See Aagaard, *supra* note 96, at 1264.

99. *Id.* at 1274–77.

100. William H. Rodgers, Jr., *The Seven Statutory Wonders of U.S. Environmental Law: Origins and Morphology*, 27 LOY. L.A. L. REV. 1009, 1016–17 (1994).

political attractiveness of the law and further increase its success. With the current political climate regarding land conservation,¹⁰¹ the more features that make such a law politically attractive the better.

An LNT law would also share some features with other highly regarded environmental laws that would further ensure its viability. While the inspirational character of LNT may have worn off a bit, LNT was founded on the same basic inspirational message of the Wilderness Act that emotionally connects people to an ancestral desire for untouched wilderness.¹⁰² This inspirational basis can weigh on the conscience of violators and lead to a self-monitoring mechanism or “attentive monitoring.”¹⁰³ These feelings can lead to pride for adhering to the message, or shame and ostracizing by a group for neglecting this message that could even lead to more legal enforcement measures available (i.e., reporting others to more formal authorities).¹⁰⁴ This self-monitoring can fill important enforcement gaps, such as resource allocation issues, that will be addressed further in the following section.¹⁰⁵

Some may look at the current federal regulations discussed previously and argue many of the actions LNT covers are addressed by those current regulations and thus an LNT law would be redundant or wholly unnecessary. As the previous survey of these regulations illustrates,¹⁰⁶ the current regulations contain overlapping prohibitions of similar actions in similar protected areas across multiple chapters of the CFR in long lists of prohibited acts.¹⁰⁷ Simplicity is a key characteristic of a potential LNT law. The principles and their sub-points would allow many of these scattered regulations to be boiled down to one set of seven general principles. These principles would bring a coherent, unifying framework that is lacking in the current regulations. There is little doubt current environmental laws are messy and scattered.¹⁰⁸ A simple, organized LNT law replacing current regulations has the potential to be an effective tool to clean the mess up a bit.

In sum, a potential LNT law possesses a number of features that make it attractive and increase its chances of success as law. LNT’s organized and simple nature would allow it to integrate into current law

101. See Sheppard, *supra* note 59.

102. See Rodgers, *supra* note 100, at 1015.

103. *Id.* at 1020.

104. *Id.*

105. See *infra* section III.D.1.

106. *Supra* notes 19–30.

107. See, e.g., 50 C.F.R. § 35.6(b) (2015); 36 C.F.R. §§ 261.16(f), 2.10(b)(2) (2015).

108. David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619, 621 (1994) (“American environmental law is complex, messy, and disorganized.”).

with less conflict than a large piece of stand-alone legislation. These features provide the added benefit of cleaning up an already complex and messy set of federal regulations governing prohibited actions in wilderness areas.

D. Focusing on the Basics as the Climb Gets Tough: The Enforcement of LNT

While the advantages discussed so far have focused mainly on an LNT law on paper, issues arise when a law is put into action. The wilderness context in particular poses unique challenges for the application of a law. For example, how can agencies adequately monitor the vast and remote acreage of the federal wilderness system to actually enforce an LNT law? Additionally, how we value the natural environment itself—rather than simply its utility to humans—can raise interesting questions about determining an appropriate penalty when that natural world is damaged. Finally, once a proper range of penalties is determined, the unpredictable nature of wilderness settings poses special challenges for those granted with enforcement discretion in determining where certain actions and scenarios should fall within that range.

1. A FALSE PEAK: ADDRESSING THE RESOURCE ISSUE OF ENFORCEMENT IN WILDERNESS

The vast and remote nature of wilderness can stretch enforcement resources. One possible critique of an enforceable LNT law is that the actions it governs take place in very remote areas; therefore, evidence or proof of a violator's misconduct may be difficult to find, especially if there is a criminal component, which requires more demanding proof.¹⁰⁹ Additionally, the hundreds of millions of acres of wilderness is a lot of ground to cover for those that enforce the law, and lack of resources (i.e., park rangers) may put a strain on effective enforcement.¹¹⁰ The LNT advantage of encouraging self-monitoring and attentive monitoring, with its inspirational foundation and familiarity among wilderness users, can help mitigate these issues.

109. Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2445 (1995).

110. See Lorraine Mirabella, *As Half of Park Rangers Near Retirement, U.S. Recruits College Students*, BALT. SUN (Aug. 13, 2010), http://articles.baltimoresun.com/2010-08-13/business/bs-bz-park-ranger-shortage-20100810_1_park-ranger-national-park-service-law-enforcement [<https://perma.cc/CU7H-HWWF>].

Furthermore, the longevity of LNT and its familiarity can help solve the resource problem in a more direct way. LNT has been a formal part of the NOLS curriculum for years through its Master Educator Course.¹¹¹ Therefore, these many “Master Educators” and those familiar with LNT over years of wilderness use can function in a way as pseudo-park-rangers, carrying out the many social enforcement mechanism discussed under attentive monitoring. While these pseudo-rangers would not carry law enforcement powers, they would carry social tools to encourage compliance and enforcement, and can serve an added function of notifying those that do carry formal law enforcement powers.

To clarify further, the familiarity and simplicity of LNT is what makes enforcement of an LNT law more feasible and effective than the current regulations. Enforcement of these current rules occurs in vast and incredibly remote areas. Therefore, enforcement of every violation or even a majority of violations by an enforcement agency is simply unrealistic, if not impossible. Additionally, a key component of a wilderness experience is solitude. So, deliberately adding more resources (i.e., more park rangers) means more interactions between visitors and rangers, and this may be viewed as an act that taints their wilderness experience.¹¹² As a result, self-monitoring is crucial for effective enforcement. Additionally, LNT’s simplicity means the rules can be clearly posted and readable at every trailhead, thus reaching more visitors, something not as feasible by the current smattering of regulations across chapters and agencies. Moving forward, publicizing or posting examples of violations that were punished can further bolster the benefits that LNT familiarity has on self-enforcement.¹¹³

111. *Leave No Trace Master Educator*, *supra* note 49.

112. This approach is different than the pseudo-ranger approach advocated previously. These pseudo-rangers would just be other wilderness users choosing to visit the parks themselves with eyes and ears open to observe potential violations they may come across, but not harming other’s experiences or seeking out enforcement. Adding more official rangers in contrast may be seen as a deliberate act by an agency to flood wilderness areas with people seeking enforcement with the goal of finding and interacting with as many visitors as they can in the backcountry and thus tainting wilderness experiences.

113. There is indication that news reports of crime may cause people to think crime rates are rising when they are not, and therefore, by analogy, posting violations at a trailhead may lead people to believe in a higher chance they will also be caught for violations, thus increasing self-monitoring. *See, e.g.,* Lydia Saad, *Most American Believe Crime in U.S. is Worsening*, GALLUP (Oct. 31, 2011), <http://www.gallup.com/poll/150464/americans-believe-crime-worsening.aspx> [<https://perma.cc/7X2P-QB4S>] (“This unwarranted pessimism may stem from the imperfect indications of crime that Americans receive from the news and other sources . . .”).

2. THE FINAL SCRAMBLE: A PROPER PENALTY AND THE DISCRETION TO APPLY IT

A major concern with modern environmental laws is that they have strayed too far from a solid underlying ethic.¹¹⁴ An LNT law would have great potential to bridge this gap. But, LNT also has the potential to initiate a fundamental shift in American environmental jurisprudence. Wilderness areas and the many natural, nonhuman living things within them have no legal rights of their own.¹¹⁵ Protection of the environment depends solely on nature's value to humans and nature's production value as opposed to protection for nature's own sake.¹¹⁶ This concept is fundamental to the point where even laws potentially grounded in some environmental ethic, with language implying environmental values, are concerned more with this human value and interest and less with the natural world itself.¹¹⁷ Consistent with its fading but still fundamental inspirational message, an LNT law could have the peculiar affect of shifting this focus and raising questions regarding human rights versus other beings' rights.

Whether LNT is founded on a concern for the environment itself or the value humans obtain from pristine areas is certainly debatable. The Leave No Trace Center for Outdoor Ethics states, "[i]n its simplest form, Leave No Trace is about making good decisions to *protect the world* around you – the world *we all enjoy*."¹¹⁸ Similarly, the "vision" of the organization centers on people's enjoyment while its "mission" centers on protecting the outdoors.¹¹⁹ These ambiguous statements certainly leave room for debate. In addition to being an effective environmental law, LNT therefore has the potential to reinvigorate debate and thought around environmental ethics, and laws taking on an ecocentric versus anthropocentric focus. The idea can raise many questions, especially pertaining to enforcement.¹²⁰

Despite the intriguing potential of these questions, an LNT law requires a more concrete starting point for determining and enforcing appropriate penalties for violation of its seven principles. Many enforceable environmental laws are created "to force dramatic changes

114. See, e.g., Purdy, *supra* note 79, at 859–60; see also Flournoy, *supra* note 72, at 65–66; Robertson, *supra* note 80, at 278.

115. Robertson, *supra* note 80, at 340.

116. *Id.*

117. *Id.*

118. *About Us*, *supra* note 33 (emphasis added).

119. *Id.*

120. For example, should the natural world possess its own rights? Should these rights be recognized in law? How does one value these rights in the sense of what is an appropriate penalty for violation of those rights?

in existing behaviors.”¹²¹ The aspirational goals for environmental quality in environmental laws, such as the Clean Air Act or Clean Water Act, can lead to implementation of strict deadlines and mandatory standards that do breed successes.¹²² But, in crafting a law, discussion on what is too harsh or too lenient may be stifled by political motivations or lack of affected party participation to hone in on appropriate enforcement.¹²³ This difficulty does not mean discussion should or does end.¹²⁴

While the current regulations governing human behavior in wilderness areas may be ineffective, they provide a useful starting point for determining appropriate sanctions. Current penalties can be used to create a range. The Bureau of Land Management, on one end, punishes prohibited, large-scale, commercial-like activity in a wilderness area with criminal prosecution including up to one year in prison and a fine up to \$100,000, as well as potential civil liability.¹²⁵ On the other end of the spectrum, the NPS punishes violations for behavior closer to that governed by the LNT principles with a simple permit revocation, or up to six months in prison and a fine “as provided by law.”¹²⁶ The scale of activity¹²⁷ governed by the Bureau of Land Management would indicate the penalties might be a bit high for LNT activity enforcement, while the need for stricter enforcement in recreational level uses¹²⁸ indicates the NPS penalties for enforcement are not high enough. Therefore, a middle ground between the two may be necessary.

However, simply choosing a spot in this middle ground is not so simple; multiple issues arise in determining legal penalties and their application that must be addressed. Subjecting violators of LNT to criminal penalties can raise certain issues rooted in the due process clauses of the Constitution.¹²⁹ A penal statute that is considered too vague will be overturned as violating due process.¹³⁰ To pass muster, a statute must define the criminal conduct: (1) with sufficient clarity that an ordinary person can understand what actions are prohibited, and (2) in a way that does not encourage arbitrary and discriminatory

121. Lazarus, *supra* note 109, at 2424.

122. *Id.* at 2424–26.

123. *Id.* at 2508.

124. *Id.* at 2509.

125. 43 C.F.R. § 6302.30 (2015).

126. 36 C.F.R. §§ 2.10(c), 1.3(a) (2015).

127. For example, commercial activity.

128. *See supra* notes 54–55 and accompanying text.

129. U.S. CONST. amends. V, XIV.

130. This concept is commonly referred to as the “void-for-vagueness doctrine.” *See Skilling v. United States*, 561 U.S. 358, 402–03 (2010).

enforcement.¹³¹ Simply not meeting these two prongs does not automatically result in a void law. In addition to these prongs, courts will generally “construe, not condemn, Congress’ enactments” in an effort to avoid overturning duly enacted laws.¹³² Finally, if a law is considered ambiguous, the law will generally be construed in favor of the defendant to avoid the harsher punishment, again to avoid violating due process.¹³³

A law containing the seven LNT principles and nothing more would likely be considered too vague to pass the tests above. To avoid this vagueness, each principle contains sub-points addressing very specific behaviors.¹³⁴ These sub-points provide more guidance or notice to ordinary persons as to what is prohibited, and provides more material to a court for construing instead of overturning an LNT law should a challenge arise. Some may argue these added sub-points lengthen the LNT law and jeopardize its inherent advantages of simplicity and brevity. But, even with these sub-points, the law boils down to seven basic and coherent principles in one location in the CFR, contrary to the current list of rules scattered across multiple chapters of the CFR with no coherent, unifying principle.

Furthermore, as with any law, enforcement warrants discretion. Some may look at an LNT law, pick a specific prong, and say a high fine and prison time is much too extreme for that minimal act. For example, a person who forgets or loses a raincoat to stay dry and warm in a storm could be said to violate the “Plan Ahead and Prepare” prong in not preparing sufficiently for extreme weather, hazards, and emergencies.¹³⁵ But, a park ranger should not, and presumably would not, penalize such a minimal and common oversight. However, a person that enters the mountains purposely with little to no gear of any kind and then requires rescue can and should be penalized for such willful oversight and jeopardizing the safety of rangers in the rescue.¹³⁶ Additionally, one who builds a cairn to avoid getting lost in an unexpected snow storm could be said to violate the “Leave What You

131. *Id.*

132. *Id.* at 403.

133. This concept is commonly referred to as the “rule of lenity.” *See Rewis v. United States*, 401 U.S. 808, 812 (1971) (“[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.”) (citation omitted).

134. For example, walk single file in the middle of the trail, even when wet or muddy, in popular areas. *The Leave No Trace Seven Principles*, *supra* note 45.

135. *See id.*

136. *See* Katherine Butler, *National Parks Abused by Visitors Abusing Technology*, MOTHER NATURE NETWORK (Aug. 24, 2010, 9:27 PM), <http://www.mnn.com/earth-matters/wilderness-resources/stories/national-parks-abused-by-visitors-abusing-technology> [<https://perma.cc/2MGW-NAQE>] (highlighting examples of egregious behavior by unprepared visitors in national parks).

Find” prong in having built a structure,¹³⁷ but would not be subject to a penalty. One who moves large rocks and cuts branches off of trees to build a shelter for fun, however, would be subject to penalty for such unnecessary and purposeful disruption of natural objects. Strict enforcement of the lesser violations in these examples could also be seen as arbitrary enforcement counter to the second prong of the void-for-vagueness doctrine.¹³⁸ Whether these lesser violations fall under the ambit of an LNT violation would also likely trigger the rule of lenity in favor of the defendant.¹³⁹ As a result, these doctrines could serve as an additional check on abuse of discretion by a park ranger should they seek to harshly enforce these lesser or minimal violations. Over time, proper discretion and what constitutes appropriate penalties and violations would become more settled.

To clarify further, the goal of an LNT law is not to punish anyone that creates any trace that they passed through the wilderness. Leaving absolutely no trace is of course impossible; such an approach would ultimately require no travel at all through wilderness areas. Instead, gray areas will likely form with an LNT law as to what constitutes a punishable violation or what crosses the threshold of being serious enough to punish. As the previous examples illustrate, many of the actions covered under LNT possess an inherent sliding scale of acceptability or necessity.¹⁴⁰ This ambiguity can be reigned in only to an extent by the legal doctrines discussed above and discretion of those enforcing the law. This gray area and enforcement discretion in a new law may be uncomfortable for some. This discomfort should not be a roadblock, however. Discretion and ambiguity are inherent in the legal system. Enforcement discretion is a necessary component to feasibly carry out the vast amount of laws in place in this country. While such discretion certainly can have its drawbacks from abuses, abolishing such discretion would require great systemic changes and may be impossible in a practical sense.¹⁴¹ With the unpredictability of

137. *The Leave No Trace Seven Principles*, *supra* note 45.

138. *Supra* notes 130–133 and accompanying text.

139. *Supra* note 133 and accompanying text.

140. Some of the LNT principles are quite black and white such as camping at least 200 feet from waterways. *See The Leave No Trace Seven Principles*, *supra* note 45. However, as discussed previously, cairns can be a necessity for navigation in wilderness areas and at other times can be completely unnecessary and built for fun. Where does one draw the line of necessity? Wilderness is inherently unpredictable and can necessitate different reactions to respond to this unpredictability or constantly changing setting. These lines are likely too difficult to determine in advance and put down on paper within the law. Instead, as the law is put into action and enforced, these blurred lines will begin to sharpen.

141. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 579–80 (2001) (discussing the arguments of abolishing enforcement discretion in criminal law).

wilderness settings and their ever-changing nature, from sudden storms to rock slides and avalanches, it is simply impossible to preconceive all possible scenarios and include all prohibited acts with specificity ahead of time. Human nature alone is not the only thing to consider in this context, but human response to a wide range of unpredictable scenarios must be taken into account. Therefore, perhaps more so than any other context, a certain level of discretion and flexibility is necessary in governing human actions in a wilderness setting.

To ease concerns about enforcement discretion of an LNT law it is important to remember wilderness travel is in a sense a niche activity; it is not an activity carried out daily by the vast majority of the population. Those who choose to become park rangers presumably have significant backcountry experience and undergo training specific to that context.¹⁴² Additionally, LNT Master Educators and those very familiar with LNT that may serve as pseudo-park-rangers have extensive wilderness experience. This experience makes these individuals exceptionally suited for discretionary enforcement of an LNT law. These groups have presumably come across a wide range of scenarios in the wilderness themselves, and are best suited to determine what an appropriate response or action by a person is in certain wilderness settings and scenarios. As the law is placed into action and enforcement begins, certain norms will develop in helping to shape this discretion and can be tweaked to avoid any abuses that may arise.

Finally, as discussed, many LNT principles are already expressed in the current federal regulations. Current prohibitions contain a level of discretion as well.¹⁴³ Therefore, the potential gray areas and discretion in an LNT law would not constitute a significant change from what currently exists in this context. With time under an LNT law in action, what constitutes an enforceable violation in what contexts will become clearer and more comfortable to skeptics. This discretion and development will be important in addressing whatever lingering ambiguity there may be in compliance with the seven principles and their sub-points.

142. See, e.g., *Park Ranger Training Program*, N. ARIZ. UNIV. PARKS & RECREATION MGMT. PROGRAM, <http://www.prm.nau.edu/rangers/> [https://perma.cc/2B47-TUNB] (last visited Apr. 12, 2017).

143. For example, the current prohibition on “unreasonable noise” after 10:00 p.m. includes a number of factors a person enforcing the rule must take into account in deciding whether the rule is violated including the “nature and purpose of the actor’s conduct, impact on park users, location, and other factors which would govern the conduct of a reasonably prudent person under the circumstances.” 36 C.F.R. § 2.10(b)(4) (2015).

E. Reaching the Summit: The Proposed Leave No Trace Regulation

As discussed, success of an LNT law would be best achieved by not being a stand-alone piece of environmental legislation. An effective way to utilize the discussed benefits of the proposed law would be to include LNT as a revision to the existing regulations. The Wilderness Act specifically delegates management of wilderness areas to the Department of Agriculture and the Department of the Interior.¹⁴⁴ Therefore, due to this broad grant to manage wilderness areas and the presence of similar rules currently in place by these departments, either one would possess the authority to promulgate an LNT rule.

As a result of this dual management, the LNT regulations would appropriately be placed in either Chapter One or Chapter Two of Title 36 in the CFR.¹⁴⁵ To maximize the benefit of simplicity in an LNT law, however, oversight of LNT should be given to one department and placed in one chapter of the CFR. Congress delegated broad authority to the NPS via the Secretary of the Interior to regulate use of national parks “by such means as will leave [the parks] unimpaired for the enjoyment of future generations.”¹⁴⁶ Additionally, Congress granted the Department of the Interior power to designate officers with law enforcement powers to protect and maintain law and order within the National Park System.¹⁴⁷ Therefore, the Department of the Interior via the NPS possesses the necessary grant of authority to implement and enforce an LNT law.¹⁴⁸

As a result of this grant of authority, an LNT law should be placed in title 36, chapter one of the CFR under Department of the Interior control enforced primarily through the NPS. Should enforcement of LNT prove beyond the resources of the NPS alone, the Department of the Interior possesses authority to designate officers from other federal agencies or of a state and its political subdivisions as supplemental law enforcement if needed.¹⁴⁹ In addition to placing LNT in chapter one,

144. 16 U.S.C. § 1132 (2012).

145. See 36 C.F.R. ch. I (2015) (under Department of the Interior control); 36 C.F.R. § 200.1 (under Department of Agriculture control).

146. 54 U.S.C. § 100101(a) (2012).

147. 54 U.S.C. § 102701(a)(1)–(2) (2012).

148. As mentioned, wilderness areas can and do fall to a large extent within the boundaries of national parks. See *supra* note 7 and accompanying text. Therefore, the broad grant of authority to the Department of the Interior and the NPS over the National Park System is presumed to extend to the National Wilderness Preservation System as well by necessity.

149. 54 U.S.C. § 102701(b)(1). For example, since designated wilderness areas can fall within national parks or national forests, the Department of Interior could serve as the primary custodian of the LNT law, but designate U.S. Forest Service rangers as enforcers of the LNT law in wilderness areas within national forests.

overly redundant, conflicting, or less stringent regulations currently in the CFR should be deleted to maximize simplicity.¹⁵⁰

With all of these considerations in mind, the Department of the Interior LNT regulations, enforced by the NPS and other land management agencies as necessary, should resemble the following:

36 C.F.R. Part 2 – LEAVE NO TRACE

§ 2.1 – Within the boundaries of any area designated as part of the National Wilderness Preservation System, all persons must:¹⁵¹

(a) Plan Ahead and Prepare

(1) Know the regulations and special concerns of the area you will visit.

(2) Prepare for extreme weather, hazards, and emergencies.

(3) Visit in small groups when possible. Consider splitting larger groups into smaller groups.

(4) Repackage food to minimize waste.

(5) Use a map and compass to eliminate the use of marking paint, rock cairns, or flagging.

(b) Travel and Camp on Durable Surfaces

(1) Camp at least 200 feet from lakes, streams, and other riparian areas.

(2) Do not make a campsite or alter existing sites.

(3) In popularly travelled areas:

(A) Concentrate use on existing trails and campsites.

(B) Walk single file in the middle of the trail, even when wet or muddy.

(C) Keep campsites small. Focus activity in areas where vegetation is absent.

(4) In pristine areas:

150. For example, 36 C.F.R. § 2.10(b)(5) (2015) prohibits the installation of permanent camping facilities. This regulation can be considered redundant when compared to the second LNT principle “Travel and Camp on Durable Surfaces,” which states, “Good campsites are found, not made. Altering a site is not necessary.” *The Leave No Trace Seven Principles*, *supra* note 45. Additionally, 36 C.F.R. § 2.10(b)(3) creates a less stringent standard prohibiting camping within 100 feet of a waterway whereas LNT specifies 200 feet. *Id.* As a result, these CFR provisions among others should be removed from the CFR. Finally, since LNT should be placed under the oversight of the Department of the Interior via the NPS, those regulations addressing similar conduct in chapters not under the purview of the Department of the Interior should be removed from the CFR. For example, the U.S. Forest Service regulations concerning waste disposal are covered by LNT and should thus be deleted or changed to a simple reference to the LNT law in chapter one. 36 C.F.R. § 261.11 (2015).

151. The proposed regulation applies specifically to wilderness areas. However, agencies could adopt the LNT law by simple reference to apply to areas not designated as wilderness (e.g., portions of national parks or national forests not designated as wilderness areas).

(A) Disperse use to prevent the creation of campsites and trails.

(B) Avoid places where impacts are just beginning.

(c) Dispose of Waste Properly

(1) Pack it in, pack it out. Inspect campsites and rest areas for trash or spilled food. Pack out all trash, leftover food, litter, toilet paper, and hygiene products.

(2) Deposit solid human waste in catholes six to eight inches deep, at least 200 feet from water, campsites, and trails. Cover and disguise the cathole when finished. Certain areas may have permanent or temporary restriction on catholes requiring human waste be packed out, be aware of and follow these special restrictions.

(3) Wash yourself or your dishes at least 200 feet from water using only a small amount of biodegradable soap. Scatter strained dishwater.

(d) Leave What You Find

(1) Only examine, do not touch cultural or historic structures and artifacts.

(2) Leave rocks, plants, and other natural objects as you find them.

(3) Avoid introducing or transporting non-native species.

(4) Do not build structures, furniture, or dig trenches.

(e) Minimize Campfire Impacts

(1) Where fires are permitted, use established fire rings, fire pans, or mound fires.

(2) Keep fires small using only sticks off the ground that can be broken by hand.

(3) Burn all wood and coals to ash, put out fires completely, then scatter cool ashes.

(f) Respect Wildlife

(1) Observe wildlife from a distance. Do not follow or approach wildlife.

(2) Never feed animals.

(3) Store rations and trash securely.

(4) Leave pets at home if possible. If not possible, control pets at all times.

(5) Avoid wildlife during sensitive times: mating, nesting, raising young, or winter.

(g) Be Considerate of Other Visitors

(1) Respect the quality of other visitors' experiences.

(2) Yield to other users on the trail.

(3) When encountering pack stock, step to the downhill side of the trail to allow stock to pass.

(4) Camp and take breaks away from trails and other visitors.

(5) Avoid using loud voices and making loud noises.¹⁵²

§ 2.2 – Penalties

(a) A person who violates any provision of section 2.1 within a designated federal wilderness area may be subject to civil liability, and may be punished by a fine of not more than \$90,000, and/or imprisoned for not more than 11 months.

The sub-points for each principle are meant to put wilderness users on notice of prohibited conduct to avoid an overly vague statute. The sub-points further provide more clarity on the scope of the LNT law and what the law is meant to regulate. The penalty levels were reached by reducing by a little bit the current penalty levels for prohibitions on large, commercial-scale activities in protected areas.¹⁵³ These levels are meant to provide LNT with a sufficiently heavy hand to reverse current trends of ignoring these principles in wilderness areas. Levels closer to the current regulations governing recreational uses¹⁵⁴ run the risk of not being strict enough or of not being a sufficient change to encourage changes in behavior. Finally, it is important to note these levels constitute maximums, not mandatory minimum penalties. Discretion is given for appropriate enforcement, and penalties below these levels are constrained by the common sense of the park ranger as well as legal doctrines, such as the rule of lenity as previously discussed.

IV. ONE SUCCESSFUL CLIMB LEADS TO THE NEXT

Wilderness areas in the United States require better management. This management need is not just on the shoulders of those whose job it is to maintain these areas, but, more importantly, on those who use and cherish these places. With record numbers of visitors flocking to wilderness areas, the need to maintain pristine wilderness is becoming dire while the ability to do so becomes more difficult. Simply designating more wilderness lands under the Wilderness Act is no longer a viable option, and eventually may become an impossible option. Furthermore, such an approach has the potential to exacerbate current problems with maintenance backlogs in national parks. We must implement better laws to regulate wilderness user behavior in order to minimize degradation of these natural areas. LNT as an enforceable law has the ability to meet these needs.

152. The proposed regulations here are substantially the same as those copyrighted principles of the Leave No Trace Center for Outdoor Ethics. *See supra* note 45.

153. *See supra* note 125 and accompanying text.

154. *See supra* note 126 and accompanying text.

Due to its long history, LNT is a well-known set of principles among wilderness users that has been examined, discussed, and tweaked to its final form. The familiarity among wilderness enthusiasts, or those whom the law would affect the most, would result in less resistance in a transition from informal principles to formal law. Additionally, the principles are easy to understand and are a coherent, unified set of rules. As a result, an LNT law would bring simplicity and coherence to a messy and scattered set of current regulations governing wilderness areas. Finally, LNT's longevity and integration into other programs creates a group of people trained in LNT's principles and goals, creating a strong potential for self-enforcement and attentive monitoring. These factors can help account for resource issues that may arise in enforcing a law in such remote places.

Inherent in the LNT principles are basic concepts of being aware of ones surroundings, adequate preparation, and respecting other beings. With these basic, universal principles, LNT has the potential to extend beyond just wilderness and environmental laws into many different sectors and legal fields. These overarching principles can be easily transferred and adapted as a coherent framework for codes of conduct or ethics in many contexts. Realization of such broad potential is a long way off, and perhaps overly optimistic, but the potential is there. Step one, however, is to enact an LNT law to regulate human actions in designated federal wilderness areas in the United States.

With a simple, enforceable LNT law, degradation of natural areas can begin to slow and eventually be reversed. Environmental degradation is now a well-covered topic from endangered species to melting glaciers due to the activities of man. Many concerns focus on how our actions today will affect the world future generations inherit. These discussions can often be centered on a macro scale, or the need to protect climate and the world as a whole, which may be difficult for some to grasp. LNT is an easy to understand and effective tool to begin to concretely address these concerns on a smaller, more comprehensible scale. Minimizing our negative impacts in wilderness areas through LNT compliance ensures these areas remain pristine for future generations to enjoy. In the meantime, with better-maintained wilderness that appears truly untrammled by man, every visitor can have the opportunity to understand what it truly means to have a wilderness experience. The more abundant these experiences are, the more relaxed and clear our collective states of mind become.