II. The Status of the Human Right to a Clean and Healthy Environment

The human right to a clean and healthy environment can be a powerful legal tool for winning as well as informing a system of ecological governance in the common interest. But there are skeptics who say that the right does not exist except in moral terms, that it lacks the elements of authority and/or control requisite to making it count as law. Are they right? The answer is both "yes" and "no"—similar to Professor Rodriguez-Rivera's answer in the title (and text) of his helpful 2001 essay: *Is the Human Right to Environment Recognized under International Law? It Depends on the Source*.[26]

In the last several decades, most recently due to heightened awareness of climate change and its consequences, environmental and human rights scholars (Professor Rodriguez-Rivera included) have explored this question with acuity and at length.[27] So as not to interrupt unduly the principal

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[26] Luis E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized Under International Law? It Depends on the Source*, 12 COLO. J. INT'L ENVTL L. & POL'Y 1, 17 (2001).

[27] *See, e.g.*, ALAN E. BOYLE & MICHAEL R. ANDERSON, HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (1996); EARTHJUSTICE LEGAL DEFENSE FUND, HUMAN RIGHTS AND THE ENVIRONMENT (2001); W. PAUL GORMLEY, HUMAN RIGHTS AND THE ENVIRONMENT: THE NEED FOR INTERNATIONAL COOPERATION (1976); HUMAN RIGHTS AND CLIMATE CHANGE (Stephen Humphreys ed., 2010); HUMAN RIGHTS AND THE ENVIRONMENT (Maguelonne Dejeant-Pons & Marc Pallemaerts eds., 2002); HUMAN RIGHTS AND THE ENVIRONMENT: CASES, LAW, AND POLICY chs. 2, 3, 5–8 (Svitlana Kravchenko & John E. Bonine eds. & contribs., 2008); LINKING HUMAN RIGHTS AND THE ENVIRONMENT (Romina Picolotti & Jorge Daniel Taillant eds., 2003); PEOPLE'S RIGHTS (Philip Alston ed., 2001); PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 291-307 (2d ed. 2003); SIERRA CLUB LEGAL DEFENSE FUND, HUMAN RIGHTS AND THE ENVIRONMENT: THE LEGAL BASIS FOR A HUMAN RIGHT TO THE ENVIRONMENT (1992); EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989); Mariana T. Acevedo, *The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights*, 8 N.Y.U. ENVTL. L.J. 437 (2000); Sam Adelman, *Rethinking Human Rights: The Impact of Climate Change on the Dominant Discourse*, *in* HUMAN RIGHTS AND CLIMATE CHANGE, *supra*; Gudmundur Alfredson & Alexander Ovsiouk, *Human Rights and the Environment*, 60 NORD. J. INT'L L. 19 (1991); Sumudu Atapattu, *The Right to Life or the Right to Die Polluted: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 65 (2002); Daniel Bodansky, *Introduction: Climate Change and Human Rights: Unpacking the Issues*, 38 GA. J. INT'L & COMP. L. 511 (2010); Alan E. Boyle, *Human Rights or Environmental Rights? A Reassessment*, 18 Fordham Envtl L. Rev 471 (2008); _____. *Human Rights and the Environment: A Reassessment?* (Dec. 2009) (Draft Paper, UNEP/OHCHR High Level Expert Meeting on the the New Future of Human Rights and the Environment: Moving the Global Agenda Forward, Nov. 30-Dec 1, 2009, on file with the authors); Lynda M. Collins, *Are We There Yet? The Right to Environment in International and European Law*, 2007 MCGILL INT'L J. SUSTAINABLE DEV. L. & POL'Y 119; Caroline Dommen, *Claiming Environmental Rights: Some Possibilities Offered by the Human Rights Mechanism*, 11 GEO. INT'L. L. REV. 1 (1998); Jonas Ebbesson, *Participatory and Procedural Rights in Environmental Matters: State of Play* (Dec. 2009) (Draft Paper, UNEP/OHCHR High Level Expert Meeting on the the New Future of Human Rights and the Environment: Moving the Global Agenda Forward, Nov. 30-Dec 1, 2009, on file with the authors); Melissa Fung, *The Right to a Healthy Environment: Core Obligations under the International Covenant on Economic, Social and Cultural Rights*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 97 (2006); Noralee Gibson, *The Right to a Clean Environment*, 54 SASK. L. REV. 5 (1990); W. Paul Gormley, *The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms*, 3 GEO. INT'L ENVTL. L. REV. 85 (1990); _____, *The Right to a Safe and Decent Environment*, 28 INDIAN J. INT'L L. 1 (1988); _____,*The Right of Individuals to be Guaranteed a Pure, Clean and Decent Environment: Future Programs of the Council of Europe*, 1 LEGAL ISSUES EUR INTEGRATION 23 (1975); Gunther Handl, *Human Rights and Protection of the Environment: A Mildly 'Revisionist' View*, *in* Human RIGHTS, SUSTAINABLE DEVELOPMENT AND THE ENVIRONMENT 117 (A. Cançado Trindade ed., 1992); _____, *Human Rights and the Protection of the Environment*, *in* ECONOMIC, SOCIAL AND CULTURAL

focus of our project, however, we limit our discussion to a summary of their findings together with some of our own. The details of the findings we leave to an addendum that we hope provides adequate supportive authority for the summary that follows.[28]

Before proceeding, however, an essential caveat: our focus here is on what we have learned about the accepted "formal" or "official" law of the State system (nationally and internationally)—"State law" we call it—not from the commonly unacknowledged "informal" or "unofficial" law that emanates from the everyday perspectives and interactions of "ordinary" human beings "pushing and pulling through reciprocal claim and mutual tolerance in [their] daily competition for power, wealth, respect, and other cherished values."[29] It is, however, helpful to remember that "[l]aw does not live by executives, legislators, and judges alone"[30] and that it can and does exist beyond the formal corridors of power. It assuredly exists in our essentially "horizontal" and voluntarist international legal order, which by definition lacks a formal center; but it exists also in our "vertical" and compulsory national legal orders, where all sorts of behavioral codes regulate sectors of life (church

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RIGHTS: A TEXTBOOK (Asbjorn Eide, Catarina Krause & Allan Rosas eds., 2d ed. 2001); Iveta Hodkova, *Is There a Right to a Healthy Environment in the International Legal Order?*, 7 CONN. J. INT'L L. 65 (1991); John H. Knox, *Linking Human Rights and Climate Change at the United Nations*, 33 HARV. ENVTL. L. REV. 477 (2009); _____,*Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163 (2009); Svitlana Kravchenko, *Procedural Rights as a Crucial Tool to Combat Climate Change*, 38 GA. J. INT'L & COMP. L. 613 (2010); _____, Kravchenko, *Right to Carbon or Right to Life: Human Rights Approaches to Climate Change*, 9 VT. J. ENVTL. L. 513, 514 (2008); John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283 (2000); Marc Limon, *Human Rights Obligations and Accountability in the Face of Climate Change*, 50 VA. J. INT'L L. 5433 (2009); Andrzej Makarewicz, *La Protection Internationale du Droit y L'Environnement*, *in* ENVIRONEMENT ET DROITS DE L'HOMME 77 (Pascale Kromarek ed., 1987); John G. Merrills, *Environmental Rights*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 666 (Daniel Bodansky, Jutta Brunée & Ellen Hey eds., 2007); R.S. Pathak, *The Human Rights System As a Conceptual Framework for Environmental Law*, *in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 205 (Edith B. Weiss ed., 1992); Neil Popovic, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment*, 27 COLUM. HUM. RTS. L. REV. 487 (1996); Lavanya Rajamani, *The Increasing Currency and Relevance of Rights-Based Perspectives in International Negotiations on Climate Change*, 22 J. ENVTL. L. 391 (2010); Rodriguez-Rivera, *supra* note 26; Naomi Roht-Arriaza, *"First Do No Harm": Human Rights and Efforts to Combat Climate Change*, 38 GA. J. INT'L & COMP. L. 593 (2010); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103 (1991); _____*The Right to Environment*, *in* THE FUTURE OF HUMAN RIGHTS PROTECTION IN A CHANGING WORLD: FIFTY YEARS SINCE THE FOUR FREEDOMS ADDRESS, ESSAYS IN HONOR OF TORKEL OPSAHL 197 (Asbjorn Eide & Jan Helgesen eds., 1991); _____ *Human Rights and the Environment: Past, Present and Future Linkages and the Value of a Declaration* (Dec. 2009) (Draft Paper, UNEP/OHCHR High Level Expert Meeting on the the New Future of Human Rights and the Environment: Moving the Global Agenda Forward, Nov. 30-Dec 1, 2009, on file with the authors); Amy Sinden, *Climate Change and Human Rights*, 27 J. LAND RES. & ENVTL. L. 255 (2007); Heinhard Steiger et al., *The Fundamental Right to a Decent Environment*, *in* TRENDS IN ENVTL. POL'Y & L. 1 (Michael Bothe ed., 1980); Melissa Thorme, *Establishing Environment as a Human* Right, 19 DEN. J. INT'L L. & POL'Y 301 (1991); Antonio Augusto A. Cançado Trindade, *The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change*, *in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 244 (Edith Brown Weiss ed., 1992); Henn-Juri Uibopuu, *The Internationally Guaranteed Right of an Individual to a Clean Environment*, 1 COMP. L. Y.B. 101 (1977).

[28] The Addendum (titled "The Status of the Human Right to a Clean and Healthy Environment") is on file with, and available from, the authors in PDF format (hereinafter "Addendum").

[29] Burns H. Weston, *The Role of Law in Promoting Peace and Violence: A Matter of Definition, Social Values, and Individual Responsibility*, *in* TOWARD WORLD ORDER AND HUMAN DIGNITY 114, 117 (W. Michael Reisman & Burns H. Weston eds., 1976).

[30] *Id.* at 117.

canons, sports rules, norms of social etiquette) without formal State approval. We call this important dimension of governance "Vernacular Law," and deal with it at greater length in Sections III, IV, and V.[31] For now, let us simply note that distinctions between formal/official and informal/unofficial present false dichotomies if invoked and applied too rigidly. Different orders of legal process are far more fluid and complementary—and therefore far more interpenetrating and interdependent—than is commonly recognized.

A. The Human Right to Environment as Officially Understood

We turn, now, to the summary conclusions that may be drawn about the right to environment as formally or officially understood within the statist legal order. Five are particularly noteworthy.

1. There are at least three ways in which the human right to environment is today officially recognized juridically:

- *as an entitlement derived from other recognized rights*, centering primarily on the substantive rights to life, to health, and to respect for private and family life, but embracing occasionally other perceived surrogate rights as well—e.g., habitat, property, livelihood, culture, dignity, equality or nondiscrimination, and sleep;[32]
- *as an entitlement autonomous unto itself*, dependent on no more than its own recognition and increasingly favored over the derivative approach insofar as national constitutional and regional treaty prescriptions proclaiming such a right are evidence;[33] and
- *as a cluster of procedural entitlements* generated from a "reformulation and expansion of existing human rights and duties"[34] (akin to the derivative substantive rights noted first above) and commonly referred to as "procedural environmental rights."[35]

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[31] The term "Vernacular Law" originates in the informal, unofficial zones of society, as we discuss in Section III, *infra,* and is a source of moral legitimacy and power in its own right. This helps explain why colonial powers often used law to repress local languages in favor of their controlling mother tongues, or that post-colonial governments have used to consolidate the rule of their linguistic culture in multilingual settings. *See, e.g.*, Robert J. Gordon, *Vernacular Law and the Future of Human Rights in Namibia* (NISER Discussion Paper No. 11, The Namibian Institute of Social and Economic Research, University of Namibia, November 1991). In several instances, however, Gordon's essay among them, we have found the term used to describe "informal," "unofficial" "customary," "grass-roots," "indigenous," or "local" law, or what Michael Reisman elucidates and calls "microlaw" in his germinal study *Law in Brief Encounters* (1999). In the end, concerned to emphasize the "living law"—communicative life pulse—nature of this form or level of legal process, we elected the term "Vernacular Law," inspired by the late Ivan Illich's essays on "Vernacular Values" first published in *CoEvolution Quarterly* and the basis of his book *Shadow Work* (1981). As summarized in a chapter on Illich in Trent Schroyer's *Beyond Western Economics: Remembering Other Economic Cultures* 69 (2009), these values evoke "the vernacular domain," a "sensibility and rootedness . . . in which local life has been conducted throughout most of history and even today in a significant proportion of subsistence- and communitarian-oriented communities," i.e., "those places and spaces where people are struggling to achieve regeneration and social restoration against the forces of economic globalization." We do not, however, restrict our use of the term to these "places and spaces" alone. For further pertinent discussion, see *infra* Sections III, IV, and V.

[32] For details, see Addendum § A, *supra* note 28, at 2-20 (fn 83 especially).

[33] For details, see Addendum § B, *id.* at 20-37.

[34] Shelton (1991), *supra* note 27, at 117.

2. All three of these official juridical manifestations of the human right to environment, however robust in their particularized applications, are essentially limited in their legal recognition and jurisdictional reach.[36]

On the global plane, no treaty provides for a human right to environment explicitly in either its autonomous or derivative form; one recognizes its autonomous existence, though only implicitly and in passing;[37] and so far but one global-level court decision affirms the right explicitly though in its derivative form (via the rights to life and to health as surrogates for it),[38] as do also a few treaty-body rulings, but only implicitly.[39] Otherwise, the recognition and reach of the human right to environment globally is left largely to a series of progressive resolutions, declarations, charters, and other assorted instruments affirming the right in its autonomous form, but all or most of them technically non-binding or at best disputed in their juridical quality or significance. Included among them is the historically prominent and influential 1972 Stockholm Declaration on the Human Environment[40] which, first in modern times, affirmed the right to environment not only in the autonomous sense but, as well, in the derivative sense via the rights to life and health. Contemporary legal scholarship, however, influenced by frightening environmental trends, actual and anticipated, evinces an increased willingness to reassess the juridical vitality of this "soft law" (as often is inadequately called).[41]

On the regional plane, the right to environment is recognized and supported by several treaties: one each in Africa and Latin America that affirm it explicitly in its autonomous form;[42] two others in Europe that, with the help of regionally authoritative regulatory and judicial decisions, embrace it

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[35] For details, see Addendum § C, *id.* at 37-45.

[36] For details, see Addendum §§ A-C, *id.* at 2-45.

[37] *See* Convention on the Rights of the Child, art. 1, Nov. 20, 1989, 1577 U.N.T.S. 44, *reprinted in* 28 I.L.M. 1448 (1989) and 3 BASIC DOCUMENTS, *supra* note 13, at III.D.3.

[38] *See* Gabcíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7.

[39] See, for example, Communication No. 67/1980, U.N. Doc. CCPR/C/OP/1, para. 8 (1984), 2 SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE 20 (1990) and *Mrs. Vaihere Bordes and Mr. John Temeharo v. France*, Communication No. 645/1995, U.N. Doc. CCPR/C/57/D/645/1995 (1996), 6 SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE 15 (1996) each dismissed on technical procedural grounds. For details, see Addendum § A, *supra* note 28, at ??-??

[40] Stockholm Declaration of the United Nations Conference on the Human Environment [hereinafter "Stockholm Declaration"], para. 1, (June 16, 1972), U.N. Doc. A/CONF.48/14/Rev.1 at 3, U.N. Doc. A/CONF.48/14 at 2-65 and Corr 1, 1972 U.N. Jurid. Y.B. 319, *reprinted in* 5 BASIC DOCUMENTS, *supra* note 13, at V.B.3.

[41] For further clarification of this scholarly trend, see *infra* Conclusion 4, at 18.

[42] *See* African Charter on Human and People's Rights ("Banjul Charter"), art. 24, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5, *reprinted in* 21 I.L.M. 58 (1982) and 3 BASIC DOCUMENTS, *supra* note 13, at III.B.1; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 10, Nov. 17, 1988, O.A.S.T.S. *reprinted in* 28 I.L.M. 156 (1989) and 3 BASIC DOCUMENTS, *supra* note 13, at III.B.25; *see also* the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S 447, U.N.Doc. ECE/CEP/43, *reprinted in* 38 I.L.M. 517 (1999) and 5 BASIC DOCUMENTS, *supra* note 13, at V.B.18 (also known and hereinafter cited as the "Aarhus Convention"), which is principally focused on procedural environmental rights but not without first confirming in its preamble "that every person has the right to live in an environment adequate to his or her health and well-being . . .."

implicitly in its derivative guise;[43] and still another, the widely adopted European Aarhus Convention, acclaimed by the United Nations and others beyond Europe's frontiers, that honors the human right to environment in terms of detailed procedural rights.[44]

Individually and together, these diplomatic initiatives make for a distinctly more receptive milieu for the human right to environment than prevails on the global plane. However, excepting perhaps the procedural environmental rights codified in the Aarhus Convention, the very fact of their regionalism and thus their inherent jurisdictional limits prevent finding in these eco-friendly juridical practices the making of a global customary international law right to environment.[45] This is all the more true in light of two additional facts: first, the bulk of these practices are found in the developing world, still seeking full effectual citizenship in the international legal order; second, the right to environment has been upheld in the African and Latin American regional systems principally with reference to the rights of native indigenous peoples and according to national constitutional and treaty safeguards unique to them at least in part.[46] Even the popularity of the deservedly lauded procedural rights detailed in the Aarhus Convention may be negatively interpreted partially as vestiges of the ideological Cold War divide which made room for certain procedural rights but thwarted the joinder of civil/political and economic/social substantive rights.

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[43] *See* European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), arts. 2 (right to life) & 8 (right to private and family life), Nov. 4, 1950, 213 UNTS 221, CETS. 5, *reprinted in* 3 BASIC DOCUMENTS, *supra* note 13, at III.B.2, and Charter of Fundamental Rights of the European Union, arts. 2 & 27, Dec. 7, 2000, C364 OJEC. 8, 2007 OJ (C303)1, *reprinted in* 40 I. L.M. 266 (2001) and 3 BASIC DOCUMENTS, *supra* note 13, at III.B.16g, now incorporated into the Consolidated Version of the Treaty on European Union the Treaty on the Functioning of the European Union, Dec. 30, 2010, 2010 OJ (C 83) 1, *reprinted in* 1 BASIC DOCUMENTS , *supra* note 13, at I.B.21. For leading judicial decisions interpreting one or more of these treaties, see *Öneryildiz v. Turkey*, No. 48939/99, Eur. Ct. H. R. 2004-XII (2005), 41 Eur. H.R. Rep. 20 (Nov. 30, 2004) (right to life); *Lopez Ostra v. Spain,* No.16798/90, 20 Eur. Ct. H.R. (ser. A), No. 303-C (1995), 20 Eur. H.R. Rep. 277 (Dec. 9, 1994) (right to private and family life); and *Taskin and Others v. Turkey*, No. 46117/99, 2004-X, 42 Eur. H. R. Rep. 50 (Nov. 10, 2004) (right to private and family life, but dismissed on procedural grounds).

[44] *See* 1998 Aarhus Convention, *supra* note 42. At this writing, 43 European states plus the European Community are party to the Aarhus Convention: Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia/ Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Community, Finland, France, Georgia, Germany, Greece, Hungary, Italy, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Tajikistan, Turkmenistan, Ukraine, United Kingdom.

[45] We note the possible exception of the Aarhus Convention, *supra* note 42, because it applies not only to most of Europe (including Russia and the former Soviet bloc countries of Eastern Europe) but also to eight of the nine former Soviet republics in Central Asia. While the United States, a member of the U.N. Economic Commission for Europe (the Convention's sponsor), is not a party to the agreement and withdrew from negotiations on it, it justified its stance in part on the grounds that the Convention would not require the reporting of specific pollutants, only waste as a whole. It is also to be noted that, at the time, the United States was "one of the few nations that already has a well established system of pollution reporting" and that much of the Aarhus Convention was already reflected in U.S. domestic law. *U.S. Backs Out of Register Treaty Group*, ENVIRONMENTAL NEWS SERVICE (Nov. 25, 2002), http://www.ens-newswire.com/ens/nov2002/2002-11-25-10.html (accessed Aug. 23, 2011). All of which points to a convention that resonates and possibly even persuades beyond its expressly authorized jurisdiction. As stated by former U.N. Secretary-General Kofi Annan shortly before the Convention's entry into force: "Although regional in scope, the significance of the Aarhus Convention is global." Kofi Annan, *Forward* to ECONOMIC COMMISSION FOR EUROPE, THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE, at v (2000).

[46] For more details, see Addendum §§ A-C, *supra* note 28, at 2-45.

On the national/local plane, as on the regional plane, legal support for the right to environment exists in both its derivative and autonomous forms, although in this setting more in constitutional and statutory mandates backed by judicial decisions from the lowest to highest of national tribunals than pursuant to international law.[47] Especially noteworthy are the growing numbers of new or amended national and subnational (provincial, state) constitutions that, explicitly and implicitly, provide for a right to environment in the autonomous sense.[48] Where these provisions appear to be taken as presumably intended—i.e., without judicially fabricated constraints upon subject-matter jurisdiction or proof of personal economic loss, as in the United States, for example[49]—they contribute to the building of a general principle of law recognized under international law as an authoritative "source of law" for the rendering of international legal judgments, judicial and otherwise.

The majority of these law-making and law-enforcing exercises, however, are restricted largely to the world's developing countries in Latin America, Sub-Saharan Africa, and South Asia (especially India), and to the Eastern European countries formerly of the Soviet Union and Soviet bloc. In each case, however, it seems that they have been pursued largely for idiosyncratic reasons: in the first instance, to erect a protective shield against ecologically derelict business enterprise as experienced in the past, not least at the hands of foreign corporations (e.g., Ecuador's Oriente, India's Bhopal, Nigeria's Ogoniland); and in the second instance, as a demonstrative embrace of "environmental democracy" meant to enhance a nation's prospective membership in the European Union.[50] In other words, the generality of the incipient general principle appears to be limited.

In sum, a juridically recognized right to environment may be said to exist officially in Africa, Asia, Europe, and Latin America based on regional treaty or national constitutional authority or both as follows:

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[47] *See* Addendum § C ?, *id.* at ??-??. For examples of, and commentary on, pertinent constitutional provisions, see CONSTITUTIONAL RIGHTS TO AN ECOLOGICALLY BALANCED ENVIRONMENT (Isabelle M Larmuseau ed., 2007) (hereinafter "CONSTITUTIONAL RIGHTS").

[48] The United States is not among them at the federal level, though in 1968 Senator Gaylord Nelson of Wisconsin urged unsuccessfully for a constitutional amendment that would have recognized within the U.S. Bill of Rights that "[e]very person has the inalienable right to a decent environment." H.R.J. Res. 1321, 90th Cong., 2d Sess. (1968). Similarly, in 2003, Representative Jesse Jackson, Jr. tendered without success a U.S. constitutional amendment "respecting the right to a clean, safe, and sustainable environment." H.R.J. Res. 33, 108th Cong., 1st Sess. (2003). On the other hand, a known eighteen of U.S. states have adopted constitutional provisions expressly affirming a state's duty to protect the environment or recognizing an autonomous right to a clean and healthy environment.

[49] A known eighteen U.S. states have adopted constitutional provisions expressly affirming a state's duty to protect the environment or recognizing an autonomous right to a clean and healthy environment (or a component thereof, such as a right to clean water): ALA. CONST. art. VIII; CAL. CONST. art. X, § 2; FLA. CONST. art. II, § 7; HAW. CONST. art. XI; ILL. CONST. art. XI; LA. CONST. art. IX; MASS. CONST. art. XCVII, § 179; MICH. CONST. art. IV, § 52; MONT. CONST. art. IX, § 1; N.M. CONST. art. XX; N.Y. CONST. art. XIV; N.C. CONST. Art. XIV, § 5; OHIO CONST. art. II, § 36; PA. CONST. art. I, § 27; R.I. CONST. art. I, § 17; TEX. CONST. art. XVI, § 59; UTAH CONST. art. XVIII; VA. CONST. art. XI, § 1. Few of these provisions have major effect, however, owing to a largely judicial but widespread judgment that they are "non-self-executing" or "non-justiciable" or, in any event, subject to a strict "standing" requirement of personal economic injury. For details, see Matthew Thor Kirsch et al., *Upholding the Public Trust Doctrine in State Constitutions*, 46 DUKE L. J. 1169 (1997); Dinah Shelton, *Environmental Rights in the State Constitutions of the United States*, *in* CONSTITUTIONAL RIGHTS, *supra* note 47, at 111-24 (citing Kirsch et al.).

[50] For more details, see Addendum §§ A-C, *supra* note 28, at ??-??.

- *in Africa* (i.e., sub-Saharan Africa), in its autonomous form courtesy of a regional treaty[51] backed by a treaty commission decision (invoking also, *sua sponte*, the derivative rights to life and health),[52] and in its derivative form (mainly the right to life) as pronounced in a few national judicial decisions interpreting constitutional mandates;[53]

- *in Asia* (i.e., South Asia, mainly India), in both its autonomous and derivative forms, via the enforcement by national courts largely of express constitutional authority—though to a degree of growing extraterritorial influence sufficient to suggest the emergence of at least a regional "general principle" voicing the right to environment;[54]

- *in Europe*, in three ways: (1) in its derivative form, mainly via the European Court of Human Rights's interpretative application of the 1950 European Convention on Human Rights and Fundamental Freedoms,[55] (2) in its autonomous form, principally in Eastern Europe according to national constitutional mandates, and (3) in procedural terms throughout Europe and extending into Central Asia by virtue of the Aarhus Convention and national constitutional and statutory law;[56] and

- *in Latin America*, as in Africa, in its autonomous form courtesy of a regional treaty[57] backed by treaty commission decisions so far limited to the rights of indigenous peoples save for one recent such decision that implicitly recognizes an autonomous right to environment for all.[58]

3. The same relatively favorable assessment cannot be made of the human right to environment on the global plane—or, for that matter, in all or most regions and nations of the world at this time—from the standpoint of statist legal process.

The sum total of the legal and "quasi-legal" instruments affirming the human right to environment on the global plane, while possibly predictive of future decisional trends, cannot be said

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[51] The 1981 Banjul Charter, *supra* note 42, art.24.

[52] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights*, Comm. No. 155/96, Case No. ACHPR/COMM/A044/1, Oct. 27, 2001, http://www.umn.edu/humanrts/Africa/comcases/allcases.html (2001) (accessed June 25, 2011).

[53] For details, see *infra* Addendum § B.3, *supra* note 28, at ??.

[54] Interestingly, legal scholars and activists appear yet to rely on this law-making authority to defend the standing of the right to environment.

[55] *Supra* note 43.

[56] *See* Bende Toth, *Public Participation and Democrary in Practice—Aarhus Convention Principles as Democratic Institution Building in the Developing World*, 30 J. LAND RESOURCES & ENVTL. L. 295, 298–320 (2010) (describing how the three pillars of the Aarhus Convention are mirrored in United States federal law, and how they have been implemented domestically in Europe); *see also supra* note 44 (listing the European and Central Asian parties to the Aarhus Convention). Given the acclaim accorded the Aarhus Convention (*supra* note 42) by the United Nations and others outside Europe, and the preexisting pollution-reporting systems codified in the domestic law of the United States (*see supra* note 45), it is credible to suggest that the right to procedural environmental rights as articulated in the Convention may be evolving into customary international law status.

[57] The 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, *supra* note 42.

[58] *See Case of the Saramaka People v. Suriname*, Inter-Am. Ct. Hum. Rts., Ser. C, No. 172 (Nov. 28, 2007).

to reflect general customary international law at present, or at least not in the eyes of the majority of the current world's *formal/official* governing elites. Neither the quantum nor strength of these communications support such a conclusion,

On the regional and national planes, except for the possible but as yet uncertain extra-regional impact of the Aarhus Convention relative to procedural environmental rights[59] and the occasional and national court case invoking international legal authority to define or support a derivative or autonomous right to environment, few law-making and law-enforcing processes sympathetic to the right to environment have demonstrated juridical resilience beyond their regional or national frontiers, few even within these frontiers as well. This makes it impossible or at best difficult to deduce from the sum of them a customary practice or general principle that might credibly validate a global right to environment. The full geographic compass of these procedural environmental rights are unclear at this time. So also are the number of jurisdictions and different kinds of legal systems in which they are recognized, and other such conditioning factors.

4. A number of highly respected international human rights and environmental law scholars and practitioners demur from the foregoing assessment on the grounds that the right to environment—derivative, autonomous, or procedural—may be said to exist universally when pertinent "soft law" instruments and "the intrinsic value of the environment" are taken into account.

Increasingly international human rights and environmental law scholars and practitioners are calling for or seriously entertaining an "expansive" right to environment as a means to enhance environmental protection.[60] They do so, understandably, out of concern over current scientific forecasts, but also out of dissatisfaction with "traditional" international legal process which, they persuasively argue, is not up to the ecological challenges now facing the planet.[61] Among their grievances is "a traditionalist approach to the sources of international law" that "rejects as unpersuasive" the existence of an "expansive right to environment."[62] Professor Rodriguez-Rivera states the case perhaps most succinctly:

> There are many instruments that serve as unmitigated sources for the recognition of the human right to environment in the international legal order, including: the thousands of international environmental soft law instruments; the many national constitutions and legislative acts; the dozens of international, regional, and national court decisions; the

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[59] *Supra* note 42.

[60] Notable among them is Rodriguez-Rivera, *supra* note 26. For further example, see PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 254-59 (2d ed. 2002); GORMLEY, *supra* note 27, at 233; ALEXANDER KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 173-78 (1992); _____, INTERNATIONAL ENVIRONMENTAL LAW 1994 SUPPLEMENT 5-6 (1994); SANDS, *supra* note 27, at 294-307; Geoffrey Palmer, *New Ways To Make International Environmental Law*, 86 AM. J. INT'L L. 259 (1992); John H. Knox, *Climate Change and Human Rights Law*, 50 Va. J. Int'l Law 163 (2009), Rajamani, *supra* note 27.

[61] Thus did New Zealand's former Prime Minister, Attorney-General, and Minister for the Environment Sir Geoffrey Palmer warn as long ago as 1991: "There is no effective legal framework to help halt the degradation . . . There is no institutional machinery to evaluate gaps that may be found in the international framework of agreements or to develop means of assigning priorities among competing claims for attention." Palmer, *supra* note 60, at 263.

[62] Rodriguez-Rivera, *supra* note 26, at 44.

> hundreds of non-governmental international organizations; the thousands of local or "grass-roots level" community organizations, and, more importantly, the overwhelming and sweeping transformation in the valoration of environmental concerns in all levels of society. To ignore this voluminous evidence of the will of the people would be to ignore the evolution of international law during the last half-century.[63]

To this may be added former Indian Chief Justice R.S. Pathak's observation, sounded later in Judge Weermantry's separate opinion in the World Court's *Gabcikovo-Nagymaros Project* case,[64] that a clean and healthy environment being indispensible to a life itself, let alone to one of dignity and to the fulfillment of other rights and needs, is warrant enough to establish an autonomous right to environment on a universal basis.[65]

The fact remains, however, that all law, its existence and its reach, and irrespective of its official or unofficial stature, is not about authority alone, but about authority *and* control jointly (not necessarily in equal measure, but jointly nonetheless). It also is fact that the statist legal world has yet to perform the control or applicative function to fulfill the right to environment (however defined) except in demonstrably limited, often idiosyncratic ways. It is not that the espoused right to environment does not have the content or justiciable standards necessary for statist endorsement and enforcement, as Professor Handl has argued.[66] Nor is it that the "will of the people" should be ignored—indeed, the environment would likely be in better shape today had "ordinary people" been regularly consulted and given real voice yesterday. It is that the world's policy- and decision-making elites (with the notable exclusion of much of the developing world) simply have not yet accepted or recognized the right, or the combined "soft" and hard" law authority on which it is said to stand, sufficiently to count as law universally or, indeed, as law at all.[67] The same control or applicative threshold we apply to customary international law in theory, but to all law in practice—the "bite" or "compliance pull" of sanction—has yet to be formally or officially crossed. It is the accepted authentication and application of durably enforceable norms over time that makes them socially as well as jurisprudentially significant.

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[63] *Id.* at 45.

[64] *Supra* note 38.

[65] *See* Pathak, *supra* note 27, at 211-14

[66] *See* Handl, *supra* note 27.

[67] For more details, *see* Addendum § A, *supra* note 28, at ??-??. While some may not currently recognize environmental rights as law, the myriad of "soft law" instruments endorsing such rights exemplify what Nobel Prize winner Amartya Sen calls the "proto-legal" connection between human rights and law—that is, the fact that human rights often form the grounds for adopting legislation, and in some cases might be called "law in waiting." Amartya Sen, *The Global Status of Human Rights*, Grotius Lecture to the International Legal Studies Program, American University, Washington D.C. (March 23, 2011).

5. The human right to environment, in at least its derivative and autonomous modes if not also its procedural one, is unlikely to grow in normative recognition and jurisdictional reach as long as the state of international law and ecological governance within the current formal/official national and international legal orders remains unchanged.

A fundamental problem with current national and international environmental law decision-making is a substantial tendency to rely on outmoded jurisprudence developed in a pre-industrial era when, for the most part, environmental harm did not cross national boundaries. A consequential assumption (and legacy) of this jurisprudence is that both the economic benefits and the environmental costs of a State's policies remain within that State's territory. Jurists thus refrain from adjudicating the substantive issues of environmental law and policy that typically inform right-to-environment claims notwithstanding the implications that such deference has for the environmental rights of humans and other species living outside the State's territory. Instead, deferring to likewise outmoded notions of State sovereignty, jurists tend to limit themselves to procedural rights issues that, as demonstrated by the popularity of the Aarhus Convention,[68] appear less likely to offend national jurisdictional sensibilities: access to information, public participation in environmental decision-making, and recourse to just remedies. This orientation—judicial resistance to substantive environmental decision-making—is found similarly at the national level. United States courts applying the "political question" doctrine, for example, will make the deferential calculus, often politically inspired, that substantive environmental issues are the province of the legislative and regulatory branches of government, not the judiciary.[69] The substantive issues raised by climate change, rapidly dwindling biodiversity, and other such major environmental problems, many of them trans-boundary in character, thus face significant theoretical and practical obstacles.

Generally overlooked, however, is yet another and very serious obstacle to the future of the right to environment as presently conceived (derivative and autonomous especially). At all levels of State governance, most of the world's major industrial powers simply do not support the legal (as opposed to moral) recognition of the right to the environment. Not surprisingly, China and the United States, the world's two largest emitters of greenhouse gases, are among them. Yet non-support is far more widespread than this, at least to the extent that it may be measured by a failure or refusal to do as at least 56 countries have done (most of them developing countries and former members of the Soviet Union or Soviet bloc) and constitutionalize the right to environment. In addition, a majority of the G-20 countries, and about half the world's top 33 economies (as determined by the International Monetary Fund) fail to meet this standard of support.[70] This roster of nations includes Australia, Canada, the European Union, Germany, India, Indonesia, Italy, Japan, Mexico, Saudi Arabia, and the United Kingdom as well as China and the United States. Non-support correlates closely with countries that have advanced economies and that are operationally if not also ideologically committed to neoliberal economic dealing, domestically and internationally.

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[68] *Supra* note 42.

[69] *See* Baker v. Carr, 369 U.S. 186 (1962) (outlining the political question doctrine in its formal posture).

[70] *See* IMF, *World Economic Outlook Database* (April 2010), http://www.imf.org/external/pubs/ft/weo/ 2010/01/ weodata/index.aspx (accessed June 25, 2011).

On the other hand, a failure or refusal to embrace a treaty or constitutional endorsement of the right to environment (derivative, autonomous, or procedural) does not necessarily indicate a State's lack of attention to, or respect for, environmental well-being, any more than does a treaty or constitution that solemnly proclaims the right ensure its implementation. Numerous treaties and constitutions advocate the protection of the environment and its natural resources, and often assert a State's obligation to prevent harm to them. Such claims are also made by States with advanced economies otherwise unrestrained by treaty or constitution.

So it may just be that the environment is perceived by jurists in advanced economies to involve too many imponderables and indeterminacies to fashion and implement a workable right in relation to it.[71] But if this be so, how then does one explain the numerous treaty- and constitution-based decisions where—as in South Asia, for example—judges and other decision-makers, often of common law training, have somehow managed to overcome these uncertainties? No doubt these complexities are acute in the climate change and biodiversity contexts. But what explains the resistance outside these contexts? And since when is it impossible for judges and other decision-makers to learn from environmental experts and specialists, even to enlist them as "special masters" of the court"?

Perhaps then the fundamental problem is just an instinctive conservativism about developing new or expanded norms and procedures to protect the environment, especially in settings where free market sensibilities are strong or assertions of extraterritorial jurisdictional overreach are suspected. Jurists can and often do make narrow interpretations of critical legal authority—in the United States, for example—minimizing or disregarding broader community interests and policies at stake.

A case in point in the United States is *Flores v. Southern Peru Copper Corporation*, decided by the U.S. Court of Appeals for the Second Circuit in 2003.[72] Peruvian residents and representatives of deceased residents brought personal injury claims against an American copper mining company under the U.S. Alien Tort Claims Act (ATCA),[73] alleging that pollution from the mining company's Peruvian operations had caused them severe, even fatal lung disease. They asserted, too, that their fundamental human rights to life, health, and sustainable development (i.e., their derivative right to a clean and healthy environment) had been violated by this environmental degradation. But they did not succeed. The court held, *inter alia,* (a) that the rights to health and life were "insufficiently definite" to be binding norms of customary international law that could underwrite subject-matter jurisdiction under ATCA; and (b) that the existence of a customary international law rule against intranational pollution was "not established" so as to provide a basis for jurisdiction under ATCA. In reaching this decision, the court, found each type of supporting authority provided by the plaintiffs—applicable treaties, General Assembly resolutions, decisions by international tribunals, and affidavits of international law experts—to be inadequate to validate their claims even though the authority provided appears to have exceeded the requirements relied upon in the leading precedent, the court's own, *Filártiga v. Peña-Irala.*[74] And it did so by using narrow grounds to distinguish its

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[71] See in this connection Rajamani, *supra* note 27, at 409-10.

[72] 406 F.3d 65 (2d Cir. 2003).

[73] 28 U.S.C. § 1350.

[74] 630 F.2d 876 (2d Cir. 1980).

decision from *Filártiga*, and without providing clear standards for future litigants as to what constitutes a violation of customary international law actionable under ATCA. One is led to wonder why it was so difficult for the court to do what its common law counterparts in Bangladesh, India, Nepal, and Pakistan have had no trouble in doing when faced with similar issues.[75] One is led to wonder also whether *Flores* is not in the tradition of the mid- to late-19th century U.S. railroad cases when continental economic expansion and development in the name of Manifest Destiny led the courts to rule against farmers, workers, and unions and "twist[ed] the law unduly in favor of the railroads and of other closely connected corporations."[76]

U.S. resistance to the human right to a clean and healthy environment as expressed in *Flores* is evident on the international plane as well. In *Mossville Environmental Action Now v. United States*, a 2010 admissibility hearing before the Inter-American Commission on Human Rights (IACHR), hundreds of Mossville, Louisiana residents (mostly African-Americans) suffering from, or put at risk of, "various health problems caused by toxic pollution released from fourteen chemical-producing industrial facilities"[77] sought relief by claiming violations of their rights to life, health, privacy, and equal protection, as proclaimed in the 1948 American Declaration of the Rights and Duties of Man.[78] While the IACHR held that the petitioners had alleged sufficient evidence to establish a *prima facie* case that environmental harm had violated the petitioners' claimed rights, it did not reach this conclusion without vigorous opposition from the United States.[79] "[There is] no such right as the right to a healthy environment either directly, or as a component of the rights to life, health, privacy and inviolability of the home, or equal protection and freedom of discrimination," the U.S. argued, and, further, that the U.S. should be considered a "persistent objector" whenever the claimed right is espoused against it.

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[75] *See e.g.,* Farooque vs. Government of Bangladesh (Bangledesh, 1996) (upholding the plaintiffs' standing based on environmental harm that violated domestic and international legal provisions and made the plaintiffs "persons aggrieved" for purposes of establishing standing); K.M. Chinnappa v. Union of India (Supreme Court of India, 2002) (holding that mining on forest land violated the plaintiff's right to environment under the Stockholm Declaration and domestic constitutional provisions); Prakash Mani Sharma v. His Majesty's Government Cabinet Secretariat (Nepal, 2003) (holding that the government must enforce essential measure to reduce pollution in the Katmandu Valley in order to comply with several constitutional provisions as well as international law)*;* Anjun Irfan v Lahore Development Authority (Pakistan, 2002) (holding that the constitutional right to life includes, *inter alia*, the right to an unpolluted environment); *see also* Addendum, §?, *supra* note 28, at ??-??.

[76] FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955, 146 (1955).

[77] Organization of American States, Report No. 43/10, Petition No. 232-05, OEA/Ser LV/II 138 (Mar. 17, 2010), at 1.

[78] American Declaration of the Rights and Duties of Man, adopted at Bogota by the Ninth International Conference of American States, 30 March-2 May 1948. OAS Res OAS Off Rec OEA/Ser L/V/I.4 Rev (1965), arts I, II, V, IX, XI, & XXIII; *reprinted in* 3 BASIC DOCUMENTS, *supra* note 13, at III.B.3.

[79] Nor did the IACHR reach a decision entirely favorable to the petitioners. Finding that the petitioners had exhausted their available U.S. remedies in respect of their claimed violations of their rights to equal treatment before the law and to privacy (involving the inviolability of the home), the it declared these claims admissible. However, as it found petitioners not to have exhausted their available domestic remedies relative to their claimed violations of their rights to life and health, the IACHR denied their admissibility. It also should be noted that the petitioners did not claim explicitly that their right to a healthy environment had been violated, doubtless because the American Declaration does not expressly recognize such a right. However, one may reasonably infer from the U.S. defense, that both the petitioners and the IACHR were assuming the existence of at least a derivative right to environment.

Of course, the two cases cited are but two cases, and involving the United States only. No doubt others from within the United States and beyond can be cited in contradistinction to them. They are, however, symptomatic of a larger pattern of environmental disregard when "free market" values are at stake. In the United States, for further U.S. example, the courts have long resisted constitutionally recognized environmental rights and duties[80] and downgraded citizen suits authorized by key environmental protection statutes[81] while going out of their way to recognize corporations and unions as "persons" with a constitutional free-speech right to advocate independently the election or defeat of candidates for federal office.[82] Similarly, the U.S. Congress has balked at enacting effective climate change legislation[83] while rushing to encourage more offshore drilling even after the Deepwater Horizon oil disaster;[84] the Department of Interior has made a competitive lease-selling of 758 million tons of coal mining land in Wyoming's Powder River Basin;[85] and the Department of State has, at this writing, given an "initial green light" to a huge pipeline company with a history of major spills to carry oil to the American heartland from the tar sands of Alberta.[86]

The United States is not alone in these respects. In addition to comparable developmental policies in other countries—such as the European Union's Common Fisheries Policy (CFP) of continuous allocation of fishing quotas greater than the fish stocks can bear[87]— the two premier threats to Earth's ecosystems, climate change and biodiversity, have gone, despite prominent scientific warnings, largely unaddressed except by the essentially dysfunctional Kyoto Protocol to the

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[80] *See supra* notes 48 and 49 and accompanying text.

[81] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), requiring that all plaintiffs, including civil society defenders of the environment, must suffer a concrete, discernible injury—not a "conjectural or hypothetical one"—to have standing to sue in federal court. "In these circumstances," observes Professor Sunstein, "the citizen suit is probably best understood as a band-aid superimposed on a system that can meet with only mixed-success. Instead of band-aids, modern regulation requires fundamental reform." Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, 'Injuries,' and Article III*, 91 MICH. L. REV. 163, 222 (1992).

[82] Citizens United v. Federal Election Commission, Case No. 08-205, 130 S.Ct. 876 (2010), holding unconstitutional a 62-year-old federal statute that prohibited corporations from making direct expenditures to support or oppose candidates in federal elections.

[83] *See* Carl Hulse & David M. Herszenhorn, *Democrats Call Off Climate Bill Effort*, N.Y.TIMES, July 23, 2010, at A15, *also available at* http://www.nytimes.com/2010/07/23/us/politics/23cong.html (accessed July 21, 2011).

[84] *See* posting of Daniel Foster to The Corner, Support for Offshore, ANWR Drilling Reaches New Heights, http://www.nationalreview.com/corner/262094/support-offshore-anwr-drilling-reaches-new-heights-daniel-foster (Mar. 14, 2011, 2:19 pm).

[85] Press Release, U.S. Department of the Interior, Salazar Announces Coal Lease Sales in Wyoming, (Mar. 22, 2011), *http://www.doi.gov/news/pressreleases/Salazar-Announces-Coal-Lease-Sales-in-Wyoming.cfm* (accessed July 22, 2011). These sales have prompted three environmental groups to sue the Bureau of Land Management, charging the Bureau with irresponsible stewardship of public land. M.J. Clark, *Coal Lease Sales Lead to Lawsuits*, WYOMING BUSINESS REPORT, Aug. 23, 2011, http://www.wyomingbusinessreport.com/article.asp?id=59357 (accessed Aug. 23, 2011).

[86] Lee-Anne Goodman, *State Department's Environmental Analysis Gives Pipeline an Initial Green Light*, WINNIPEG FREE PRESS, The Canadian Press Online Edition, Aug. 26, 2011, 10:32 AM, http://www.winnipegfreepress.com/arts-and-life/life/greenpage/state-dept-says-us-canada-oil-pipeline-wont-cause-big-environmental-problems-128464813.html (accessed Aug. 27, 2011).

[87] *See* European Commission, The Common Fisheries Policy: A User's Guide (2008), http://ec.europa.eu/fisheries/documentation/publications/pcp2008_en.pdf (accessed July 22, 2011).

United Nations Framework Convention on Climate Change[88] and the 1972 Convention on Biological Diversity.[89] The notoriously failed Fifteenth Meeting of the States Parties to the United Nations Framework Convention on Climate Change held in Copenhagen in December 2009 (COP 15)[90] never had a real chance of success.[91] Not even the non-binding "Copenhagen Accord" drafted by Brazil, China, India, South Africa, and the United States, though dubbed a "meaningful agreement" by the U.S., was adopted, much less passed unanimously, by the participating States.[92] Developed countries refused to commit to legally binding emission reductions and to financing and technology for developing country climate mitigation and adaptation needs, and the so-called "Basic Countries" (the rising developing nations bloc of Brazil, China, India, and South Africa) were prepared to block any imposition of binding emissions reductions on them lest this curb their economic growth.[93]

On final analysis, then, it may just be that, in a highly decentralized and essentially voluntarist international legal order, the bottom-line imperatives of the contemporary global political-economy invariably trump human rights and environmental values. Clearly it is not a system that invites widespread, much less universal, legal recognition and enforcement of a human right to a clean and healthy environment. Incredulous though it may seem, many smart and sophisticated people seem incapable of understanding that our formal/official national and international legal orders are structurally organized to contribute to—and not prevent—the deterioration of the natural world. Elizabeth Kolbert of *The New Yorker* puts it crisply: "It may seem impossible to imagine that a technologically advanced society could choose, in essence, to destroy itself, but that is what we are now in the process of doing."[94]

What, then, do we conclude from these findings from the formal/official legal world? That the human right to a clean and healthy environment exists in legal as well as moral terms? Yes. That it is juridically most strongly recognized in its derivative versus autonomous form? Yes. That this acceptance is found principally in the developing worlds of Africa, Asia, and Latin America? Yes. That it is recognized also in expanded procedural terms principally in industrialized Europe? Yes.

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[88] Dec. 10, 1997, FCCC/CP/1997/7/Add.1; *reprinted in* 37 I.L.M. 32 (1998) and 5 Basic Documents V.E.20d, *supra* note 13.

[89] June 5, 1992, 1760 U.N.T.S. 79; *reprinted in* 31 I.L.M. 818 (1992) and 5 BASIC DOCUMENTS , *supra* note 13, at V.H.22.

[90] The acronym "COP" is shorthand for "Conference of the Parties" to the 1992 Climate Change Convention.

[91] Tom Zeller Jr., *Fault Lines Remain After Climate Talks*, INT'L HERALD TRIBUNE, Jan. 4, 2010, http://www.nytimes.com/2010/01/04/business/energy-environment/04green.html?ref=unitednationsframeworkconventiononclimatechange (accessed July 22, 2011).

[92] For the text of the Copenhagen Accord (Dec. 18, 2009), see U.N. Doc. FCCC/CP/2009/11/Add.1 at 5, http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf (accessed June 25, 2011).

[93] In fairness, it must be noted that this agreement, while initially opposed by many countries and NGOs because it contained no legally binding commitments for reducing CO2 emissions, as many as 141 countries, including the 27-member European Union, have "engaged" or are likely to have "engaged" with the Accord as of June 7, 2011, representing 87.24% of global emissions, according to U.S. Climate Action Network (USCAN), http://www.usclimatenetwork.org/policy/copenhagen-accord-commitments (accessed June 25, 2011). The central issue is of course the meaning or terms of "engagement."

[94] ELIZABETH KOLBERT, FIELD NOTES FROM A CATASTROPHE: MAN, NATURE AND CLIMATE CHANGE 189 (2006).

That there exists a growing sentiment, albeit more regional and national than global, favoring an autonomous right to environment? Yes.

But at bottom, it seems, it all comes down to a simple but profound truth: that as long as ecological governance remains in the grip of essentially unregulated (liberal or neoliberal) capitalism—a regime responsible for much if not most of the plunder and theft of our ecological wealth in the last, roughly 150 years—there never will be a human right to environment widely recognized and honored across the globe in any formal/official sense, least of all an autonomous one. This truly is another inconvenient truth.

The roots of this failure to come to terms with humankind's systemic destruction of the environment are deep. They are reinforced, legitimized, and perhaps even sanctified by the Scientific Revolution of the 16th and 17th centuries as embodied in the philosophical views of Copernicus, Bacon, Galileo, Descartes, and Newton. We also are heirs to a religious anthropocentrism born of the Reformation, which encouraged so-called "civilized" humans to see themselves as separate from nature and, indeed, as its master beneficiaries rather than its servant stewards. It has become normal to treat non-human species as *things or objects* to be exploited, not as fellow *beings or subjects* to be respected. So long as this worldview prevails—so long as we continue to insist that humans are outside nature and that nature has no limits—the mainstream economic and political paradigm will not take the right to environment seriously, and it will remain an idiosyncratic influence at best.[95] It should be added that neither Soviet-based communism nor Chinese-style State capitalism has shown an ability to transcend this way of thinking and governing any more than the capitalist West.

B. Two Attractive Alternatives and Their Complexities

In light of the ever accelerating catastrophe of climate change, species depletion, the exhaustion of vital resources, and overpopulation—all provoking "discomfiting images of a non-future"[96]—two alternative legal approaches to the right to a clean and healthy environment have emerged in recent years, each in its own way seeking to surmount the wall of resistance to the right to environment that, as noted, has kept it largely in check to date. The first approach—intergenerational environmental rights—relies heavily on its ability to appeal to the moral conscience of existing, disaggregated legal processes. The second—nature's environmental rights—chooses instead to alter the procedural playing field altogether. At the same time, they share several features in common: in their legal character they are autonomous or holistic rather than derivative or disaggregate; they partake of both substantive and procedural environmental rights, in the sense that they reformulate and re-conceptualize environmental rights and look to claimant surrogates to enforce them; and they are asserted, to date, at the official national and subnational levels primarily. Politically, both approaches—intergenerational and nature's rights—reflect a deep frustration with the environmental community's conventional terms of advocacy and the formal legal order's deep commitments to a neoliberal political and economic system.

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[95] *Accord*, Alberto Acosta, *Toward a Universal Declaration of Rights of Nature* (article for the AFESE Journal, Aug. 24, 2010), *available in unpaginated manuscript form at* http://www.e-joussour.net/files/DDNN_ingl..pdf (accessed Aug. 19, 2011); CULLINAN, *supra* note 20, at ch. 2 ("The Illusion of Independence").

[96] WESTON & BACH, *supra* note 22, at 60.

1. Intergenerational Environmental Rights

The assertion of intergenerational environmental rights focuses on the ecological rights of future generations. Born in modern times of the pioneering scholarship of Edith Brown Weiss[97] and continued with others[98] (including one of us[99]), it is premised on the understanding, first, that "the future" is a temporal space without outer limits (because such matters as the storage of radioactive waste make it unwise, except for cognitive convenience, to define "the future" narrowly[100]) and, second, that "future generations" includes all persons under 18 years[101] (i.e., children, as defined by Article 1 of the Convention on the Rights of the Child[102]). These rights insist that each generation must receive a "natural and cultural legacy" in legal trust from previous generations; that this legacy, in turn, each generation holds in legal trust for generations in its future; and that this trust relationship grants to future generations a legal right to at least three conditions of ecological and cultural well-being that each living generation is legally obligated to fulfill:

- *conservation of ecological options*—i.e., each living generation shall "conserve the [planet's] natural and cultural resource base" and thus "not unduly restrict the options available to future generations in solving their problems and satisfying their own values";[103]

- *conservation of the quality of the planet*—i.e., each living generation shall "maintain the . . . planet so that it is passed on in no worse condition than the present generation received

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97 *See* Brown Weiss's germinal book IN FAIRNESS TO FUTURE GENERATIONS, *supra* note 27, at 26. But see also the earlier essay collection RESPONSIBILITIES TO FUTURE GENERATIONS: ENVIRONMENTAL ETHICS (Ernest Partridge ed., 1980).

98 *See, e.g.*, Tracy Bach, *The Recognition of Intergenerational Rights and Duties in U.S. Law*, *in* WESTON & BACH, supra note 22, Appendix A (CLI Background Paper No. 6); Tracy Bach, *The Recognition of Intergenerational Rights and Duties in Foreign Law*, *in* WESTON & BACH, *supra* note 22, Appendix A (CLI Background Paper No. 7) (2010); WILFRED BECKERMAN & JOANNA PASEK, JUSTICE, POSTERITY, AND THE ENVIRONMENT (2001); FAIRNESS AND FUTURITY (Andrew Dobson ed., 1999); HANDBOOK OF INTERGENERATIONAL JUSTICE 53 (Jörg Chet Tremmel ed., 2006); RICHARD P. HISKES, THE HUMAN RIGHT TO A GREEN FUTURE: ENVIRONMENTAL RIGHTS AND INTERGENERATIONAL JUSTICE (2009); INTERGENERATIONAL JUSTICE (Axel Gosseries & Lukas H. Meyer eds., 2009); EDWARD A. PAGE, CLIMATE CHANGE, JUSTICE AND FUTURE GENERATIONS (2006) JÖRG CHET TREMMEL, A THEORY OF INTERGENERATIONAL JUSTICE (2009); LAURA WESTRA, ENVIRONMENTAL JUSTICE AND THE RIGHTS OF UNBORN AND FUTURE GENERATIONS: LAW, ENVIRONMENTAL HARM, AND THE RIGHT TO HEALTH (2006).

99 *See* Burns H. Weston, *The Foundational Theories of Intergenerational Ecological Justice—An Overview,* forthcoming in 34 HUM. RTS. Q. NO. 1 (Feb. 2012); *see also* Burns H. Weston, *Climate Change and Intergenerational Justice: Foundational Reflections*, 9 VT. J. ENVTL. L. 375 (2008); WESTON & BACH, *supra* note 22, at 17-27.

100 Energy Inst., Inc. v. Envtl. Prot. Agency, 373 F.3d 1251, 362 U.S. App. D.C. 204 (D.C. Cir. 2004), a case that concerned, *inter alia*, the temporal standard to be applied to activate safely a federal repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain, Nevada, the time frame contested ranged from between 10,000 to "hundreds of thousands of years after disposal, 'or even farther into the future.'" However, because it helps bring potentially vague future persons into meaningful focus, and thereby helps to mobilize much needed political energies, we recommend, for this convenience only, a notion of future generations defined by three and a half generations of persons that exist from this day forward, a notion that is derived from the "one hundred year present" of the late sociologist Elise Boulding. *See* Elise Boulding, *The Dynamics of Imaging Futures*, 12 WORLD FUTURE SOCIETY BULL. No. 5, at 7 (Sept-Oct 1978).

101 I.e., children, as defined by Article 1 of the Convention on the Rights of the Child, *supra* note 37.

102 *Id.*

103 BROWN WEISS, *supra* note 27, at 38, elaborated at 40-42.

it," recognizing that future generations are "entitled to a quality of the planet comparable to the one enjoyed by previous generations";[104] and

- *conservation of equitable resource access*—i.e., each living generation shall "provide its members with equitable rights of access to the legacy [of resources and benefits received] from past generations . . . and conserve this access for future generations."[105]

Conditions or obligations of intergenerational ecological justice,[106] these three principles facilitate both the right to, and the reality of, a clean and healthy environment for future generations (living and yet to be born) assuming, of course, a received clean and healthy ecological legacy in the first place). They also are widely endorsed in the documentary literature (some of it predating Brown Weiss) and appear now to be increasingly accepted juridically.[107] One may assume this is so if for no other reason than that they comport with both the ethical and pragmatic rationales that give intergenerational justice moral purpose and with the jurisprudential theories of social justice that give

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[104] *Id.* at 42-43.

[105] *Id.* at 43-45.

[106] In the literature, the terms "intergenerational justice" and "intergenerational equity" may be understood interchangeably. We prefer "intergenerational justice," however, because "equity" has lost some of its resonance since equity was combined with law into one cause of action, but more importantly because it evokes the fundamentally relevant sensibility of "social justice."

[107] *See, e.g.*, Stockholm Declaration, *supra* note 40; Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S. 151, *reprinted in* 11 I.L.M.1358 (1972) and 5 BASIC DOCUMENTS, *supra* note 13, at V.B.4; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 1046 U.N.T.S. 120, *reprinted in* 11 I.L.M. 1294 (1972) and 5 BASIC DOCUMENTS, *supra* note 13, at V.F.14; Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 993 U.N.T.S. 243, *reprinted in* 12 I.L.M. 1085 and 5 BASIC DOCUMENTS, *supra* note 13, at V.H.10; Charter of Economic Rights and Duties of States, G.A. Res. 3281, at 50, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc A/9631 (Dec. 12, 1974); *reprinted in* 14 I.L.M. 251 (1975) and 4 BASIC DOCUMENTS, *supra* note 13, at IV.F.5; Historical Responsibility of States or the Preservation of Nature for Present and Future Generations, G.A. Res. 35/8, at 15, U.N. GAOR, 35th Sess., Supp. No. 48, U.N. Doc A/35/48 (Oct. 30, 1980,); *reprinted in* 5 BASIC DOCUMENTS, *supra* note 13, at V.B.9; U.N. World Charter for Nature, G.A. Res. 37/7 (Annex), at 17, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc A/37/51 (Oct. 28, 1982); *reprinted in* 22 I.L.M. 455 (1983) and 5 BASIC DOCUMENTS, *supra* note 13, at V.B.11; the Rio Declaration on Environment and Development, June 13, 1992, U.N. Doc. A/CONF.151/26 (1992), *reprinted in* 31 I.L.M. 874 (1992) and 5 BASIC DOCUMENTS, *supra* note 13, at V.B.16 (hereinafter "Rio Declaration"); and the Declaration of The Hague, Mar. 11, 1989, U.N. Doc. A/44/340, *reprinted in* 28 I.L.M. 1308 (1989) and 5 BASIC DOCUMENTS, *supra* note 13, at V.E.13; U.N. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, *reprinted in* 31 I.L.M. 849 (1992) and 5 BASIC DOCUMENTS, *supra* note 13, at V.E.19; Convention on Biological Diversity, *supra* note 89; several regional seas conventions such as the Revised Barcelona Mediterranean Sea Convention, June 10, 1995, U.N. Doc. UNEP (OCA)/MED IG.6 (Annex), *reprinted in* 5 BASIC DOCUMENTS, *supra* note 13, at V.F.30a-1; UNESCO Declaration on Responsibilities Towards Future Generations, Nov. 12, 1997, http://unesdoc.unesco.org/images/0011/001102/10220e.pdf#page=75 (accessed June 25, 2011); Aarhus Convention, *supra* note 42; Declaration of Bizkaia on the .Right to Environment, United Nations Educational, Scientific and Cultural Organization, Feb. 12, 1999, 30th Sess., Doc. 30C/INF.11 (1999), *reprinted in 3* BASIC DOCUMENTS, *supra* note 13, at III.S.5; International Mother Earth Day, G.A. Res. 63/278, at 4, U.N. GAOR, 63d Sess., Supp. No. 49, vol. III, U.N. Doc. A/RES/63/49 (Apr. 22, 2009), *reprinted in* 5 BASIC DOCUMENTS, *supra* note 13, at V.???.??? . Especially noteworthy is the 1998 Aarhus Convention, *supra*, which builds on the "conservation of access" principle in considerable detail. For helpful insight, see Jeremy Wates, *The Aarhus Convention: Promoting Environmental Democracy*, *in* SUSTAINABLE JUSTICE: RECONCILING ECONOMIC, SOCIAL AND ENVIRONMENTAL LAW 393 (Marie-Claire Cordonier Segger & C.G. Weeramantry eds., 2005).

[them] legal standing,[108] i.e., distributive, reciprocity-based, and respect-based theories of social justice.[109]

These theories of intergenerational justice have been voiced in some quarters of everyday law and policy. In the *Bamaca Vélasquez Case* decided by the Inter-American Court of Human Rights in November 2000, for example, Judge Cançado Trindade, in his separate opinion, observed as follows:

> Human solidarity manifests not only in a spatial dimension—that is, in the space shared by all peoples of the world—but also in a temporal dimension—that is, among the generations who succeed each other in the time, taking the past, present and future altogether. . . . It is the notion of human solidarity, understood in this wide dimension, and never that of State sovereignty, which lies on [sic] the basis of the whole contemprarary thinking on the rights inherent to the human being.[110]

This kind of thinking, however, has scant support in statist circles internationally—and nationally, for that matter. The far-sighted, eloquent argument famously put forward by the United States in the 1893 *Bering Sea Fur Seals Arbitration*[111] (U.S. v. Great Britain) in defense of intergenerational environmental rights has not been resurrected in most of contemporary international jurisprudence; and though an impressive array of international instruments express concern for the ecological legacy we leave to future generations,[112] either they do not have the force of law or, if considered binding, they lack enforcement procedures adequate to moving from the aspirational to the justiciable.[113]

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[108] For extensive treatment of the ethical rationales, see MORAL GROUND: ETHICAL ACTION FOR A PLANET IN PERIL (Kathleen Dean Moore & Michael P. Nelson eds., 2010); *see also* Weston (2008), *supra* note 99, at 397-405 (including pragmatic rationales); Weston (2012) *supra* note 99.

[109] The respect-based theory of social justice that we favor builds on two distinct but conceptually related intellectual traditions: the relational metaphysics and "process philosophy" of Alfred North Whitehead, on the one hand, and the values that underlie human rights law and policy, on the other, the core value of which—respect—honors difference, freedom, of choice, equality of opportunity, and aggregate well-being in value processes. For further elaboration and justification, see references cited in note 99, *supra.*

[110] Judgment of Nov. 25, 2000, Inter-Am. Ct. H.R. (Ser. C), No. 70 (July 25, 2000), at ¶ 23.

[111] *See* IX Fur Seal Arbitration 2-8 (Washington: Government Printing Office 1895). In a passage that could have been written with present-day greenhouse gases and climate change in mind, the U.S. expressed the ideal of intergenerational justice as a Whitehead-informed, respect-based theory would have it:

> The earth was designed as the permanent abode of man through ceaseless generations. Each generation, as it appears upon the scene, is entitled only to use the fair inheritance. It is against the law of nature that any waste should be committed to the disadvantage of the succeeding tenants. The title of each generation may be described in a term familiar to English lawyers as limited to an estate for life; or it may with equal propriety be said to be coupled with a trust to transmit the inheritance to those who succeed in at least as good a condition as it was found, reasonable use only excepted. That one generation may not only consume or destroy the annual increase of the products of the earth, but the stock also, thus leaving an inadequate provision for the multitude of successors which it brings into life, is a notion so repugnant to reason as scarcely to need formal refutation.
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> *Id.* at 65–66 (footnotes omitted).

[112] *See, e.g.*, all the instruments cited in note 107, *supra.*

[113] For confirmation, see WESTON & BACH, *supra* note 22, at 35-36, 44-45, and 52–53.

There are some notable exceptions that, both explicitly and implicitly, strive to conserve ecological options, maintain ecological quality, and/or provide ecological access to benefit future generations—for example, the 1992 conventions on climate change and biological diversity[114] and the 1998 Aarhus Convention.[115] But the principal legal recognition of an intergenerational right to the core elements of a clean and healthy environment is found mainly at the national and subnational levels, in constitutions, statutes, regulations, and judicial and other third-party decisions, both explicitly and implicitly.[116]

For example, an amendment to the Constitution of France (by way of its 2004 Charter for the Environment) provides that "[e]ach person has the right to live in a balanced environment which shows due respect for health";[117] and in the French Civil Code it is made subject to the principle of sustainable development which, the Code states, makes it necessary "[to] protect the health of current generations without compromising the ability of future generations to meet their own needs."[118] The Basic Law of Germany, on the other hand, recognizes the ecological rights of future generations implicitly (dwelling on duty in lieu of right): "Mindful . . . of its responsibility toward future generations, the state shall protect the natural foundations of life and animals . . .."[119] Similarly implicit is the Constitution of the Commonwealth of Pennsylvania as amended in 1971 to mark the first Earth Day, proclaiming that "[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment" and that these resources "are the common property of all the people, including generations yet to come," held in trust by the Commonwealth for all their benefit.[120] Likewise, the Constitution of the State of Montana as amended in 1972, mandates that "the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."[121]

Also illustrative are such legislative initiatives as Japan's Basic Environmental Law of 1993 which provides, *inter alia*, that "environmental conservation shall be conducted appropriately to ensure that the present and future generations of human beings can enjoy the blessings of a healthy and productive environment . . .."[122] New Zealand's 1996 Resource Management Amendment Act was designed in part to "[s]ustain the potential of natural and physical resources . . . to meet the

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[114] *Supra* note 107.

[115] *Supra* note 42.

[116] *See* WESTON & BACH, *supra* note 22.

[117] LA CONSTITUTION FRANÇAISE DU 4 OCTOBRE 1958, Charte de l'environnement de 2004, http://www.assemblee-nationale.fr/english/8ab.asp (English transl., accessed June 25, 2011).

[118] C. CIV., art. L110-2 (2002), http://195.83.177.9/code/liste.phtml?lang=uk&c=40 (accessed June 25, 2011).

[119] GRUNDGESETZ [GG] [Constitution] art. 20(a), https://www.btg-bestellservice.de/pdf/80201000.pdf (English transl., accessed June 25, 2011).

[120] PA. CONST., art. I, § 27.

[121] MONT. CONST., art. IX, §1.

[122] Law No. 91 of 1993, ch. 1,, art. 3, http://www.env.go.jp/en/laws/policy/basic/ch1.html (Japan, accessed June 25, 2011).

reasonably foreseeable needs of future generations."[123] And the U.S. Congress, in enacting the 1994 National Environmental Policy Act (NEPA), declared its intention "[to] create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans," facilitated in part by mandated environmental impact assessments.[124]

Similar intentions lie behind the establishment in the United States of state public trusts and parks such as the Alaska Permanent Fund (created "to benefit all generations of Alaskans"[125]) and New York State's Adirondack Park (the largest protected area in the contiguous United States, declared to be "forever wild"[126]). Not to be overlooked either are tribal codes such as those giving voice to the "seventh generation principle,"[127] extending responsibility for the environment far into the future.[128] And worldwide, as one should expect, there are favorably disposed administrative directives and regulations, both national and subnational, interpreting and overseeing environmental actions and laws with an eye to the ecological rights of future generations—though, it appears, exceedingly few judicial decisions.[129]

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123 Resource Management Act 1991, 1991 S.N.Z. No. 69, §5, http://www.legislation.govt.nz/act/public/1991/0069/latest/DLM230265.html (New Zealand, accessed June 25, 2011); *see also* WESTON & BACH, *supra* note 22, at 97 n.115 (listing New Zealand expressly references the environmental rights of future generations).

124 42 USC. §4331(A) (1970).

125 ALASKA STAT. §37.13.020 (2004).

126 N.Y. CONST., art. XIV; *see also* Nicholas Robinson, *"Forever Wild": New York's Constitutional Mandates to Enhance the Forest Preserve*, DIGITALCOMMONS@PACE (Feb. 15, 2007), http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1283&context=lawfaculty (accessed June 25, 2011).

127 *E.g.*, the Dine Natural Resources Protection Act of 2005, http://www.sric.org/ uranium/DNRPA.pdf (accessed June 25, 2011).

128 *See* WESTON & BACH, *supra* note 22, at 31 discussing the mission statement of the Great Lakes Indian Fish and Wildlife Commission invoking the "Anishinaabe Way" that embraces the "Seventh Generation" principle in ecosystem management; N. Bruce Duthu, *The Recognition of Intergenerational Ecological Rights and Duties in Native American Law*, a "background paper" in Appendix A of WESTON & BACH, *supra* note 22. *See generally* BRIAN EDWARD BROWN, RELIGION, LAW AND THE LAND: NATIVE AMERICANS AND THE JUDICIAL INTERPRETATION OF SACRED LAND (1999).

129 For six known cases granting intergenerational relief, see Cape May Count Chapter, Inc., Izaak Walton League of America v. Macchia, 329 F. Supp. 504 (D.N.J. 1971) (holding that an environmental group had standing to sue in a representative status in a class action suit on behalf of future generations to prevent the dredging and development of an island off the coast of New Jersey); Concerned About Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1976) (holding that the Navy's environmental impact statement [EIS] was insufficient because it limited the EIS analysis to environmental harms up to a time only seven years away and thus held that the EIS "fail[ed] to ensure that the environment will be preserved and enhanced for the present generation, much less for our descendants"); Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978) 9 (reasoning that "the health and safety gains that achievement of the [Clean Water] Act's aspirations would bring to future generations will in some cases outweigh the economic dislocation it causes in the present generation"); Nat'l Wildlife Fed'n v. Burford, 835 F.2d 305, 326 (D.C. Cir. 1987) (stating that "denying the motion could ruin some of the country's great environmental resources—and not just for now but for generations to come"); Juan Antonio Oposa, et al. vs. Fulgencio S. Factorian, Jr., *et al.*, G.R. No. 101083, July 30, 1993, (noting in dicta that minors, their parents, and the Philippine Environmental Network had standing to sue for their own generation and for successive generations based on the concept of intergenerational responsibility and the right to a balanced and healthful ecology), http://www.lawphil.net/judjuris/juri1993/jul1993/ gr_101083_1993.html (accessed June 25, 2011); Gray v. The Minister for Planning, (2006) NSWLEC 720, ¶ 116 (Australia) (reasoning that environmental impact assessments are key considerations because they include the public interest and they enable the "present generation to meet its obligation of intergenerational equity by ensuring the health, diversity and productivity of the environment is

In sum, as the foregoing illustrations suggest, the intergenerational right to a clean and healthy environment is backed by powerfully persuasive ethical or moral arguments[130] and is well established in law *as a matter of principle*. Overall, however, legal recognition of intergenerational environmental rights has been hemmed in by doctrines of nonjusticiability and is limited in scope and practice. The right thus must be understood as still emerging. On the other hand, the rights of future generations could plausibly be applied to climate change and other such large-scale hazards.[131]

2. Nature's Environmental Rights

On September 28, 2008, the people of Ecuador approved, by a 2 to 1 margin, a new constitution that for the first time in modern history recognizes legally enforceable ecosystem rights. Title II ("Fundamental Rights"), Chapter 7 ("Rights of Nature") of the new constitution[132] grants Nature "the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes."[133] In short, Nature is put on the same legal footing as individuals and governments, corporations, and other legal persons to enforce it. Title II treats the natural world—or "Pacha Mama [Goddess Earth], where life is reproduced and occurs"—as having protective rights of its own; when threatened, they can be adjudicated via human surrogates, thus granting Nature legal standing—potentially even beyond Ecuador, depending on the construct of the dispute. The constitution stipulates that "all persons, communities, peoples and nations" can call upon public authorities to enforce the rights of Nature."[134] It adds that "Nature has the right to be restored" and that "[t]his restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems."[135]

This constitutional innovation was inspired by indigenous communities in Ecuador demanding environmental protection of their traditional habitats from exploitation and abuse by large, predominantly corporate interests (as in Texaco's defilement of Ecuador's Oriente rainforest[136]). It must be understood as an historic, audacious lifting of the right to a clean and

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maintained and enhanced for the benefit of future generations").

130 For such arguments, see references in note 99, *supra*.

131 *See generally*, TREMMEL, *supra* note 98.

132 To our best knowledge, no official translation of the 2008 Ecuador Constitution has yet been released. For Title II, Chapter Seven, we therefore rely on an English language rendition provided by the Edmund A. Walsh School of Foreign Service at Georgetown University, offering also the original Spanish version of the Constitution. *See* http://pdba.georgetown.edu/constitutions/ecuador/ecuador.html (accessed June 25, 2011). A somewhat different English translation is provided also by the Community Environmental Legal Defense Fund (CELDF), a Pennsylvania-based NGO dedicated to providing legal assistance to governments and community groups working to reconcile human affairs with the natural environment. *See* http://celdf.org/rights-of-nature-ecuador-articles-of-the- constitution (accessed June 25, 2011). CELDF having assisted Ecuador's Constitutional Assembly in the drafting of Title II, Chapter 7, we believe it to be a worthy translation also.

133 Ecuador Constitution of 2008, *supra* note 132, at Title II, Ch. 7, art. 1.

134 *Id.*

135 *Id.* art. 2.

136 *See* Inter-Am. Comm. H. R., *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev.1 (1997), ch. VIII. Reporting on the human rights situation of some 500,000 indigenous peoples in Ecuador's interior

healthy environment to a new, higher level of legal recognition and activism. Not only are plaintiffs stripped of the need to prove self-injury to have legal standing—a hallmark of most judicial systems today—the autonomous right *to* a clean and healthy environment is converted into an autonomous right *of* the environment itself to be clean and healthy. "The essence of Nature's Rights," affirms former President of Ecuador's Constituent Assembly Alberto Acosta in a vigorous and eloquent defense of Ecuador's constitutional daring, "is rescuing the '*right to existence*' of human beings *themselves*. . . . [H]uman beings cannot live apart from Nature."[137]

This "Rights of Nature" idea is certainly not without its critics and active resisters. Indeed, it faces an uncertain future in Ecuador itself in light of President Rafael Correa's recent political shift rightward. Still, these "Rights of Nature" provisions have helped set in motion what has come to be called the "Pachamama" or "Earth Jurisprudence" movement, now spreading elsewhere, in sub-Saharan Africa, Australia, Canada, India, the United Kingdom, and even the United States, but most prominently in Bolivia.[138]

In 2008, the President of Bolivia, Aymara Indian Evo Morales, convened and hosted in Cochabamba the People's Conference on Climate Change and the Rights of Mother Earth,[139] an achievement that prompted the U.N. General Assembly in 2009 to declare Morales "World Hero of Mother Earth."[140] The conference, held in the small town home of an historic "water war" that helped sweep Morales into power, resulted in a proposed "Universal Declaration of the Rights of Mother Earth"[141] and a "People's Agreement."[142] Doubtless energized by the conference, President

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(known as the Oriente), the IACHR observed that "severe environmental pollution" resulting from decades of developmental activities, mostly of oil drilling concessionaires (Texaco and Ecuador's state-run Petroecuador primarily) who dumped close to 16 million gallons of oil and 20 billion gallons of petroleum waste into roughly 17,000 acres of pristine rainforest, had so despoiled the Oriente environment as to threaten the physical and cultural lives of the indigenous inhabitants of the area, in violation of their internationally as well as constitutionally guaranteed rights to life and health. Stated the Commission in its ruling, *id.* at 89:

> The Commission recognizes that the right to development implies that each state has the freedom to exploit its natural resources, including through the granting of concessions and acceptance of international investment. However, the Commission considers that the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the * * * American Convention on Human Rights [which] is premised on the principle that rights inhere in the individual simply by virtue of being human. Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution which may cause serious physical illness, impairment and suffering on the part of the local populace are inconsistent with the right to be respected as a human being. *See also supra* note 3; Lucy Mayhew, *Rights of Nature*, 253 RESURGENCE MAGAZINE 8 (2009).

137 Acosta, *supra* note 95, citing Swiss jurist JÖRG LEIMBACHER, DIE RECHTE DER NATUR 27 (1988).

138 For some of the details, see CULLINAN, *supra* note 20, at 178-91.

139 World People's Conference on Climate Change and the Rights of Mother Earth of the People's World Movement for Mother Earth, at http://pwccc.wordpress.com (accessed June 25, 2011) (hereinafter "PWCCC").

140 *See* Remarks of H.E. Miguel D'Escoto Brockmann, President of the United Nations General Assembly at the Mother Earth Special Event (New York, Apr. 22, 2009*), transcript available at* www.un.org/esa/socdev/unpfii/documents/MEDSE_PGA_ en.doc (accessed June 25, 2011).

141 PWCCC, at http://pwccc.wordpress.com/2010/02/07/draft-universal-declaration-of-the-rights-of-mother-earth-2 (accessed June 25, 2011). For an updated version, see http://climateandcapitalism.com/?p=2268 (accessed June 25,

Morales in 2010 succeeded in winning U.N. General Assembly approval of a resolution declaring April 22 International Mother Earth Day.[143] The resolution expressed the General Assembly's conviction that, to achieve a just balance among the socioeconomic and environmental needs of present and future generations, "it is necessary to promote harmony with nature and the Earth."[144]

Significantly, these achievements—and implicitly the Pachamama Movement itself—won further General Assembly support in its February 2010 Resolution 64/196 on "Harmony and Nature," requesting the Secretary-General to submit a report on the same theme,[145] which he did in August 2010.[146] It also is noteworthy that Secretary-General Ban Ki-moon issued a Mother Earth Day 2010 statement declaring that "protecting the Earth must be an integral component of the strategy to achieve the MDGs [Millennium Development Goals[147]] . . . that world leaders have pledged to try to achieve by 2015, along with other ambitious targets to halve poverty, hunger and disease."[148] While not legally enforceable, communications such as these can help garner the support that Nature's rights require to win widespread legal recognition.

Especially instructive in this regard is the proposed Universal Declaration of the Rights of Mother Earth that emanated from the People's Conference in Bolivia in 2008, since submitted to the U.N. General Assembly for consideration[149] and prelude to a new Ley de Derechos de La Madre Tierra (Law of Mother Earth) soon to be adopted.[150] Clearly drawing inspiration from, e.g., the 1948 Universal Declaration of Human Rights[151] and the 2000 Earth Charter,[152] it begins with an

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2011); *see also* Cormac Cullinan, *The Universal Declaration of the Rights of Mother Earth: An Overview in* Does NATURE HAVE RIGHTS? TRANSFORMING GRASSROOTS ORGANIZING TO PROTECT PEOPLE AND THE PLANET (Council of Canadians, Fundacion Pachamama, and Global Exchange: 2011), *available in draft form at* http://canadians.org/rightsofnature (accessed June 25, 2011).

142 PWCCC, at http://pwccc.wordpress.com/support (accessed June 25, 2011).

143 International Mother Earth Day, GA Res. 63/278, at 4, U.N. GAOR, 63d Sess., Supp. No. 49, vol. III, U.N. Doc. A/RES/63/49 (May 1, 2009), *reprinted in* 5 BASIC DOCUMENTS, *supra* note 13, at V.???.???.

144 *Id.*, prmbl.

145 Harmony with Nature, GA Res. 64/196, at 267, U.N. GAOR, 64th Sess., Supp. No. 49, vol. I, U.N. Doc. A/RES/64/49 (Feb. 12, 2010), *reprinted in* 5 BASIC DOCUMENTS, *supra* note 13, at V.???.???.

146 Report of the Secretary-General, *Harmony and Nature*, U.N. Doc. A/65/314 (Aug. 19, 2010).

147 *See* United Nations Millennium Declaration, Sept. 8, 2000, GA Res. 55/2, U.N. GAOR, 55th Sess., Supp. No. 49, at 4, U.N. Doc A/55/49 (2000), *reprinted in* 3 BASIC DOCUMENTS, *supra* note 13, at, III.U.4.

148 *See* U.N. News Centre, *Safeguarding Earth Crucial to Development, Human Well-being, Ban Stresses*, at http://www.un.org/apps/news/story.asp?NewsID=34445&Cr=&Cr1= (accessed June 25, 2011).

149 Submission by the Plurinational State of Bolivia to the AWG-LCA, *Additional views on which the Chair may draw in preparing text to facilitate negotiations among Parties, Submissions from Parties* (Apr. 30, 2010) FCCC/AWGLCA/2010/MIS.

150 *See Bolivia's Law Of Mother Earth Would Give Nature And Humans Equal Protection*, HUFFPOST GREEN, http://www.huffingtonpost.com/2011/04/13/bolivias-law-of-mother-earth_n_848966.html (accessed June 25, 2011); *see also* John Vidal, *Bolivia Enshrines Natural World's Rights with Equal Status for Mother Earth*, GUARDIAN.CO.UK, Sunday, Apr. 10, 2011, http://www.guardian.co.uk/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights (accessed June 25, 2011).

151 Universal Declaration of Human Rights (UDHR), G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), *reprinted in* 3 BASIC DOCUMENTS, *supra* note 13, at III.A.1.

acknowledgment that "[w]e, the peoples and nations of Earth . . . are all part of Mother Earth, an indivisible, living community of interrelated and interdependent beings with a common destiny."[153] Thereafter, in Article 1(1), it asserts that "Mother Earth is a living being," and in Article 2 specifies the "Inherent Rights of Mother Earth":

> (1) Mother Earth and all beings of which she is composed have the following inherent rights:
> (a) the right to life and to exist;
> (b) the right to be respected;
> (c) the right to regenerate its bio-capacity and to continue its vital cycles and processes free from human disruptions;
> (d) the right to maintain its identity and integrity as a distinct, self-regulating and interrelated being;
> (e) the right to water as a source of life;
> (f) the right to clean air;
> (g) the right to integral health;
> (h) the right to be free from contamination, pollution and toxic or radioactive waste;
> (i) the right to not have its genetic structure modified or disrupted in a manner that threatens it integrity or vital and healthy functioning;
> (j) the right to full and prompt restoration the violation of the rights recognized in this Declaration caused by human activities;
> (2) Each being has the right to a place and to play its role in Mother Earth for her harmonious functioning.
> (3) Every being has the right to wellbeing and to live free from torture or cruel treatment by human beings.

Thus does the Pachamama Movement seek to shift the anthropocentric rights paradigm of environmental protection. However, while its Mother Earth declaration does detail "Obligations of human beings to Mother Earth,"[154] it does not identify—perhaps intentionally—the mechanisms and procedures through which these obligations might be enforced. One can hope that, if the U.N. General Assembly does choose to endorse this revolutionary initiative, it will point the way to practicable, effective legal and social governance mechanisms, and to operational arrangements that may obtain at different levels of social governance.

It is, in any event, revealing that these developments have received scant attention in the Western media except as passing objects of bemused curiosity, even derision.[155] Perhaps this should

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[152] The Earth Charter, adopted at The Hague by the Earth Charter Commission, 29 June 2000. Available from the Earth Charter Commission at http://www.earthcharterinaction.org/content/pages/Read-the-Charter.html (accessed June 25 2011).

[153] Universal Declaration of the Rights of Mother Earth, *supra* note 149, prmbl.

[154] *Id.* art. 3.

[155] *See, e.g.,* posting of Nita Still to Siskiyou Daily News, *Lies and Deceptions*, http://www.siskiyoudaily.com/opinions/letters_to_the_editor/x121482358/-Lies-and-deceptions (July 19, 2011, 9:01 am PST) (accessed July 22, 2011); Jonathan Wachtel, *U.N. Prepares to Debate Whether 'Mother Earth' Deserves Human Rights Status*, FOXNEWS.COM, http://www.foxnews.com/world/2011/04/18/prepares-debate-rights-mother-earth (Apr. 18, 2011) (accessed July 22, 2011).

be expected of a movement that seeks to pierce Western anthropocentric conceits of scientism, economics, and law and catalyze a great socioeconomic shift. Such shifts are rarely if ever popular at their outset.

Improbably enough, however, the most memorable modern-day plea for the "rights of Nature" idea came from a U.S. law professor, Christopher Stone of the University of Southern California, when, in 1972, he published his now iconic essay *Should Trees Have Standing?–Toward Legal Rights for Natural Objects*[156] in which he gave legal voice to Aldo Leopold's "land ethic."[157] By now, one would think, we should have gotten used to the idea, even engaged with it seriously. Stone pointed out how the law routinely transmutes the fictional into justiciable reality: "We have been making persons out of children although they were not, in law, always so. And we have done the same, albeit imperfectly some would say, with prisoners, aliens, women (especially of the married variety), the insane, Blacks, and Indians."[158] The U.S. judiciary has even vested corporations with First Amendment rights.[159] Joint ventures, trusts, municipalities, ships, and other inanimate right-holders, too, have been endowed with legal personhood. But until now legal innovation to recognize the interests of Nature has never taken root. As Stone conceded, "[t]hroughout legal history, each successive extension of rights to some new entity has been . . . a bit unthinkable,"[160] adding that "[w]e are inclined to suppose the rightlessness of rightless 'things' to be a decree of Nature, not a legal convention acting in support of some status quo."[161]

Still, Professor Stone's idea that natural objects should have rights gave rise to U.S. Justice William O. Douglas' spirited dissent in *Sierra Club v. Morton.*[162] It also provoked skepticism, even disdain[163] and antipathy.[164] Today, however, Ecuador's and Bolivia's challenges to the world are

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156 45 S. CAL. L. REV. 450 (1972); *see also* CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING: AND OTHER ESSAYS ON LAW, MORALS AND THE ENVIRONMENT (2010); Susan Emmenegger & Axel Tschentscher, *Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law*, 6 GEO. INT'L ENVTL L. REV. 545 (1994) (22 years after the publication of Stone's essay).

157 ALDO LEOPOLD, A SAND COUNTY ALMANAC 201-26 (1949/1981). Leopold wrote, at 224-25: "[T]he 'key-log' which must be moved to release the evolutionary process [of cultivating a land ethic] is simply this: quit thinking about decent land-use as solely an economic problem. Examine each question in terms of what is ethically and esthetically right, as well as what is economically expedient. A thing is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise….The fallacy the economic determinists have tied around our collective neck, and which we now need to cast off, is the belief that economics determines *all* land use.. This is simply not true."

158 Stone, *supra* note 156 at 2.

159 Citizens United v. Federal Election Commission, Case No. 08-205, 130 S.Ct. 876 (2010).

160 Stone, *supra* note 156, at 2.

161 *Id.*

162 405 U.S. 727, 741 (1972).

163 See, for example, the derisive verse penned by attorney John M. Naff, Jr. under the title *Reflections on the Dissent of Douglas, J. in Sierra Club v. Morton*, 58 A.B.A.J. 820 (Aug. 1972):

> If Justice Douglas has his way –
> O Come not that dreadful day –
> We'll be sued by lakes and hills

causing even some well-placed lawyers and policymakers to see merit in Stone's argument. For example, President Obama's top science advisor, John Holdren recently described Stone's arguments as "tightly reasoned."[165] One may reasonably assume that this is due partly to the enormity and urgency of climate change and other large-scale environmental threats. But one can sense also not a little professional frustration with a system of environmental laws and regulations that "don't actually protect the environment" but, "at best . . ., merely slow the rate of its destruction."[166]

These words were written by the Associate Director of the Community Environmental Legal Defense Fund (CELDF), a nongovernmental not-for-profit environmental law firm based in south-central Pennsylvania. CELDF has been helping communities across the United States develop and adopt "Rights of Nature" ordinances that put the power of legal protest into the hands of local citizens without their having to prove personal environmental harm to achieve standing.[167] It also has assisted delegates to the Ecuador Constitutional Assembly in re-writing that country's constitution, specifically in the drafting of the "Rights of Nature" language, drawing upon the "Rights of Nature" ordinances CELDF has promoted at home.[168]

"[E]nvironmental protection cannot be attained," CELDF asserts on its website, "under a structure of law that treats natural communities and ecosystems as property."[169] This is a crude but

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Seeking a redress of ills
Great Mountain peaks of name prestigious
Will suddenly become litigious
Our brooks will babble in the courts,
Seeking damages for torts
How can I rest beneath a tree
If it may soon be suing me?
Or enjoy the playful porpoise
While it's seeking habeas Corpus?
Every beast within his paws
Will clutch an order to show cause
The Courts besieged on every hand,
Will Crowd with suits by chunks of land.
Ah! But vengeance will be sweet
Since this must be a two-way street.
I'll promptly sue my neighbour's tree
For shedding all its leaves on me.

[164] Persons sympathetic to Stone's thesis, for example, are reported to have been identified as "radical," a McCarthy-style ploy well known to marginalize people and ideas. *See,* e.g., Christopher Neefus, *Obama's Science Adviser Endorsed Giving Trees Legal Standing to Sue in Court,* CNSNEWS.COM http://www.cnsnews.com/node/51756, (July 29, 2009) (accessed June 25, 2011).

[165] As quoted in Neefus, *supra* note 164. According to this source, Holdren supports Professor Stone's thesis and thus also the idea of Rights of Nature.

[166] Mari Margil, *Stories from the Environmental Frontier*, *in* WILD LAW: A READER IN EARTH JURISPRUDENCE (Peter Burdon, ed., forthcoming), as quoted in Peter Burdon, *The Rights of Nature: Reconsidered,* 49 AUSTL. HUMAN. REV. 69, 70 (2010).

[167] *See* CELDF's website at http://www.celdf.org. In particular, see the CELDF's April 2010 Draft Rights of Nature Ordinance at http://www.celdf.org/-1-6 (each accessed June 25, 2011).

[168] *See* "Rights of Nature" page on CELDF's website, *supra* note 167.

[169] *Id.* at CELDF's "Rights of Nature," http://www.celdf.org/rights-of-Nature (accessed June 25, 2011). Says

essentially accurate judgment. Adds Peter Burdon, paraphrasing the CELDF website: "[B]y every measurable statistic, the environment is in worse condition today than thirty years ago when the first environmental protection law was passed."[170] The growing appeal of CELDF's work, nationally and transnationally, suggests a promising new vanguard for environmental advocacy that could ultimately transform environmental law.

Of course, for all the obvious reasons, this sort of initiative, national or international, does not of itself change the economic practices and cultural norms that are primarily to blame for the environmental predicament we are in. Local environmental ordinances are subservient to the "higher" laws of State and constitution, and national and even international environmental priorities are subservient to the "higher" interests of the Market and national security, as we have seen, for example, in the politics of the Kyoto Protocol, the UNFCC's COP 15 in Copenhagen, and COP 16 in Cancun.[171] As Professor Stone correctly foresaw, the supposed theoretical barriers to change have deeper origins in powerful "psychic and socio-psychic aspects" that are not easily overcome.[172]

3. Four Systemic Complications

Both the intergenerational and Nature's rights approaches to environmental protection and sustainability have their own complexities, well beyond the psychic and socio-psychic ones. They necessarily raise fundamental questions of economic and political governance and moral philosophy. They also challenge the worldwide corporate-led, bigger-better-more value system within which most of us live (or, in the name of development, seek to live). Finally, society and lawyers have a quite natural tendency to treat the unfamiliar cautiously if not apprehensively.

This is not to say that these new approaches do not have significant issues with which they must contend, born of the official legal systems within which they live. Three procedural issues stand out. So also does a fourth issue, but arguably more substantive than procedural. We advert to questions concerning legal surrogacy, legal standing, uncertainty in determining future damage, and anthropocentrism.

Legal Surrogacy

The intergenerational rights and Nature's rights approaches share equally unresolved questions concerning the threshold issue of qualified representation. Since each approach requires surrogates to represent their beneficiaries in order to function—future generations in the first instance, Mother Nature in the second—each therefore faces a host of representational issues that appear not to have been thoroughly or widely vetted so far: Should the surrogate be a "guardian" (as

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CELDF's Co-founder and Executive Director Thomas Linzey, quoting an unidentified source, "the only thing that environmental regulations regulate are environmentalists." *Of Corporations Law, and Democracy: Claiming the Rights of Communities and Nature*, 25th Annual E. F. Schumacher Lecture, October 2005, Stockbridge, MA, http://neweconomicsinstitute.org/publications/lectures/of-corporations-law-and-democracy (accessed June 25, 2011).

[170] Burdon, *supra* note 166, at 72.

[171] "UNFCC" is the acronym for "United Nations Framework Convention on Climate Change." The acronym "COP" is shorthand for "Conference of the Parties" to the 1992 Climate Change Convention.

[172] Stone, *supra* note 156, at 7.

recommended vis-à-vis future generations in preparation for the 1992 UNCED conference in Rio[173]) or would an "ombudsperson" or even an "everyman" model be more appropriate (each of them options under Article 3 of the Universal Declaration of the Rights of Mother Earth[174])? Who, in short, should serve in surrogate capacity? What kind of individual, institution, or agency, and with what geopolitical reach? How should the surrogate be selected? What background, training, and experience should the surrogate have? What obligations should the surrogate be required to fulfill and what functions should he, she, or it be expected to perform? For whom or what, exactly, should the surrogate be authorized to speak? What guidelines or standards of judgment should the surrogate be expected to follow, and who should author them in the first place? To whom should the surrogate account? And so forth.[175]

None of these operational questions are easy. But neither are they insurmountable. Every legal system, certainly the most advanced, has had to wrangle with these and related issues every time they have had to deal with the rights and interests of women (alas, still necessary), children, unborn persons, the mentally retarded, and the elderly infirm, for example. The current statist legal framework notwithstanding, it is not unreasonable to believe that the world could handle these issues when its own sustainability is at stake.

Legal Standing

Even if surrogates for future generations and Mother Nature succeed at establishing their credentials, they run up against other, potentially insurmountable threshold criteria of justiciability. Prominent in this regard is the much-litigated doctrine of legal standing or *locus standi*, requiring a personal stake in the outcome of a case to bring suit and common to many legal systems in one form or another.[176] In *Lujan v. Defenders of Wildlife* (1992),[177] the U.S. Supreme Court articulated a highly restrictive three-part test to determine whether the "standing" requirement is met: plaintiffs must prove (a) actual personal injury, (b) fairly traceable to defendants' alleged harmful acts, and (c) a likelihood of favorable redress—or face dismissal of their claims without consideration of their

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[173] In anticipation of the 1992 U.N. Conference on Environment and Development Earth Summit in Rio (UNCED) and in furtherance of Principle 1 of the 1972 Stockholm Declaration (*supra* note 40) declaiming that "Man . . . has the solemn responsibility to protect and improve the environment for present and future generations," the Maltese delegation submitted to the Preparatory Committee a proposal to institute a guardian officially to represent the interests of future generations. Except for the earnest musings of scholars, however, little if anything has been done in this regard in the the statist arena vis-à-vis future generations; nor in relation to Nature's rights, it seems, except in Ecuador. But for scholarly work, see, for example, STONE, supra note 156, at ch. 5; *see also* CULLINAN, *supra* note 20; WESTON & BACH, *supra* note 22; and the scholars cited in notes 97-99, *supra*.

[174] *Supra* note 154. Article 3(2)(h) of the Mother Earth Declaration provides as follows: "Human beings, all States, and all public and private institutions to defend the rights of Mother Earth and of all beings . . . ."

[175] For some conscientious answers to these kinds of representational questions, see Recommendation 10 (Adopt a Model Executive Order Establishing an Office of Legal Guardian for Future Generations and Provide for the Training and Certification of Legal Guardians, authored mostly by Carolyn Raffensperger) in WESTON & BACH, *supra* note 22, at 81.

[176] For helpful exploration of this and related doctrines without as well as within the United States, see, for example, CONSTITUTIONAL RIGHTS, *supra* note 47.

[177] 504 U.S. 555 (1992). For helpful elaboration and analysis, see Robin Kundis Craig, *Standing and Environmental Law: An Overview*, available on the Social Science Research Network (SSRN) website at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1536583 (accessed June 25, 2011).

merit.[178] The Nature's rights approach exempts surrogates from such traditional standing requirements because it measures claimed environmental damage not by human loss of use of an ecosystem but by harm done to the ecosystem itself, and thus presupposes or explicitly grants legal standing to those who would defend the environment—e.g., everyman under Ecuador's constitution,[179] generally residents in U.S. municipalities.[180]

The intergenerational rights approach, however, does not have the same warrant, especially in free-market economies such as the United States. In the United States, it has much to do with the Article III "cases and controversies" clause of the U.S. Constitution which, over the years, the Supreme Court has interpreted to sharpen the adversarial nature of cases and to define the U.S. judiciary's boundaries within the separation of powers mandated by the Constitution.[181] But as, for example, the post-*Lujan* case of *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[182] and the writings of qualified scholars[183] make clear, the doctrine of legal standing in environmental cases, like all legal norms, is subject to interpretation, and thus open to possible other influencing factors, and whether or not stated. In the intergenerational rights context, it is not unreasonable to wonder if legal standing decisions are not the consequence, at least in part, of an understandable bias favoring the property rights of presently living generations, or of general ignorance or misunderstanding of theories of intergenerational ecological justice[184] (perhaps because of the bias),

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178 Among many critiques of this and like U.S. decisions for being too restrictive, especially in environmental cases, see, for example, Robin Kundis Craig, *Removing the "Cloak of a Standing Inquiry": Pollution Regulation, Public Health, and Private Risk in the Injury-in-Fact Analysis*, 29 CARDOZO L. REV. 149, 176–83 (2007); Neil Gormley, *Standing in the Way of Cooperation: Citizen Standing and Compliance with Environmental Agreements*, 16 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 397, 398 (2010); Sunstein, *supra* note 81.

179 *See supra* note 132 and accompanying text.

180 *See, e.g.*, Section 7 of the April 2010 Draft Rights of Nature Ordinance of the Community Environmental Law Defense Fund (CELDF), *supra* note 167.

181 U.S. CONST., art. III, §2 provides: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects." Addressing the meaning of "cases" and "controversies," Chief Justice Earl Warren explained on behalf of the 8-1 majority in *Flast v. Cohen*, 392 U.S. 83, 95 (1968):

> In part, those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the "case and controversy" doctrine.

182 528 U.S. 167 (2000).

183 *See, e.g.*, the scholars cited in note 178, *supra*; *see also* Justin R. Pidot, *Global Warming in the Courts: An Overview of Current Litigation and Common Legal Issues* 3–4 (Georgetown Envtl. Law & Policy Inst. 2006), http://www.law.georgetown.edu/gelpi/current_research/documents/GlobalWarmingLit_CourtsReport.pdf (accessed June 25, 2011); Joseph M. Stancati, *Victims of Climate Change and Their Standing to Sue: Why the Northern District of California Got it Right*, 38 CASE W. RES. J. INT'L L. 687, 704–06 (2006–07).

184 For an attempt at enlightenment, see Weston (2012), *supra* note 99.

or both—but in either event inviting extra caution. When plaintiffs are members of future generations, the assumed complexities in dealing with an abstract group of individuals (if they be not persons under age 18) make this "standing" hurdle particularly challenging, as the very few known cases granting relief for intergenerational ecological harms would seem to affirm.[185]

On the other hand, an alternative, favorable scenario within the formal or official legal framework is possible, even within market economies. "Australia, New Zealand, Germany, Japan, France, Israel, The Philippines, the U.K., and Sweden," reports Professor Bach, "all provide examples of how different countries, with different legal systems, have inserted the rights of future generations into their governing law."[186] Not to be overlooked either, although yet to gain real traction, is a "posterity" proposal within the U.S. constitutional system for a new and independent doctrine of "equitable standing" for future generations based on the U.S. Constitution's Preamble: "We the People of the United States, in Order to form a more perfect Union, . . . to ourselves and our Posterity, do ordain . . ."[187]

On final analysis, however, given the worldwide paucity of cases on the ecological rights of future generations, it is not likely that the courts will be proactive in this realm. More likely they will invoke another non-justiciability doctrine known in the United States as the "political question doctrine," leaving it to the administrative and legislative branches to untangle the legal—and political—complexities involved.[188] And they probably will apply it to Nature's rights as well, which, under this doctrine, will most likely not be exempted if and when challenged.[189] Still, future generations and Mother Nature are at Law's gate, hoping that its gatekeepers are listening. At bottom it is a matter of moral/political values and choice.

Uncertainty of Future Damage

Assuming they have avoided or overcome the difficulties of surrogacy and legal standing, claimants espousing the ecological rights of future generations and Nature's rights must, like all who seek redress for alleged environmental damage, demonstrate environmental loss in fact and extent. Often—in the case of intergenerational rights claims especially—this requires having to estimate and prove the likelihood that future damage will occur, at once or cumulatively over time. And in this setting, decision-makers in the present must account for the probabilistic nature of consequences in the future, which can be especially difficult to establish for events having long-term impact. The likelihood that a given cost or benefit will materialize in the future is affected both by scientific

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185 See cases cited in note 129, *supra.*

186 Tracy Bach (Background Paper No. 7), *supra* note 98, at 17. For further evidence, see CONSTITUTIONAL RIGHTS, *supra* note 47.

187 *See* John Edward Davidson, *Tomorrow's Standing Today: How the Equitable Jurisdiction Clause of Article III, Section 2 Confers Standing upon Future Generations*, 28 COLUM. J. ENVTL. L. 185 (2003).

188 *See* Baker v. Carr, 369 U.S. 186 (1962) (outlining the political question doctrine). *But see* James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENV. U. L. REV. 919 (2008) (arguing that courts often misapply the political question doctrine in the context of environmental litigation).

189 While legal standing poses an obstacle for the Nature's Rights approach in the judiciary, it does not create the same difficulty for local legislative initiatives, which are gaining traction in municipalities like Pittsburg, Pennsylvania, and over two dozen others. Rights of Nature FAQ, Community Environmental Legal Defense Fund, http://celdf.org/rights-of-nation-faqs (accessed Aug.24, 2011).

uncertainty in projecting outcomes and by the possibility of unforeseen external influence. This difficulty is reflected in the aphorism, "a bird in the hand is worth two in the bush," which economists have taken to heart with the mathematical tool of discounting, the practice of reducing future costs and benefits by a set percentage so that they can be compared with the immediate consequences of a decision.[190]

A form of cost-benefit analysis, discounting has the effect of favoring short-term benefits at the expense of long-term costs. Such a trade-off is not only problematic for the future- damaged claimant, it often involves continued and widespread environmental degradation in exchange for temporary economic benefit. Not surprisingly, it works well for those who would champion corporate and state economic interests over individual and community environmental interests.

Discounting future environmental consequences has its own practical and moral difficulties.[191] Economists often cannot agree on an accurate discount rate for a given problem, and "the precise discount value chosen can result in very different regulatory choices."[192] In addition, some question how a discount rate could be set to account for projected costs that are "catastrophic" and "irreversible,"[193] as in the case of climate change, for example. Arguably more important, however, discounting provokes an ethical question of fairness because its cost-benefit tradeoffs privilege present market interests over future nonmarket interests. Both the intergenerational rights claimant and the Nature's rights claimant are disadvantaged by this supposedly neutral tool. As Cass Sunstein and Arden Rowell note with respect to the intergenerational rights claimant, but applicable to the Nature's rights claimant as well, "the moral obligations of current generations should be uncoupled from the question of discounting, because neither discounting nor refusing to discount is an effective way of ensuring that those obligations are fulfilled. The moral issues should be investigated directly, and they should be disentangled from the practice of discounting."[194] Accordingly, it may be argued, discounting is an inherently unsatisfactory tool for addressing the crucial and controversial issue of future damage uncertainty in environmental decision-making.[195]

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[190] The issue is complicated, as conveniently, briefly explained in WESTON & BACH, *supra* note 22, at 54:

> Economists believe that benefits received in the future generally have less value than those received in the present, because people have a "positive pure time preference," meaning that they prefer to receive benefits now rather than in the future. Economists also believe that because society will continue to become richer and consume more, benefits consumed now have greater marginal utility than those in the future, when any particular cost or benefit will constitute a smaller portion of society's total wealth. In addition, economists highlight the "opportunity cost" of spending resources now rather than later. The cost of regulatory action now theoretically means forgoing the opportunity to invest the money instead, let it grow in value, and then have greater wealth with which to purchase benefits in the future.

[191] *See* Joseph H. Guth, *Resolving the Paradoxes of Discounting, in* WESTON & BACH, *supra* note 22, Appendix A (CLI Background Paper No. 12).

[192] WESTON & BACH, *supra* note 22, at 55.

[193] *See* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS—ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 185-86 (2004); THOMAS O. MCGARITY, SIDNEY SHAPIRO, & DAVID BOLLIER, SOPHISTICATED SABOTAGE: THE INTELLECTUAL GAMES USED TO SUBVERT RESPONSIBLE REGULATION (2004).

[194] Cass R. Sunstein & Arden Rowell, *On Discounting Regulatory Benefits: Risk, Money, and Intergenerational Equity*, 74 U. CHI. L. REV. 171, 199 (2007).

[195] For detailed overviews of the deficiencies of discounting, see WESTON & BACH, *supra* note 22, at 55-59, and Guth, *supra* note 191; *see also* ACKERMAN & HEINZERLING, *supra* note 192.

There are, thus, no easy formulae or techniques that will reduce the problem of uncertainty to an unambiguous mathematical calculus. The uncertainty-of-future-damage argument in the cloak of discounting is in reality a methodological subterfuge, a diversionary "straw man."[196] Decision-makers should rely, rather, on meticulous investigation and analysis of future cost and benefits on a case-by-case basis, and strive to "relate environmental science with social values in the search for rational policies."[197]

Anthropocentrism

Ironically, critics have taken issue with the anthropocentrism that inheres in intergenerational rights and its absence in the case of Nature's rights. But this is not, as one might therefore think, a "lose-lose" situation.

In the case of the intergenerational rights approach, the fundamental underlying concern is whether *any* human rights approach (intergenerational ecological rights included) can honor sufficiently the interdependence of human and non-human life as well as the importance of natural processes and ecosystems given that all human rights are by definition anthropocentric. This complaint is most commonly made by those who profess "deep ecology," the philosophical outlook that has greatly influenced many green movements and activist organizations. But the concern is exaggerated, in our view. The anthropocentrism of intergenerational rights is scarcely egoistic at all, or in event far less human-centered than in the traditional human rights-based approach, focused as it largely is on persons unknown in potentially distant futures. Intergenerational rights is, at bottom, another way of thinking, talking, and acting on behalf of Mother Nature. It should not only be retained but, because of its strong moral pull, understood as one of the most conceptually cogent human rights approaches to environmental well-being currently available to us. It takes the long planetary view, not the all-too-familiar myopia of the self-indulgent present that has brought us such major environmental calamities as climate change and drastic species declines.

In the case of Nature's rights, the fundamental and obvious fact is that it is a *non*-anthropocentric ecological right, not a *human* right. This of course provokes the question whether any human right to a clean and healthy environment (substantive ones in particular) is of any real necessity or utility at all. Does the Nature's rights approach essentially mean the abandonment of human rights approaches to environmental protection and sustainaility altogether? The answer to this question, for the reasons just mentioned, must certainly be "no" when it comes to the intergenerational rights approach. The same must be said of the more traditional derivative, autonomous, and procedural approaches to environmental human rights insofar as they prove ecologically wise and legally feasible. Now is not the time to abandon any human rights strategy that, even if only periodically, can break through the walls of resistance and benefit the environment.

But the answer to the question can also be in the negative when it comes to the Nature's rights approach, provided that the right to environment in this setting is conceived in procedural terms—that is, as a human right *to represent* Mother Nature in the quest for a clean and healthy environment (not oneself or other members of the human species alone). Such a right is comparable

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196 For more on these issues, see MCGARITY, ET AL., *supra* note 192, especially at 67-102.

197 BRYAN G. NORTON, SUSTAINABILITY: A PHILOSOPHY OF ADAPTIVE ECOSYSTEM MANAGEMENT xii (2005).

to the procedural environmental rights that people have—access to information, public participation in environmental decision-making, and recourse to just remedies—and that, in recent years, have been much lauded as part of an "expansive right to environment" in recent years.[198] To invoke a procedural human right to represent Mother Nature is not, we hasten to add, mere word play. It gives to the Nature's rights approach a power that currently is not guaranteed by any legislative, administrative, or judicial modality anywhere, except, as previously noted, in Ecuador where it is enshrined in the country's new constitution[199] and in Bolivia's soon to be adopted "Law of Mother Earth"[200] (a legislative step not yet taken in Ecuador despite its constitutional amendment[201]). It is thus much needed. Contesting on human rights grounds unleashes the power, in theory at least, to assert maximum claims on society, juridically more elevated than commonplace "standards," "laws," or mere "policy choices" which, in contrast to "human rights," are subject to everyday revision and rescission for lack of such ordination.[202]

This truth applies to the intergenerational rights approach as well. Indeed, despite their limitations, it applies to all approaches to the right to a clean and healthy environment, the traditional ones included. For all the hurdles that human rights approach to a clean, healthy, ecologically balanced and sustainable environment must surmount to succeed, it remains a powerful way—arguably *the* most powerful way—to achieve environmental (and social) well-being via legal process, or perhaps in any other way. No other approach challenges the official (public or private) status quo as human rights advocacy does (certainly no other that is readily accessible at the grass roots). And no other approach provides the gateway to a socially constructed paradigm of ecological governance based on principles of respect and collective responsibility, without which Planet Earth cannot survive.[203] Human evolution is determined as much by socio-cultural beliefs and behaviors (memes) as it is of biological factors (genes). The inconvenient truth is that "smart growth, green buildings, hybrid vehicles, lifecycle analysis, internalizing the externalities, a triple bottom-line, [and other so-called] improvements in economic and technological efficiency" are alone insufficient.[204] An alternative paradigm that recalibrates the law of humans with the laws of nature is required.

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[198] *See supra* text accompanying notes 58-65.

[199] *See supra* text accompanying notes 132-37.

[200] *See supra* note 150.

[201] *Id.*

[202] For further discussion of the advantages of a human rights approach to ecological well-being, see *infra* Section III.C.

[203] For elaboration on these themes, see *infra* Section III.C.3.

[204] Paraphrasing and quoting William E. Rees, *Past the Tipping Point? The Coming Post-Sustainability World,* http://globalecointegrity.net/pdf/samos/Rees.pdf (accessed June 25, 2011).

C. Toward a "Copernican Revolution" in Ecological Governance

We arrive, then, at the following seven grand conclusions:

- Planet Earth and all who inhabit it are today confronted with a crisis unparalleled since the dinosaurs;

- The dominant economic, political, and legal institutions—and their norms and procedures—are principally responsible for this state of affairs, having not only failed to guard against this crisis, but contributed to it;

- A human rights approach to this dilemma has the potential like no other to help reverse these perilous arrangements in a manner that is beneficial to both nature and humankind;

- All obstacles notwithstanding, all manner of human rights approaches to a clean and healthy environment should therefore be utilized to the extent that the approaches are legally feasible and—especially important—ecologically sound (i.e., do not over-privilege the human as against non-human ecological interests);

- While traditional derivative and autonomous human-rights approaches to the right to environment, and expanded procedural human-rights approaches as well, should be pursued, the intergenerational rights and Nature's rights approaches may be seen as preferable—provided the former strives to balance the human interest with Nature's interest and the latter Nature's interest with the human interest;

- The non-anthropocentric thrust of the intergenerational and Nature's rights approaches (implicitly and explicitly, respectively) offer the best inherent capacity to ensure the short- and long-term interests of the natural world—and therefore also the best potential to challenge effectively the established governing order;

- This strategy advances an ecological governance framework premised on the belief that human beings are but temporary lessees on our "lonely planet," therefore are duty-bound to ensure its continued vitality, diversity, and sustainability for the next tenants, and consequently rejects the notion, at every level from local to global, that the State and Market combination responsible for our ecological and consequent social devastation should have a monopoly on such governance.

Of course, barring some game-changing ecological disaster, huge economic and political forces will continue to resist these legal initiatives, especially the most innovative. This opposition is not just political, but historical and philosophical, and therefore has very deep roots.

Famed biologist E.O. Wilson takes a long view: "According to the archeological evidence," he writes, "we strayed from Nature with the beginning of civilization roughly ten thousand years ago. That quantum leap beguiled us with an illusion of freedom from the world that had given us birth. . . ." He adds: "A wiser intelligence might now truthfully say of us at this point: here is a chimera, a new and very odd species come shambling into our universe, a mix of Stone Age emotion, medieval self-

image, and godlike technology." He concludes: "The combination makes the species unresponsive to the forces that count most for its own long-term survival."[205]

A more prosaic, shorter-range view is more common.[206] Since the development of economics as an autonomous discipline in the 18th Century, the dominant wisdom has been that issues of distributive justice, in contrast to commutative justice,[207] are not amenable to scientific or empirical measurement and therefore are best left to political, philosophical, and other dominions of values discourse. This credo first emerged, as previously noted, with the reductionist, quantitative, and individualistic thought that marked the Scientific Revolution and Reformation of the 16th and 17th centuries, and these ideas greatly influenced modern Western jurisprudence. To this day, that jurisprudence tends to perceive issues of distributive justice—e.g., socioeconomic and environmental rights—as a matter of politics to be dealt with, *if at all*, by the administrative and legislative institutions of government. This conviction is abundantly evident in the conservative-leaning rulings of the U.S. judiciary in recent years. Observes international and comparative law scholar Ugo Mattei:

> The birth of the Welfare State in the early twentieth century was . . . considered as an *exceptional intervention* by regulation (by means of fiscal policy) into the market order, with the specific aim to guarantee some social justice to the weaker members of society. In the West, since then, social justice was never able to capture again the core of rights discourse, and consequently has remained constantly at the mercy of fiscal crisis: no money, no social rights![208]

Ecological rights as social rights have befallen the same fate. Add to this environmental ignorance, the bewildering specialization and complexity of the natural sciences, and grossly inadequate science education in crucial societies, and it becomes clear why the task of righting our ecological (and social) wrongs, of ensuring a viable right to environment, and providing a more responsible form of ecological governance, can seem overwhelmingly difficult if not impossible.

But we cannot—must not—falter. It is not an option to blame antiquated forms of economics and ecological misthought (and consequent misdeed) which are perpetuated by the self-interests of the contemporary State and Market. What is needed is "a Copernican revolution in ethics"[209]—economic, political, legal, and otherwise—and a practical plan to deploy such ideas in the here and now. We are talking, dear reader, about saving the only planetary home we know. And in this regard we are at one with Professor Wilson: "We took a wrong turn when we launched the Neolithic revolution. We have been trying ever since to ascend *from Nature* instead of *to Nature*. It is

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[205] E. O. Wilson, *The Fate of Creation Is the Fate of Humanity*, *in* MORAL GROUND, *supra* note 105, at 21.

[206] *See, e.g.*, CULLINAN, *supra* note 20, at pt. 2; Ugo Mattei, *The State, the Market, and Some Preliminary Questions about the Commons*, http://works.bepress.com/ugo_mattei/40 (accessed June 25, 2011).

[207] I.e., the fundamental fairness that is owed in all private agreements and exchanges between individuals and groups, especially in the conduct of business transactions.

[208] Mattei, *supra* note 206, at 1 (English version) (emphasis added).

[209] Kate Rawles, *A Copernican Revolution in Ethics*, *in* MORAL GROUND, *supra* note 108, at 88.

not too late for us to come around, without losing the quality of life already gained, in order to receive the deeply fulfilling beneficence of humanity's natural heritage."[210]

But there is no time to waste. The ultimate "tipping point," the overwhelming majority of the climate scientists estimate, is but 40-50 years off—not even a lifetime for the majority of the world's current population. True, we do not know precisely how much and how fast our planet will heat up during this century. It is difficult to make exact predictions about how long greenhouse gas emissions will continue to increase and how exactly Earth's interdependent ecosystems will react to warmer temperatures. However, we do know that Earth's temperature has increased by 6□C in the last 100 years and that, barring major human intervention, it is destined to get dangerously warmer—from 2°C to 6°C—within the coming *50* years. And we know, too, what T. S. Eliot knew as long ago as 1939. "We are being made aware," he wrote, "that the organization of society on the principle of private profit, as well as public destruction, is leading to both the deformation of humanity by unregulated industrialism, and to the exhaustion of natural resources, and that a good deal of our material progress is a progress for which succeeding generations may have to pay dearly."[211] It is already 72 years later.

We now turn, therefore, to the necessary task of trying to make up for lost time. In the ensuing sections, we explore several trends that already are pointing to a new paradigm of ecological governance (Section III); the history and rediscovery of the Commons as a compelling governance template (Section IV); and the imagining of a rights-based legal architecture that could support the Commons from the most local to most global precincts (Section V). We close with a Coda (Section VI) that suggests how we might get from "here" to "there."

[210] Wilson, *supra* note 205, at 24-25.

[211] T.S. Eliot, The Idea of a Christian Society page 62 (1940).