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Recommended Citation

Victor B. Flatt, *Too Big to Jail or Too Abstract (or Rich?) to Care*, 72 Md. L. Rev. 1345 (2013)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol72/iss4/16>

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TOO BIG TO JAIL OR TOO ABSTRACT (OR RICH?) TO CARE

VICTOR B. FLATT*

I. INTRODUCTION

For much of human-recorded history, Thomas Hobbes's observation that the life of man is "nasty, brutish, and short" has seemed true.¹ For example, new research indicates that certain hunter-gatherer societies maintained a relatively abundant life with little work, but population numbers were kept down by savage warfare.² By Hobbes's time, agriculture had been invented, supporting larger populations, but the ability to co-opt brute-force work, such as agriculture, meant that many people still had what we would consider very difficult lives.³ From the latter parts of the Industrial Revolution to the post-World War II era, however, a larger segment of society has enjoyed middle-class, prosperous lifestyles.⁴ It is in this last few hundred years of human existence that what we consider the "common law" comes into play.⁵ It is important to ground our discussion in this

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1. See THOMAS HOBBS, *LEVIATHAN* 63–66 (J.M. Dent & Sons Ltd. 1987) (1651) (describing the natural state of mankind).

2. Cf. Victor B. Flatt, *This Land Is Your Land (Our Right to the Environment)*, 107 W. VA. L. REV. 1, 12–14 (2004) (explaining "the synergistic capacity of members in a human pack to produce more food per person when acting together than by acting alone," but noting that there was "fierce warfare over the best fishing, hunting, and gathering areas[, making] life in pre-history . . . a zero sum game" (footnotes omitted)).

3. Cf. *id.* at 16–17 ("During the development of much of the common law, ancient protections for chieftains and/or royalty . . . slowly expanded to "commoners," to so-called yeoman farmers . . .").

4. See June Carbone, *Unpacking Inequality and Class: Family, Gender, and the Reconstruction of Class Barriers*, 45 NEW ENG. L. REV. 527, 538, 542 (2011) ("Class consciousness increased with industrialization. Yet, labor tensions between industrialists and unions may have obscured the more dramatic change taking place in American families during the industrial age, namely the reordering of family life to encourage investment in an expanding middle class." (footnote omitted)).

5. See Flatt, *supra* note 2, at 6, 11–18 ("[W]hat we consider our historic or common law rights in torts and property are critical responses to our societal and human evolution . . ." (footnote omitted)).

common law, since before that period, enforcement, whether environmental or otherwise, made little sense.⁶ There was scarce rule of law, and then only for the very wealthy and propertied, which was just a small subset of the human population.⁷ Homicide rates in Europe during the Middle Ages, for example, were thirty times higher than they are today.⁸

Over time, the protections of the law were extended to more and more people,⁹ and by the end of the nineteenth century, the rule of the common law was complete in the Anglo-American system.¹⁰ Though governed by civil law, many other countries' legal systems reflect this collection of rights-based law governing the interactions of individuals with each other.¹¹ Under a classical theory of common law, then, our courts of law could "apply[] a complete, coherent, and formal body of law, police the boundaries of legislative authority and define the ground rules for interaction among private individuals."¹²

Another important strand of human history that in turn engaged with and helped create the legal system we have today is the human propensity for groups and connection. Traced to an evolutionary advantage, human group activity may be one of the most important el-

6. See *id.* at 12, 21 (suggesting that "[t]he world into which humans evolved must have been a very insecure place," in part because "there was less interest in some environmental amenities (such as wilderness or vistas) in older times because of other social concerns" (footnote omitted)).

7. See Christopher L. Blakesley, *Ruminations on Terrorism & Anti-Terrorism Law & Literature*, 57 U. MIAMI L. REV. 1041, 1069–70 (2003) (discussing the oppression of "the people," which represented the "law" in France during the Middle Ages); Ricardo Gosalbo-Bono, *The Significance of the Rule of Law and Its Implications for the European Union and the United States*, 72 U. PITT. L. REV. 229, 237 (2010) ("The Middle Ages were a long and tumultuous period and the citizens during this time were not always law-abiding. Indeed, feuds were legal in the Middle Ages and law often regulated less and left more liberty than our present laws.").

8. Steven Pinker, *The Decline of Violence: Taming the Devil Within Us*, 478 NATURE 309, 309 (2011).

9. Flatt, *supra* note 2, at 16–17.

10. See, e.g., Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 397, 405 (2004) (explaining that the "systematization of American law" that occurred at the end of the nineteenth century).

11. See, e.g., Bret Boyce, *Property as a Natural Right and as a Conventional Right in Constitutional Law*, 29 LOY. L.A. INT'L & COMP. L. REV. 201, 203, 274 (2007) (noting that "eighteenth-century guarantees of property rights reflected distinct but largely parallel rhetoric of property as an absolute right in both civil law and common law traditions," but that state courts in the United States "drew upon the natural rights theories of civil law theorists such as Grotius and Pufendorf" to develop a natural rights jurisprudence for the protection of property rights).

12. Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 4 (2004).

ements of humanity.¹³ Fostering such group cooperation in turn implicates important social roles and bonds that members of the group are expected to follow.¹⁴ Failure to do so could lead to punishment, including exclusion from the group, which has traditionally been a serious punishment.¹⁵

When we combine the basic human needs for community and connection with the emergence of a more equitable society, we arrive at the system of law and society with which we are familiar today—a society where the law grants everyone under its jurisdiction particular “rights” and governs the interaction and potential collision of these rights.¹⁶ It is within the context of this historical framework that we place our story and questions of *Too Big to Jail*.

Why is it that we do not, in the eyes of many, have effective enforcement of important legal principles governing our financial system and our environment, health, and safety? I posit that at least in the environmental realm, the impacts of environmental harm have come to seem less immediate and threatening, and therefore are seen as less of a threat to the social order.¹⁷ In such circumstances, the public zeal, which is expressed in calls for better laws, better enforcement, and public pressure, generally has waned. As Paul Stern observed in his review of studies concerning environmental attitudes, community norms and expectations are one of the factors associated with “environmentally significant behavior.”¹⁸

13. See Flatt, *supra* note 2, at 13 (“All evidence indicates that humans lived together in small societies, family groups, or tribes. . . . Humans are, and from available scientific evidence, always have been, pack animals.” (footnotes omitted)).

14. See, e.g., Carol Rose, *Expanding the Choices for the Global Commons: Comparing New-Fangled Tradable Allowance Schemes to Old Fashioned Common Property Regimes*, 10 DUKE ENVTL. L. & POL’Y F. 45, 49 (1999) (“Critically important [to the development of community regimes for managing common property] are opportunities for mutual monitoring and social leverage; small group size helps to produce these opportunities . . .”).

15. See, e.g., Clare E. Lyon, Note, *Alternative Methods for Sentencing Youthful Offenders: Using Traditional Tribal Methods as a Model*, 4 AVE MARIA L. REV. 211, 219–23 (2006) (explaining that North American Indian tribes did, and still do, use banishment as punishment for “transgress[ing] social boundaries”).

16. See, e.g., Flatt, *supra* note 2, at 25 (“The law is quite clear in what rights an individual has in property and how far that right extends if there is a conflict. . . . The contours of the right are definitive and do not depend on a balancing of societal costs and benefits. . . . The only exception is when this might bump up against a right historically recognized as more important, such as the protection of life . . .”).

17. See *infra* Part II.B.

18. Paul C. Stern, *Toward a Coherent Theory of Environmentally Significant Behavior*, 56 J. OF SOC. ISSUES 407, 415–17 (2007) (discussing contextual forces, which include interpersonal influences and community expectations, as causal variables of environmentally significant behavior).

Related to this notion of the impact of community norms on environmental behavior, and perhaps even more important, is the erosion of the equitable idea of society, which has been happening in the United States since at least the 1980s.¹⁹ This erosion has allowed certain segments of society to separate from the shorter- and longer-term environmental harms that we now face. In other words, our “community,” which was essentially the majority of the public when the major U.S. environmental laws were passed in the 1970s, is now fragmented into smaller communities and interest groups with newly outsized conceptions of the role of the individual.²⁰

Part II of this Article will examine the experience of environmental harm through the public lens in the 1970s and how this has changed from the 1980s through today. Part III of this Article will analyze the re-emergence of income inequality in the 1970s and how this in turn impacted the societal conceptualization of protection from harm, in particular from environmental, health, and safety harms. Finally, Part IV of this Article will examine the implications of this societal conceptualization of protection from harm for how environmental protection and enforcement might be improved, or what will have to change for that to occur.

Though I will attempt to examine historical facts, societal reactions to those facts, and changes in social policy, I am not a trained historian, economist, or anthropologist. Nevertheless, my own observations have convinced me that these social science factors are incredibly important to how we make and enforce environmental law. In this Article, I will offer my own observations about what this can mean for the law, and hope that others will be able to further examine such issues in this context.

I am convinced that it will only be through a reconceptualization of the true environmental harms that we still face and a rethinking of values governing our social contract, that we may muster public zeal, which in turn will backstop strong enforcement to protect our environment and public health.²¹ As famously noted by Jean Jacques Rousseau: “The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before.”²² Unless

19. *See infra* Part III.

20. *See infra* Part III.

21. *See infra* Part IV.

22. JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 11–12 (E. P. Dutton & Co., Inc. 1950) (1762) (internal quotations marks omitted).

we find some social compact and some social construct for enforcing our environmental values for all, then at least for some, a “nasty, brutish and short” life will again become all too common.

II. ENVIRONMENTAL PERCEPTIONS: THEN AND NOW

A. *The Beginning: 1962–1978*

The beginning of the modern environmental movement is often traced to the passage of the National Environmental Policy Act (“NEPA”) of 1969²³ and the passage of the Clean Air Amendments of 1970.²⁴ Certainly the flurry of laws that included the Clean Water Act,²⁵ the Endangered Species Act,²⁶ the Resource Conservation and Recovery Act,²⁷ and the Comprehensive Environmental Response, Compensation, and Liability Act²⁸ represents a unique point in time in American environmental history.²⁹ In the 1970s, “[f]rustrated by the nation’s seeming inability to control the fouling of our water, air, and land, Congress cast aside prior, less ambitious regulatory approaches and passed a series of pollution statutes that were sweeping in their scope and uncompromising in their rigor.”³⁰

What was going on right before, during, and right after the passage of these laws? In 1962, Rachel Carson published the book *Silent Spring*,³¹ which eloquently combined the everyday experience of hearing songbirds with the claim that insecticides were weakening the egg structures of these very birds such that they could no longer survive

23. Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321, 4331–4335, 4341–4347 (2006)).

24. Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7407–7414, 7525, 7541, 7571–7574, 7603–7609, 7641–7642 (2006)); see CRAIG N. JOHNSTON, WILLIAM F. FUNK & VICTOR B. FLATT, *LEGAL PROTECTION OF THE ENVIRONMENT* 5 (3d ed. 2010) (“The year 1970 was a watershed in environmental law. On January 1, President Nixon signed into law the National Environmental Policy Act; . . . and on the last day of the year, the Clean Air Act became law.”).

25. Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified as amended at 33 U.S.C. §§ 1294–1297, 1281a (2006)).

26. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531–1544 (2006)).

27. Pub. L. No. 94-580, 90 Stat. 2795 (1976).

28. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 26 U.S.C. §§ 4611–4612, 4661–4662 and 42 U.S.C. §§ 6911a, 9601–9628, 9651–9652, 9654–9675 (2006)).

29. See William L. Andreen, *Of Fables and Federalism: A Re-Examination of the Historical Rationale for Federal Environmental Laws*, 42 ENVTL. L. 627, 628–29, 633–34 (2012) (“The decade of the 1970s witnessed a veritable explosion of environmental law.”).

30. *Id.* at 628.

31. RACHEL CARSON, *SILENT SPRING* (First Mariner Books 2002) (1962).

and be part of our lives.³² According to Lorus and Margery Milne's contemporaneous book review in *The New York Times*, *Silent Spring* was a call to the public to get rid of poisons that will destroy life on earth.³³ The reviewers noted the importance of Carson's book, the huge reaction from the public when part of it was published in *The New Yorker*, and, in a foretaste of the future, the backlash from certain industries.³⁴

In *Silent Spring*, Carson wrote that every human is subjected to dangerous chemicals for the sake of some perceived public good.³⁵ The programs using these chemicals often had extremely negative side effects, such as the anti-gypsy moth programs that led to the death of numerous fish, crustaceans, and birds.³⁶ According to the Milnes' review, Carson's book clearly demonstrated that the benefits of the chemicals we used did not outweigh their disastrous costs, once these costs were understood.³⁷

Then, in 1969, seven years after the publication of Carson's book, the Cuyahoga River in Cleveland, Ohio caught fire.³⁸ An oil slick on the water burned intensely below two railroad bridges spanning the river.³⁹ As described in the article *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, a fire on the Cuyahoga was nothing new; in fact, the river had reportedly burned as early as 1868.⁴⁰ As a consequence of the economic value of a river flowing through a major city, the Cuyahoga River had been a convenient and free sewer for

32. See generally *id.* at 3 (attempting to explain “[w]hat has already silenced the voices of spring in countless towns in America”).

33. Lorus Milne & Margery Milne, *There's Poison All Around Us Now*, N.Y. TIMES (Sept. 23, 1962), <http://www.nytimes.com/books/97/10/05/reviews/carson-spring.html>.

34. See *id.* (discussing how, with the publication of parts of *Silent Spring* in *The New Yorker*, “a gentle author was transformed into a controversial one,” and quoting an anonymous source from the Food and Drug Administration who stated that Carson's book was “one-sided”).

35. See CARSON, *supra* note 31, at 15–16 (expressing concern that “every human being is now subjected to contact with dangerous chemicals” due to “the sudden rise and prodigious growth of an industry for the production of man-made or synthetic chemicals with insecticidal properties”).

36. See *id.* at 156–61 (“The gypsy moth program shows what a vast amount of damage can be done when reckless large-scale treatment is substituted for local and moderate control.”); Milne & Milne, *supra* note 33 (reporting on Carson's observation that “gypsy-moth campaigns . . . killed fish, crabs and birds as well as some gypsy moths”).

37. See Milne & Milne, *supra* note 33 (“[Carson's] book is a cry to the reading public to help ban private and public programs which by use of poisons will end by destroying life on earth.”).

38. Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L. REV. 89, 89–90 (2002).

39. *Id.* at 96–97.

40. *Id.* at 95, 101 (explaining that “the 1969 fire was less severe than prior Cuyahoga conflagrations”).

the industry of the entire city for decades.⁴¹ According to one account, the river was filled with so much oil and other pollution that it was completely devoid of life.⁴² It should be noted that most major surface waters at this time, and for decades prior, were conceived of as little more than refuse dumps.⁴³

But changes were afoot. Unlike prior incidents, “[t]he [Cuyahoga River] fire attracted national media attention.”⁴⁴ The image of the flaming river was burned into the nation’s consciousness and became “a symbol of the earth in need of repair.”⁴⁵ This image also became one of the driving forces behind the 1972 Federal Water Pollution Control Act Amendments,⁴⁶ and it “endures as a symbol of rampant environmental despoliation prior to the enactment of federal environmental laws.”⁴⁷

The movement ignited by the Cuyahoga fire was stoked by a 1969 oil spill off the coast of Santa Barbara, California. On January 28th of that year, a Unocal oil rig, located six miles off the California coast, “spilled 3 million gallons of oil into the [Pacific Ocean].”⁴⁸ A high-pressure explosion on the rig caused cracks along the sea floor around a 3,500-foot-deep well.⁴⁹ Oil spilled into the ocean for eleven days as workers desperately tried to contain the spill.⁵⁰ Wind and ocean currents, however, spread the oil over thirty-five miles of the Santa Barbara coastline, coating the land with up to six inches of oil and leaving thousands of dead seabirds along the shoreline, as well as

41. *Cf. id.* (“Water pollution in the 1960s was a major environmental problem throughout the nation. Many rivers were declared industrial streams, used predominantly for commercial purposes and the disposal of industrial waste.”).

42. *Id.* at 97 (describing coverage of the fire in *Time* magazine).

43. James Salzman, *Why Rivers No Longer Burn*, SLATE (Dec. 10, 2012, 5:20 AM), http://www.slate.com/articles/health_and_science/science/2012/12/clean_water_act_40th_anniversary_the_greatest_success_in_environmental_law.html (noting that “discharging raw sewage and pollution into our harbors and rivers has been common practice for most of the nation’s history”).

44. Adler, *supra* note 38, at 90, 104 (“Compared to the 1952 inferno, the 1969 fire was nothing special, a freak accident that merited little local concern, but sparked national attention because of increased environmental consciousness throughout the country.” (footnotes omitted)).

45. *Id.* at 90–91.

46. Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251–1263, 1265, 1281–1292, 1311–1326, 1328, 1341–1345, 1361–1376 (2006)).

47. Adler, *supra* note 38, at 91 & n.10, 92.

48. Dan Duray, *The Santa Barbara Oil Spill of 1969: A Lesson In Offshore Drilling*, HUFFINGTON POST (July 22, 2008, 5:12 AM), http://www.huffingtonpost.com/2008/07/14/the-santa-barbara-oil-spi_n_112605.html.

49. Keith C. Clarke & Jeffrey J. Hemphill, *The Santa Barbara Oil Spill: A Retrospective*, 64 Y.B. ASS’N PAC. COAST GEOGRAPHERS 157, 157 (2002), available at <http://www.geog.ucsb.edu/~kclarke/Papers/SBOilSpill1969.pdf>.

50. *Id.* at 158.

destroying kelp forests and displacing endangered birds.⁵¹ This event influenced the movement toward environmental protection that had gained strength from the Cuyahoga River fire.⁵²

Major environmental events in the 1960s and 1970s were not limited to water pollution. Starting in the mid-twentieth century, pollution from automobiles noticeably changed the sky in Southern California,⁵³ and by the early 1970s, there were air pollution emergencies in Birmingham, Alabama.⁵⁴

In the mid-twentieth century, Southern California, specifically Los Angeles, became associated with smog that covered the entire city.⁵⁵ Of course, true “smog,” as its name suggests, is created by a mixture of smoke and fog.⁵⁶ Traditional eastern smog is composed of sulfur dioxides created from burning coal.⁵⁷ California smog was created from automobile exhaust; hydrocarbons from other forms of pollution mixed with nitrogen oxides from automobile exhaust in the atmosphere.⁵⁸ Large amounts of sunlight resulted in these chemicals

51. *Id.* at 158–59.

52. *See, e.g.*, Adler, *supra* note 38, at 91 (“Following on the heels of . . . high-profile events such as the oil spill off the coast of Santa Barbara, the 1969 Cuyahoga fire spurred efforts to enact sweeping federal environmental legislation.”); Clarke & Hemphill, *supra* note 49, at 160 (noting that U.S. Secretary of the Interior Walter J. Hickel and President Richard Nixon “personally viewed the [Santa Barbara oil spill] damage” and arguing that this “undoubtedly influenced their opinions regarding . . . the newly emerging environmentally conscious political movement”).

53. Nathan Masters, *L.A.’s Smoggy Past, in Photos*, KCET SOCAL FOCUS (Mar. 17, 2011, 3:00 PM), http://www.kcet.org/updaily/socal_focus/history/los-angeles-smoggy-past-photos-31321.html (writing that “[a]lthough a pristine view of the Hollywood sign may still elude Angelenos on most days, air pollution rarely cripples the city in present times as it did in the mid-twentieth century” and reporting that “[i]n the 1950s, automobile exhaust became a prime suspect” for the cause of the smog).

54. *See* Thomas Spencer, *An Old Cloud of Polluted Air Lifts from Birmingham’s Shoulders*, BIRMINGHAM NEWS (Nov. 13, 2011, 6:15 AM), http://blog.al.com/spotnews/2011/11/an_old_cloud_of_polluted_air_1.html (noting that at nearly 2:00 AM on November 18, 1971, a federal judge in Birmingham “became the first judge in the country to invoke the emergency powers section of the Clean Air Act”).

55. Masters, *supra* note 53; S. COAST AIR QUALITY MGMT. DIST., *THE SOUTHLAND’S WAR ON SMOG: FIFTY YEARS OF PROGRESS TOWARD CLEAN AIR* (1997), *available at* <http://www.aqmd.gov/news1/Archives/History/marchcov.html> (“On July 26, 1943, in the midst of World War II, Los Angeles was attacked—not by a foreign enemy, but a domestic one—smog.”).

56. S. COAST AIR QUALITY MGMT. DIST., *supra* note 55.

57. *See id.* (“Los Angeles smog was unlike air pollution in eastern U.S. cities, where it was chiefly composed of sulfur dioxides from burning coal and heavy oil.”).

58. *See id.* (reporting on the findings of Arie J. Haagen-Smit, a Dutch chemist, who determined in 1950 that the air pollution in California was the result of ozone created in the atmosphere from a “combin[ation of] hydrocarbons from oil refineries and the partially unburned exhaust of automobiles with nitrogen oxides, a combustion byproduct”).

forming ozone, the primary molecule in California smog.⁵⁹ In the 1950s, this smog resulted in an odorous haze over the city, causing eye irritation in humans and widespread crop damage.⁶⁰ One of the most noticeable impacts of this smog was the rapid deterioration of rubber tires on cars.⁶¹

Unlike California, with its ozone-based smog, 1970s Pittsburgh saw more traditional coal-oriented air pollution. Pittsburgh, which was one of the primary coal-processing cities in the nation as well as a famous steel-producing town, was so polluted that the city often had “remarkably poor visibility and dark days.”⁶² Environmental groups fought to control this pollution in the 1970s, with some impact, but the air did not really change until the iron and steel industries collapsed in the 1980s.⁶³ Similarly, Birmingham, Alabama had heavy coal and steel industries, which led to extreme levels of pollution. The pollution in Birmingham was so severe that there were advertisements for moving out of the city (called the “smoke zone”) and into the hills (called the “o-zone”).⁶⁴ Of course, air quality was not much better in the hills.⁶⁵

In 1978, “multicolored basement walls” and “purple lawns” signaled problems in the Love Canal neighborhood of upstate New York.⁶⁶ Starting in 1942, the Hooker Chemical Company began to

59. *Id.* (noting “that ozone, the primary ingredient in [California] smog, was . . . [d]riven by sunlight[, specifically] a photochemical reaction”).

60. *Id.*; A. J. Haagen-Smit, *Chemistry and Physiology of Los Angeles Smog*, 44 *INDUS. & ENG'G CHEMISTRY* 1342, 1342–45 (1952), available at http://web.gps.caltech.edu/classes/ese172/haagen_smit_1952.pdf.

61. S. COAST AIR QUALITY MGMT. DIST., *supra* note 55 (“After tire manufacturers noticed that rubber deteriorated faster in Los Angeles than other areas of the country, researchers at Cal Tech showed air pollution to be the cause. They found that rubber exposed to high smog levels cracked in just seven minutes.”); Haagen-Smit, *supra* note 60, at 1342–43, 1345–46.

62. Cliff I. Davidson, *Air Pollution in Pittsburgh: A Historical Perspective*, 29 *J. AIR POLLUTION CONTROL ASS'N* 1035, 1035 (1979).

63. See Joel A. Tarr, *Pittsburgh's Environmental History*, [PITTSBURGHGREENSTORY.ORG](http://www.pittsburghgreenstory.org/html/history.html), <http://www.pittsburghgreenstory.org/html/history.html> (last visited Mar. 14, 2013) (“In the 1970s and 1980s, however, the efforts of the advocacy organization Group Against Smoke and Pollution (“GASP”), working to encourage local enforcement of the Clean Air Act, brought about some improvement. But perhaps the most substantial air quality improvements came because of the collapse of the iron and steel industry in the 1980s.”).

64. Steve Chiotakis, *Birmingham Air Quality: A History*, *WBHM PUBLIC RADIO* (Jun. 16, 2008), http://www.wbhm.org/News/2008/Air_Quality_History.html.

65. See *id.* (reporting that “it’s a misnomer that the ridges around Birmingham keep the bad air in one place” and that the “air quality [in the mountains] can be just as bad as it is in downtown Birmingham”).

66. MARC K. LANDY, MARC J. ROBERTS & STEPHEN R. THOMAS, *THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS: FROM NIXON TO CLINTON* 134 (1994).

dispose of chemical waste in this small neighborhood of Niagara Falls, New York.⁶⁷ After the company was finished with the dumping in Love Canal, the canal was covered and eventually sold to the Niagara Falls School Board, while the surrounding land was used for housing developments.⁶⁸ Chemical waste leaked into the soil and groundwater, raising concerns about increased health risks among the residents of Love Canal.⁶⁹ Residents began to report odorous black sludge seeping into their homes; grass and shrubs were dying; and a stench was settling over the town.⁷⁰ On August 2, 1978, the New York State Health Commissioner declared a public health emergency, and Love Canal came to the forefront of environmental issues in the United States.⁷¹

In addition to chemical pollution, the decades of the 1960s and 1970s also witnessed large-scale litter, with trash appearing in places not seen before. Primarily the result of newly-invented temporary containers and increased travel, such litter despoiled many settings.⁷² Though it did not result in specific federal laws, the litter did spur memorable and effective education campaigns. For example, “Lady Bird Johnson’s ‘Keep America Beautiful’ campaign of the early 1960s culminat[ed] in the White House Conference on Scenic Beauty in

67. *Id.* (noting that between 1942 and 1952, Hooker Chemical “disposed of more than 21,000 tons of chemical waste” in Love Canal).

68. *Id.* (“[A]fter the canal became full, it was covered with earth and clay and deeded over to the Niagara Falls School Board for one dollar. . . . The vacant land along the canal was developed into modest two- and three-bedroom homes . . .”).

69. See Lenore J. Gensburg et al., *Cancer Incidence Among Former Love Canal Residents*, 117 ENVTL. HEALTH PERSPECTIVES 1265, 1265 (2009) (“In 1976–1977, heavy precipitation led to a rise in the water table and preceded the surfacing of some of the buried waste. Subsequent environmental sampling in homes adjacent to the waste site detected numerous volatile organic chemicals in basement air, suggesting a possible serious health threat via inhalation.” (citations omitted)); *id.* at 1270 (reporting “elevations of bladder and kidney cancers [among former Love Canal residents,] especially . . . among residents potentially exposed as children”). But see LANDY, ROBERTS & THOMAS, *supra* note 66, at 133 (“[N]o reliable epidemiological studies showed that [Love Canal] residents were subject to greater health risks than the population at large.”).

70. Randy Alfred, *Nov. 21, 1968: Love Canal Calamity Surfaces*, WIRED (Nov. 21, 2008), http://www.wired.com/science/discoveries/news/2008/11/dayintech_1121#.

71. LANDY, ROBERTS & THOMAS, *supra* note 66, at 133, 135 (observing that in 1980, two years after Love Canal gained worldwide media attention, Congress passed “legislation providing for the cleanup of abandoned hazardous waste dumps and spills of toxic chemicals”).

72. Cf. Ginger Strand, *The Crying Indian*, ORION, Nov.–Dec. 2008, available at <http://www.orionmagazine.org/index.php/articles/article/3642/> (“[T]he beer industry, . . . began turning to new ‘one-way’ or disposable bottles. By the end of the 1950s, half the nation’s beer would be in throwaway containers. Many of them were ending up as roadside trash.”).

May 1965.”⁷³ On Earth Day in 1971, Keep America Beautiful launched a famous public service announcement (“PSA”) featuring a Native American man, commonly referred to as the “Crying Indian.”⁷⁴ In the PSA, a Native American man paddles a canoe down a pristine river and into a city harbor.⁷⁵ The primeval nature of the river is juxtaposed with the polluted industry in the harbor. As the man pulls his canoe onto the shore, the narrator says, “Some people have a deep, abiding respect for the natural beauty that was once this country, and some people don’t.”⁷⁶ Then, a bag of trash is thrown from a passing car and lands at the man’s feet, as a solitary tear rolls down his cheek.⁷⁷

A less solemn—but just as famous—commercial came out of Tennessee at around the same time. The “Tennessee Trash” commercial features a man driving through abundant litter, while he contributes to the trash around him.⁷⁸ Eventually, the bumper falls off of his rusted Corvair to reveal a license plate that reads “Trash.”⁷⁹ Throughout the commercial, a jovial song is playing, with lyrics such as, “Lord, there ain’t no lower class than Tennessee Trash.”⁸⁰ The Crying Indian and the Tennessee Trash man became household names, showing the dire situation caused by the large amounts of litter in the United States.⁸¹

In retrospect, these commercials and images also seem to reflect their time because of the use of what I call “equality” images—images where “black” and “white” are equal and where all achieve the bene-

73. John S. Applegate, *The Story of Reserve Mining: Managing Scientific Uncertainty in Environmental Regulation*, in ENVIRONMENTAL LAW STORIES 49 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

74. Strand, *supra* note 72; *Pollution Prevention: Keep America Beautiful—Iron Eyes Cody (1961–1983)*, ADVER. EDUC. FOUND., http://www.aef.com/exhibits/social_responsibility/ad_council/2278# (last visited Apr. 17, 2013) [hereinafter *Pollution Prevention*]. *But see* Strand, *supra* note 72 (“It’s no big secret that the crying Indian was neither crying nor Indian. . . . His long black braids were a wig, his dark complexion deepened with makeup.”).

75. Strand, *supra* note 72; *Pollution Prevention*, *supra* note 74.

76. Strand, *supra* note 72; *Pollution Prevention*, *supra* note 74.

77. Strand, *supra* note 72; *Pollution Prevention*, *supra* note 74.

78. Lisa Kass Boyle, *Brief from Bonnaroo: Tennessee Trash*, HUFFINGTON POST (July 18, 2011, 5:35 PM), http://www.huffingtonpost.com/lisa-kaas-boyle/brief-from-bonnaroo-tenne_b_900038.html; Tenn. Dep’t Transp. 1976, *Tennessee Trash*, YOUTUBE, <http://www.youtube.com/watch?v=tu1B6kblecs> (last visited Apr. 17, 2013).

79. Boyle, *supra* note 78; *Tennessee Trash*, *supra* note 78.

80. Boyle, *supra* note 78; *Tennessee Trash*, *supra* note 78.

81. *See, e.g.*, Strand, *supra* note 72 (“The crying Indian wept for our sins, and from his tears sprang forth a new Green Age.”).

fits of forward social progress. Long before Benetton ads,⁸² images of different races championing a social cause were carefully cultivated, including, for example, an ad featuring Woodsy Owl and environmental protection.⁸³

Thus, environmental despoliation and impacts on human health in the 1960s and 1970s were obvious and visible, and were thought to impact all people. This entered the public consciousness in a massive, broad way. For example, in 1971 and 1972, three *Dennis the Menace* comic books spelled out and visualized Dennis having adventures combating an oil spill, dams that could harm fish, water and air pollution, and trash.⁸⁴

Anything that can be described in the pages of a comic book has become an accepted part of the nation's consciousness. What then accounts for the waning of environmental concern that we see?

In his chapter "Public Opinion and Environmental Policy" from *Environmental Politics and Policy: Theories and Evidence*, Riley Dunlap posits that a waning of environmental fervor among the public may be similar to the "issue attention" cycle visible in all social issues.⁸⁵ In particular, Dunlap states "that a movement's success in stimulating governmental action to solve a problem leads the public to believe

82. Robin Givhan, *Benetton's Rebirth*, DAILY BEAST (Sept. 23, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/09/23/benetton-s-rebirth.html> ("[I]n the 1980s, . . . the United Colors of Benetton called to mind socially conscious, multicultural advertising Back then, Benetton was a youthful Italian brand that seemed . . . intent on riling middlebrow sensibilities with its bold statements on AIDS, religion, and racism . . .").

83. See Jamie Lewis, *Happy 40th Birthday, Woodsy Owl!*, PEELING BACK THE BARK (Sept. 15, 2011), <http://fhsarchives.wordpress.com/2011/09/15/happy-40th-birthday-woody-owl/> (depicting children of different races in a print ad with Woodsy Owl, urging other children "Give a hoot! Don't pollute!"); see also Harald Fuller-Bennett & Iris Velez, *Woodsy Owl at 40*, FOREST HISTORY TODAY, Spring 2012, at 22-23, available at <http://foresthstory.org/publications/FHT/FHTSpring2012/woodsey.pdf> ("Secretary of Agriculture Clifford Hardin officially launched the Woodsy Owl campaign on September 15, 1971, which is now celebrated as Woodsy's 'birthday.' A department press release explained the purpose of the new symbol: "Woodsy will work as a constant reminder to children and adults of positive ways in which pollution can be fought").

84. Hank Ketcham (w), (other creative contributor(s) unknown), Creative Contributor(s), DENNIS THE MENACE 118 (Fawcett Comics Jan. 1972); Hank Ketcham (w), (other creative contributor(s) unknown), Creative Contributor(s), DENNIS THE MENACE 117 (Fawcett Comics Nov. 1971); Hank Ketcham (w), (other creative contributor(s) unknown), Creative Contributor(s), DENNIS THE MENACE 116 (Fawcett Comics Sept. 1971).

85. See generally Riley Dunlap, *Public Opinion and Environmental Policy*, in ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE 64-65 (J.P. Lester ed., 2d ed. 1997) (suggesting that "the issue-attention cycle has clearly been the most influential among those interested in public opinion on environmental issues" and describing the cycle as one in which "environmental problems . . . meet the fate experienced by most social problems—have a brief 'moment in the sun' and then fade from the public attention as newer problems take center stage on the national agenda").

that the problem is ‘being taken care of.’”⁸⁶ This may be particularly true when the government intervention does meet with visible success.

B. Visible Harm Fades: 1980–Present

After the passage and implementation of the major initial environmental laws, we began to see some relief from the worst possible impacts of air and water pollution.⁸⁷ The biggest emerging pollution problems, however, were significantly less visible.⁸⁸ For example, though often associated with smog, current ground-level ozone is colorless and odorless, and thus can cause health problems without having an obvious physical presence.⁸⁹ As for water pollution, while there are still occasional fish kills, the problems related to uncontrolled raw sewage have given way to problems with run-off, which cause cumulative harm in the shape of dead zones in far-away portions of large bodies of water.⁹⁰ Furthermore, the stratospheric ozone layer was threatened, but that harm is not directly visible.⁹¹ There were also major American oil spills in 1989 and 2010,⁹² but aside from these, there were very few visible natural despoliations. Of course, many natural disasters occurred, including heat waves, droughts, wildfires, floods, hurricanes, and tornadoes; while these events are consistent

86. *Id.* at 66.

87. *Cf.* Carol M. Rose, *Environmental Law Grows Up (More or Less), and What Science Can Do to Help*, 9 LEWIS & CLARK L. REV. 273, 279, 281 (1995) (arguing that “[t]he First Wave approaches to environmental law clearly had some success, adding needed muscle to the exercise of setting quality-based goals,” which “d[id] a great deal for environmental quality”).

88. *See, e.g.*, Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 118 (2001) (“Environmental law has succeeded in addressing the most visible environmental problems and, in so doing may have, ironically, contributed to a degree of complacency on the part of the public when it comes to less tangible, but potentially no less serious, environmental problems.”).

89. *See, e.g.*, *Air Quality: Ground Level Ozone*, OR. DEP’T ENVTL. QUALITY, <http://www.deq.state.or.us/eq/planning/ozone.htm> (last visited Mar. 14, 2013) (discussing Oregon’s ozone maintenance plan).

90. Arthur McAvoy, *Environmental Law and the Collapse of the New Deal Constitution*, 46 AKRON L. REV. (forthcoming 2013) (manuscript at 19–22) (on file with author).

91. *See Ozone*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/ozone/> (last visited Mar. 14, 2013) (“The stratosphere, . . . extends upward from about 6 to 30 miles [from Earth.] This natural shield has been gradually depleted by man-made chemicals like chlorofluorocarbons (CFCs). A depleted ozone shield allows more UV radiation to reach the ground . . .”).

92. SUSAN LYON & DANIEL J. WEISS, CTR. FOR AM. PROGRESS, OIL SPILLS BY THE NUMBERS: THE DEVASTATING CONSEQUENCES OF EXXON VALDEZ AND BP GULF (2010), available at <http://www.americanprogress.org/issues/green/news/2010/04/30/7620/oil-spills-by-the-numbers/> (describing the 1989 Exxon Valdez oil spill in Alaska and the 2010 BP Gulf Coast rig explosion).

with the problem of global warming, they also occur naturally, and there is a great deal of public debate over the linkage between natural disasters and global climate change.⁹³ According to James Hansen, a NASA scientist, “the scientific community realizes that we have a planetary emergency[, but i]t’s hard for the public to recognize because they stick their head out of the window and don’t see much going on.”⁹⁴

Environmental problems were also less “visible” because of the lack of focused media attention. In the late 1960s and early 1970s, most people got their news from the same place,⁹⁵ and television shows and newspapers carried many major stories about environmental despoliation and visible harms.⁹⁶ But after the initial media scrutiny calling for action, the media would typically turn to more “exciting news”.⁹⁷ In fact, media attention to environmental issues declined significantly after the early 1970s.⁹⁸ According to Everett Ladd and Karlyn Bowman, by 1995 “Americans remain[ed] committed to the goal of protecting . . . the environment, but they no longer s[aw] an urgent [and overt] problem.”⁹⁹ We see a similar story with climate change, where reporting has dropped drastically.¹⁰⁰

93. See, e.g., Margaux J. Hall, *Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law*, 37 YALE J. INT’L L. 309, 318 (2012) (“The degree to which climate change will increase natural disasters is somewhat less clear, though the general prognosis is poor. Although direct linkages may be difficult to identify in many cases, climate change creates systemic conditions for more frequent and more extreme weather events.”).

94. Justin Gillis, *Ending Its Summer Melt, Arctic Sea Ice Sets a New Low That Leads to Warnings*, N.Y. TIMES, Sept. 20, 2012, at A8.

95. Cf. JAMES T. HAMILTON, ALL THE NEWS THAT’S FIT TO SELL: HOW THE MARKET TRANSFORMS INFORMATION INTO NEWS 160 (2004) (writing that in 1969, “[t]he average television household received seven channels,” so “[i]f viewers did not enjoy the hard news stories provided in the evening news programs, they had few other options on the dial,” and that “[a]t the dinner hour more than one-third of all television households watched the network evening news”).

96. See Dunlap, *supra* note 85, at 71 (“[B]y the late sixties, environmental problems were receiving tremendous exposure in the media.”).

97. See Dunlap, *supra* note 85, at 66 (“Most authors are rather vague about precisely why the public loses interest, but . . . the fact that the media typically turn to newer, more exciting issues [is] often mentioned.” (citation omitted)).

98. Dunlap, *supra* note 85, at 78–79.

99. EVERETT CARLL LADD & KARLYN H. BOWMAN, ATTITUDES TOWARD THE ENVIRONMENT: TWENTY-FIVE YEARS AFTER EARTH DAY 2 (1995).

100. See generally John Daley, *Why the Decline and Rebirth of Environmental Journalism Matters*, YALE F. ON CLIMATE CHANGE & MEDIA (Jan. 7, 2010), <http://www.yaleclimatemediaforum.org/2010/01/why-decline-rebirth-of-environmental-journalism-matters/> (“[W]hen it comes to coverage of climate change . . . the meltdown in mainstream news reporting couldn’t come at a worse time. . . . [T]he ranks of reporters best equipped to cover these major environmental and climate change stories at most news outlets, particularly in local markets, are being decimated.”).

Whether because of success, less media focus, or a combination, these factors have decreased the visibility of environmental harm and the needs for change and enforcement to the average person. This Article includes many references to visual images precisely because they were part of the experience of Americans at all levels. Without these visuals, there was less perceived threat.

As noted by Alice Kaswan, the remoteness of the threat means that people are less likely to focus on it.¹⁰¹ Less engagement is linked to under-enforcement. Alexis de Tocqueville praised the early American legal system because the public investment in the law meant that the law was more likely to be enforced and not flouted.¹⁰² The more people believe something is not really harmful, the less likely they are to support controls on that activity, or strict enforcement of it.¹⁰³ But scientists tell us that we face critical harms, even if they are not as obvious as in the past. Are we victims of a media or public opinion cycle? Is anything else at play?

III. EMERGENCE OF AN INDIVIDUALISTIC PARADIGM AND THE INCREASE IN INEQUALITY

At the same time that visibility of harm was starting to decrease, another change was occurring. Cass Sunstein has called the 1960s and 1970s the decades of the “rights revolution” because many problems were framed and seen as related to individual rights.¹⁰⁴ Perhaps due to a stagnating economy in the late 1970s, a portion of the public turned away from environmental rights and began to focus more on the costs of environmental protection, while the Republican presidential administration under Ronald Reagan adopted a mantra espousing the ills of government regulation.¹⁰⁵ Thus began the de-legitimizing

101. See Alice Kaswan, *Domestic Climate Change: Adaptation and Equity*, 42 ENVTL. L. REP. 11125, 11139 (2012) (“Individuals could discount what appear to be inchoate, distant, and remote threats.”).

102. See Bruce Frohnen, *Tocqueville’s Law: Integrative Jurisprudence in the American Context*, 39 AM. J. JURIS. 241, 255 (1995) (“Americans identified with the law as the product of their own will more because they engaged in its enforcement than because it was an end product of their (or the majority’s) will. Thus, in America, citizens bent themselves to the law because they saw themselves (and in this Tocqueville felt that they were correct) to be obeying the law rather than a mere man . . .”).

103. Cf. LADD & BOWMAN, *supra* note 99, at 51 (“Clearly, the vast majority of our citizens are environmentalists. But we are now more inclined to think that for most Americans, the urgency has been removed, and the battle to protect the environment is being waged satisfactorily.”).

104. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 24–27 (1993).

105. See *id.* at 30–31 (discussing the calls for deregulation that accompanied the economic recession of the late 1970s and 1980s); Don Bradford Hardin, Jr., Comment, *Why*

of “Progressivism.”¹⁰⁶ Along with this, we saw the beginnings of the so-called “rational” approach to regulation through cost-benefit analysis, with less focus on protection and the rights of the public.¹⁰⁷ This approach emphasizes the rational *individual* decision maker.¹⁰⁸

This “rational” regulation was formalized through the executive orders that began with President Jimmy Carter and were then strengthened under President Reagan.¹⁰⁹ Contrary to the assumptions present at the passing of the major environmental laws—that environmental values are priceless and that regulation can only come from “public debate and participation”¹¹⁰—economists and policy makers began to embrace the ethos of the rational decision maker in government.¹¹¹ Although this cost-benefit analysis is not explicitly against the ethos of environmental protection, it certainly indicates that the concept of a “priceless” inalienable right to health and environmental protection is false.¹¹² Cost-benefit analysis is also particu-

Cost-Benefit Analysis? A Question (and Some Answers) About the Legal Academy, 59 ALA. L. REV. 1135, 1147–48 (2008) (explaining President Reagan’s deregulation efforts).

106. See Mark Lilla, *The Great Disconnect*, N.Y. TIMES, Sept. 30, 2012, at BR1 (reviewing CHARLES R. KESLER, *I AM THE CHANGE: BARACK OBAMA AND THE CRISIS OF LIBERALISM* (2012) and writing that “Reagan did in fact restore (then overinflate) America’s self-confidence, and he did bequeath to Republicans a clear ideological alternative to [the] Progressivism [of the New Deal and Great Society]”).

107. See generally Hardin, *supra* note 105, at 1147–48 (noting that President Reagan’s executive order regarding deregulation “was urged by ‘technocrats,’ who believed in rational regulatory decisionmaking and expected implementation of [cost-benefit analysis] to preclude unreasonable regulation”); see also Robert Bejesky, *An Analytical Appraisal of Public Choice Value Shifts for Environmental Protection in the United States and Mexico*, 11 IND. INT’L & COMP. L. REV. 251, 285 (2001) (“The deregulatory era of environmental protection eventually evolved into a market approach to environmental regulation . . . by allowing industries and individual companies to determine how much the right to pollute was valued via permitting these individual actors to make cost-benefit decisions within the context of a given level of environmental standards.”).

108. Bejesky, *supra* note 107, at 285.

109. Hardin, *supra* note 105, at 1147–49.

110. See generally LISA HEINZERLING & FRANK ACKERMAN, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* 205–34 (2005) (criticizing the cost-benefit approach and advocating in favor of a more holistic analysis); Hardin, *supra* note 105, at 1162–65 (discussing Ackerman & Heinzerling’s “moral critique” of cost-benefit analysis).

111. See HEINZERLING & ACKERMAN, *supra* note 110, at 11 (characterizing “the atomistic [cost-benefit] analysis offered by contemporary economists, [as one] in which a problem is severed into its component parts, examined by experts, and [then poorly] reconstructed” and noting that “[this] kind of economic thinking . . . is ascendant in public-policy circles today”).

112. Cf. Hardin, *supra* note 105, at 1145–46 (discussing early applications of cost-benefit analysis by Congress when enacting environmental legislation such as the Water Pollution Control Act Amendments, passed in 1972, which “limit[ed] the application of technology only where the [benefits were] wholly out of proportion to the costs of achieving such marginal level of reduction,” and the Toxic Substances Control Act, which “required con-

larly ill-suited, to analyzing “macro” societal risks such as global warming.¹¹³

As noted by Richard Lazarus and Oliver Houck, “[e]nvironmental protection laws are by their very nature radically redistributive.”¹¹⁴ So even though the calls for protection of the entitlements set out in the major environmental statutes were not altered in the statutes, the enthusiasm and wisdom of the enforcement of such laws was questioned.¹¹⁵ In their seminal book, *The Environmental Protection Agency: Asking the Wrong Questions*, Marc Landy, Marc Roberts, and Stephen Thomas agree with this assessment and also note that the EPA may have undertaken cost-benefit analysis even where it should not have done so.¹¹⁶

Additionally, the rhetoric of the 1980 presidential election spurred a visible backlash against the role of government in providing assistance to the individual.¹¹⁷ Scholars have speculated that the backlash was related to the economic woes of the time, and that it resulted in more than simply a call to end to welfare.¹¹⁸ There was an emphasis placed on the work ethic and on the individual as being responsible for her state of life.¹¹⁹ This “Reagan Revolution” reverberates today.¹²⁰

sideration of the benefits of the substance and the economic costs of the contemplated regulation” (footnotes omitted)).

113. Michael Vandenberg & Jonathan A. Gilligan, *Macro-Risks: The Challenge for Rational Risk Regulation*, 21 DUKE ENVTL. L. & POL’Y F. 401, 412 (2011).

114. Richard J. Lazarus & Oliver A. Houck, *The Story of Environmental Law*, in ENVIRONMENTAL LAW STORIES 2 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

115. Cf. Hardin, *supra* note 105, at 1179 (observing that “[President] Reagan capitalized on those calls [for rationalized decisionmaking] by . . . requir[ing] agencies to conduct a cost-benefit analysis in conjunction with the contemplation or promulgation of all major rules”).

116. LANDY, ROBERTS & THOMAS, *supra* note 66, at 238 (“The Clean Air Act excludes economic considerations. But, in the absence of any threshold for risk, some balancing between costs and benefits had to be implicit in the standard setting decision—a reality EPA neither acknowledged nor forced Congress to confront.”).

117. See, e.g., Dana Neacsu, *A Brief Critique of the Emaciated State and Its Reliance on Non-governmental Organizations to Provide Social Services*, 9 N.Y. CITY L. REV. 405, 415 (2006) (“The Reagan Administration . . . did [its] best to end the paternalist social liberal state . . .”).

118. Cf. *id.* at 416 (“Surprisingly, by the end of the Carter Administration the welfare discourse had become apocalyptic, using the biblical mythology of ‘after the collapse.’ Shortly thereafter, the Reagan Administration ushered in the beginning of the end when ‘[i]n 1981, deep cuts in federal aid to states and localities reduced funding to 1968 levels.’” (alteration in original) (footnote omitted)).

119. See, e.g., KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 38–39 (2011) (discussing how in the 1980s, social science began to drive the discourse on welfare and how Charles Murray used “an economic model of welfare use, describing the receipt of welfare as an individual choice that stood in opposition to work” in his influential 1984 book *Losing Ground*).

120. See Drew Weston, *America’s Leftward Tilt?*, N.Y. TIMES, Nov. 4, 2012, at SR6 (discussing the lasting effects of Reagan-era political ideals).

Arthur McEvoy has written a wonderful piece that links this cultural change to the environmental movement, noting that environmental law was a notable success of the New Deal coalition, and that the last forty years of efforts to undermine the New Deal's societal protection, which began with the Reagan Revolution, necessarily includes attacks on the framework of environmental protection.¹²¹

The use of cost-benefit analysis and the call for individual responsibility merge to emphasize that we are not all in the same boat and that we may not deserve to be. Environmental protection grounded in the commonality of the exposure of all, is inapposite to the idea that you can change your own circumstances by hard work. For example, some could be "less harmed" by environmental impacts than others; if one can leave a neighborhood with bad schools and fence in her property to keep out thieves, then she can also presumably move to a location that has fewer environmental problems.¹²² The perception that we are all in the same environmental boat, then, really begins to wane. To the extent that the "commons" indicates that benefits can accrue to decision makers, while costs accrue to all, the embrace of "every person for herself" supports a return to the commons and the idea of individual gain.¹²³ Under this paradigm, the government will not protect us, and we do not expect it to. According to *The New York Times* columnist Nicholas Kristof: "In the 1960s, more than two-thirds of Democrats and Republicans alike expressed trust in government. That has fallen to about one-third for Democrats—and to just 5 percent for Republicans."¹²⁴ This trend coincides with what Chris Schroeder describes as a change from a "morally outraged" approach toward environmental compliance to a "coolly analytical approach."¹²⁵

In addition, income inequality has continued to grow in our society since the 1970s, with the exception of parts of the 1990s. Shortly after World War II, the United States entered into the "Golden Age"

121. McEvoy, *supra* note 90 (manuscript at 19–22).

122. See Robert H. Frank, *When Low Taxes Don't Help the Rich*, N.Y. TIMES, Oct. 28, 2012, at BU6 (discussing the insulation of wealthy individuals from the problems of society at large).

123. See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1245 (1968) (explaining the problem of the commons and how an individualistic outlook may hinder social welfare, particularly in the context of pollution, in which the tragedy of the commons means that "we are locked into a system of 'fouling our own nest,' so long as we behave only as independent, rational, free-enterprisers").

124. Nicholas D. Kristof, Op-Ed., *It Takes One to Know One*, N.Y. TIMES, Sept. 20, 2012, at A27.

125. See generally Chris Schroeder, *Cool Analysis Versus Moral Outrage in the Development of Federal Environmental Criminal Law*, 35 WM. & MARY L. REV. 251, 257–58 (1993).

of economic growth.¹²⁶ Incomes grew at rates that exceeded the rate of inflation, and “the middle class swelled.”¹²⁷ The 1970s, however, witnessed a reversal of fortune, in which the middle class weakened as wage increases fell behind inflation.¹²⁸ Some scholars dubbed this change the “Great U-Turn.”¹²⁹ It has also been called the “Great Divergence.”¹³⁰ During the 1970s, income inequality began to rise, in both the distribution of household incomes and in the distribution of wages.¹³¹

Income inequality is commonly measured in three different ways: (1) “the percentage of total income held by [part] of the income distribution,”¹³² (2) “the ratio of income” held by one percentile group as compared to another percentile group,¹³³ and (3) “one-number-summary statistics,” such as the Gini Index.¹³⁴ In their paper, *Financialization and U.S. Income Inequality, 1970-2008*, Ken-Hou Lin and Donald Tomaskovic-Devey propose that the three most important indicators of income inequality are: (1) labor’s decline in the share of national income, (2) the top earners’ “increasing income share,” and (3) increasing income divergence among workers.¹³⁵

As to the first factor, labor’s decline in the share of national income in the United States began in the 1970s.¹³⁶ After World War II, there was a gradual increase in labor’s share of income. The share of

126. Steven C. Deller, *What Has Caused the “Great U-Turn” in Income Inequality?*, COMMUNITY ECON. NEWSLETTER (Ctr. Cmty. & Eco. Dev. et al.), June 2005, available at <http://www.aae.wisc.edu/pubs/cenews/docs/ce344.pdf>.

127. *Id.*

128. *Id.*

129. Stephanie Moller, Arthur S. Alderson & François Nielsen, *Changing Patterns of Income Inequality in U.S. Counties, 1970–2000*, 114 AM. J. SOC. 1037, 1037–38 (2009).

130. Timothy Noah, *The United States of Inequality: The Great Divergence*, SLATE (Sept. 3, 2010, 3:06 PM), http://www.slate.com/articles/news_and_politics/the_great_divergence/features/2010/the_united_states_of_inequality/introducing_the_great_divergence.html.

131. See Moller, Alderson & Nielson, *supra* 129, at 1090 (“Since the early 1970s, inequality in the distribution of family income in the United States has been on the rise.”); Noah, *supra* note 130 (“The Great Compression ended in the 1970s. Wages stagnated, inflation raged, and by the decade’s end, income inequality had started to rise.”).

132. Leslie McCall & Christine Percheski, *Income Inequality: New Trends and Research Directions*, 36 ANN. REV. SOC. 329, 332 (2010).

133. *Id.*

134. *Id.* The Gini Index measures inequality through a descriptive approach, “giving summary information on the income distribution [but] not giving any information about the characteristics of the income distribution.” See generally LORENZO GIOVANNI BELLÙ & PAOLO LIBERATI, *INEQUALITY ANALYSIS: THE GINI INDEX 2* (2006), available at http://www.fao.org/docs/up/easypol/329/gini_index_040EN.pdf.

135. Ken-Hou Lin & Donald Tomaskovic-Devey, *Financialization and U.S. Income Inequality, 1970–2008*, at 4–5 (Nov. 3, 2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1954129.

136. *Id.* (manuscript at 5).

income in the private sector, however, then decreased from 66% to 60% between 1970 and 2008.¹³⁷ The change differed by industry, with declines in manufacturing, transportation, and construction, but with increases in the finance and service industries.¹³⁸ According to the *Huffington Post*, this measure of income inequality has changed even more dramatically in the last few years, falling to 57.1%, the lowest percentage of income “since the measure was first recorded.”¹³⁹

In 2010, the annual median wage fell to \$26,364, the lowest level since 1999, and incomes continued to drop, falling 6.7% between June 2009 and June 2011.¹⁴⁰ In comparison, company profits-per-employee rose in 2010.¹⁴¹ In fact, while wages have consistently fallen during the recovery from the recent recession, corporate profits have consistently increased during the same time period.¹⁴² One explanation could be the emergence of outsourcing in the U.S. economy.¹⁴³ Stated briefly, policies that allow American companies to shift capital to foreign countries, with lower wages and less stringent working condition controls,¹⁴⁴ have given employers a “bargaining advantage,” particularly in the manufacturing sector.¹⁴⁵ The changes in bargaining power compound labor’s decline in economic share since the 1970s.

The second factor, the increase in the income share of top earners, really began in the 1980s.¹⁴⁶ The top decile of income earners controlled 31% of total income in the 1970s, while in comparison this

137. *Id.*

138. *Id.*

139. Jillian Berman, *Labor Force’s Share of Income Plunges to Lowest Recorded Level*, HUFFINGTON POST (Dec. 1, 2011, 6:34 PM), http://www.huffingtonpost.com/2011/12/01/labor-forces-share-of-income_n_1124189.html.

140. Jillian Berman, *U.S. Median Annual Wage Falls to \$26,364 as Pessimism Reaches 10-Year High*, HUFFINGTON POST (Jan. 23, 2012, 8:48 AM), http://www.huffingtonpost.com/2011/10/20/us-incomes-falling-as-optimism-reaches-10-year-low_n_1022118.html.

141. Berman, *supra* note 139.

142. *Id.*

143. See WORKING AMERICA & AFL-CIO, *OUTSOURCED: SENDING JOBS OVERSEAS: THE COST TO AMERICA’S ECONOMY AND WORKING FAMILIES* 5, 7 (2010), available at <http://staging.workingamerica.org/upload/OutsourcingReport.pdf> (“[I]t is clear that offshoring has continued and accelerated in recent years—at the same time the wages of American workers have stagnated and mass layoffs and job cuts continue to ravage many communities.”). *But see* Dan Ikenson, *Outsourcing for Dummies (Including the Willfully Ignorant)*, FORBES (Nov. 11, 2012, 11:46 PM), <http://www.forbes.com/sites/danikenson/2012/07/11/outsourcing-for-dummies-including-the-willfully-ignorant/> (positing that only a small number of Americans have lost their job to outsourcing, which, in fact, filters money back into the United States economy).

144. WORKING AMERICA & AFL-CIO, *supra* note 143, at 7, 22.

145. Andrew Glyn, *Explaining Labor’s Declining Share of National Income* (Intergov’t Group of Twenty-four (IG024), Int’l Monetary Affairs & Dev., Policy Brief No. 4), <http://www.g24.org/PolicyBriefs/pbno4.pdf> (last visited Apr. 17, 2013).

146. Lin & Tomaskovic-Devey, *supra* note 135 (manuscript at 5).

group controlled 50% of income in 2007.¹⁴⁷ In fact, studies have indicated that this change is more profound when examined through a narrower lens; the top 0.1% of earners had a 2.6% share of income in the 1970s, but a 12.3% share of income in 2007.¹⁴⁸ Lin and Tomaskovic-Devey suggest that changes in executive compensation among the very top earners strongly influenced this change.¹⁴⁹ For example, practices such as tying executive compensation to the compensation of “peer” executives led to a doubling of executive compensation between 1993 and 2003.¹⁵⁰

Finally, divergence in wages among workers is the best known of the three economic factors associated with rising income inequality.¹⁵¹ Wage inequality among workers increased by 40% between 1973 and 2007.¹⁵² Generally, the wages of college graduates were 30% greater than those of non-graduates in the late 1970s, but “the premium doubled over the next few decades.”¹⁵³ In addition, employment increases concentrated on either largely unskilled workers or on highly skilled workers.¹⁵⁴

An important factor in the increase in wage inequality is the decline of organized labor since the 1970s.¹⁵⁵ Between the early 1970s and 2007, private sector union membership fell from just below 35% of male workers to 8%, and from just below 15% of female workers to less than 4%.¹⁵⁶ During this time period, men’s wage inequality rose by 40%, largely between 1978 and 2000.¹⁵⁷ Women’s wage inequality,

147. *Id.*

148. *Id.*

149. *See id.* (“[C]ompensation has become an increasingly important source of income for these top earners. That is, elite workers now constitute a significant fraction of the highest income population.” (citation omitted)).

150. *See id.* (noting that the doubling of executive compensation “was accomplished in part by an institutional tying of executive pay to the pay of other ‘peer’ executives, engineering an upward leapfrogging game in CEO compensation” (citing Thomas A. DiPrete, Gregory M. Eirich & Matthew Pittinsky, *Compensation Benchmarking, Leapfrogs, and the Surge in Executive Pay*, 115 AM. J. SOC. 1671, 1673 (2010))).

151. Lin & Tomaskovic-Devey, *supra* note 135 (manuscript at 5).

152. *Id.*

153. *Id.*; *see also* Janet L. Yellen, *Economic Inequality in the United States*, FRBSF ECON. LETTER, Dec. 1, 2006, at 2 (“[F]rom 1973 to 2005, real hourly wages of those in the 90th percentile—where most people have college or advanced degrees—rose by 30% or more.”).

154. *See* Lin & Tomaskovic-Devey, *supra* note 135 (manuscript at 5) (“The labor market also has become more polarized, with the growth of employment concentrated at both tails of the skill distribution.” (citation omitted)).

155. Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 514 (2011).

156. *Id.* at 514, 516.

157. *Id.* at 514.

which was originally lower than men's wage inequality, grew at an even faster pace.¹⁵⁸ Certain theorists and economists have stated that this change in unionization is a major cause of wage disparities,¹⁵⁹ as there is a positive association between unions and wage equalization,¹⁶⁰ as well as between unions and a reduction in excessive compensation.¹⁶¹

Differences in educational histories of workers during the growth of income inequality are equally important.¹⁶² As the economy changed, the wages for unskilled workers diverged from the wages for skilled workers.¹⁶³

The wages for highly skilled workers increased substantially compared to those for less-skilled workers around 1980, impacting contemporary workers along with future workers.¹⁶⁴ Young white males from higher-family-income groups flocked to get college degrees to take advantage of this wage differential, while lower income families did not respond at the same rate.¹⁶⁵ This difference in college attendance widened wage differentials even further. Overall, technological change, workforce change, and increases in foreign trade increased the demand for highly skilled workers, leading to an increase in the

158. *Id.* It should be noted, however, that many of these statistical issues are driven by "the top and bottom of the wage distribution," meaning that this wage differential may be more relevant in the discussion of top earner income share, rather than in the discussion of wage disparities among workers. *See id.* ("Overall trends were driven by movements at the top and the bottom of the wage distribution. Increasing inequality in the late 1970s and 1980s reflected falling wages at the bottom and rising wages at the top of the distribution. Since the late 1980s, the growth in wage inequality has been propelled by wage increases for the highest-paid workers." (citation omitted)).

159. *See id.* at 533 ("As unions declined, not only did the logic of the market encroach on what had been the union sector, but the logic of the market deepened in the nonunion sector, too, contributing to the rise in wage inequality.").

160. *See id.* at 517 ("The theory of union threat has distributional implications. If unions threaten to organize low-wage workers, employers may raise wages, thereby equalizing the wage distribution.").

161. *See id.* at 518 ("Consistent with the egalitarian effect of union advocacy, studies of data from the mid-1970s through the early 2000s find that managerial compensation is lower in unionized firms, and managerial employment is lower in highly unionized industries." (citation omitted)).

162. *See supra* text accompanying notes 153–154.

163. *See Inequality in America: What Role for Human Capital Policies?*, 23 FOCUS 1, 1 (2005), available at <http://www.irp.wisc.edu/publications/focus/pdfs/foc233a.pdf> ("The slowdown in the growth in the quality of the U.S. labor force came during a period of increasing wage differentials between skilled and unskilled workers.").

164. *See id.* ("Around 1980, the measured wage premium for higher-skilled workers in the United States began to increase substantially. . . . Because education is a primary determinant of earnings, these disparate responses to the new market for skills widened racial, ethnic, and family-related wage differentials, contributing to rising economic inequality among U.S. households.").

165. *Id.* at 1–2.

wage premium of college graduates,¹⁶⁶ and to even more profound differences in wages among workers.¹⁶⁷

This increase in income inequality could have, and obviously has had, many effects on our society.¹⁶⁸ For example, in public discourse, the new “selfishness” of Americans is associated with hyper-individualism.¹⁶⁹ A discussion of individualism and its implications for the country’s social concerns is beyond the scope of this Article, but one example cited by Tim Mulvaney shows a relationship between income inequality and environmental amenities that may work outside of a direct attitudinal shift. He notes that a 2007 study found a *strong correlation* between income inequality and the presence of beneficial, human-friendly urban forestry.¹⁷⁰ Mulvaney explains that this difference is attributable to high-income areas having the property taxes and financial support to plant more trees and maintain more wooded areas, while the poorer “concrete jungles” do not have such resources available.¹⁷¹ According to the study cited by Mulvaney, this difference is troubling because the presence of—or lack of—trees can directly change property values, lower cooling costs, reduce air pollution, and generally improve the aesthetic value of the area.¹⁷² This study might imply that poor areas are caught in a downward spiral of lessened environmental and property values, while wealthy areas are able to improve their environmental factors, and thus increase the wealth of

166. See Western & Rosenfeld, *supra* note 155, at 513 (noting that in the market explanation for wage inequality, “technological change, immigration, and foreign trade increased demand for highly skilled workers, raising the premium paid to college graduates” (citation omitted)).

167. Cf. Yellen, *supra* note 153, at 2–4 (“In recent years, globalization and skill-biased technological change may have been working in combination to particularly depress the wage gains of those in the middle of the U.S. wage distribution . . .”).

168. See Linette Lopez, *This is How Income Inequality Destroys Societies*, BUS. INSIDER (Nov. 1, 2011, 1:49 PM), <http://www.businessinsider.com/the-negative-effects-of-income-inequality-on-society-2011-11?op=1> (charting correlations between income inequality and “social ills”).

169. See Frank Bruni, *Three Muffled Syllables*, N.Y. TIMES, Sept. 30, 2012, at SR3 (lamenting the lack of “sacrifice” in the United States and positing that “the rise of interest groups, identity politics and cause-specific lobbyists has diminished our attention to, and sense of, a communal good”); Nicholas D. Kristof, Op-Ed., *Scott’s Story and the Election*, N.Y. TIMES, Oct. 18, 2012, at A33 (noting that the number of Republicans who think “it is the responsibility of the government to take care of people who can’t take care of themselves” has slipped from 58 percent in 2007 to just 40 percent today”).

170. Tim Mulvaney, *Income Inequality and Trees*, ENVTL. LAW PROF BLOG (Sept. 20, 2012), http://lawprofessors.typepad.com/environmental_law/2012/09/income-inequality-and-trees.html (discussing the connection between income inequality and “tree cover” (citing Pengyu Zhu & Yaoqi Zhang, *Demand for Urban Forests in United States Cities*, 84 LANDSCAPE & URB. PLANNING 293 (2008))).

171. *Id.*

172. *Id.*

those areas. Though Mulvaney points out that this study does not supply *any causal link* between income inequality and environmental factors,¹⁷³ he notes that it connects urban planning concerns directly with environmental amenities,¹⁷⁴ which in theory should be available to everyone. Rather than showing the dangers of income inequality, Mulvaney suggests that income inequality can have serious impacts on environmental justice.¹⁷⁵

Returning to our earlier discussion of the increased individualism in the United States, the political discourse has mirrored the debate over inequality and grown even more individualistic since President Reagan's time. Perhaps because of the focus on inequality in the 2012 presidential election, many columnists and pundits tried to address the impacts of this individualism leading up to the election.¹⁷⁶ Liberal and conservative *New York Times* columnists criticized this individualism. According to David Brooks, the Republican party has moved "from the Reaganesque language of common citizenship to the libertarian language of makers and takers."¹⁷⁷ Brooks argues that this individualistic attitude discourages people from taking risks, even ones that would be beneficial to society as a whole.¹⁷⁸ These individualistic attitudes may also promote irrational views of problems.¹⁷⁹ In times of distrust and fear, people are more likely to downplay societal

173. *See id.* ("[M]ost significantly, as an empirical matter the 2007 study . . . did not seem to offer any causal link between tree cover and income inequality . . .").

174. *See id.* ("[T]he story calls attention to the advantages and challenges of incorporating green space into local planning and development models.").

175. *Cf. id.* ("[T]rees can have significant 'existence value;' that is, people might feel a lost sense of well-being by virtue of the fact that natural features of the land are depleted in areas outside their own daily surroundings."). Several recent studies have explored the relationship between environmental justice and income inequality. *See generally* Kyle Crowder & Liam Downey, *Interneighborhood Migration, Race, and Environmental Hazards: Modeling Microlevel Processes of Environmental Inequality*, 115 *AM. J. SOC.* 1110, 1115–16, 1143 (2010) (concluding "that family income and householder education significantly decrease householder proximity to industrial pollution"); Liam Downey & Brian Hawkins, *Race, Income, and Environmental Inequality in the United States*, 51 *SOC. PERSP.* 759, 775–78 (2008) (analyzing the relationship between race, representation in "environmentally hazardous neighborhoods," and income level).

176. *See supra* note 169 and accompanying text; *see also* David Brooks, *Thurston Howell Romney*, *N.Y. TIMES*, Sept. 18, 2012, at A25 ("The Republican Party, and apparently Mitt Romney, too, has shifted over toward a much more hyperindividualistic and atomistic social view . . .").

177. Brooks, *supra* note 176.

178. *Cf. id.* ("People are motivated when they feel competent. They are motivated when they have more opportunities. Ambition is fired by possibility, not by deprivation . . .").

179. David Ropeik, Op-Ed., *Inside the Mind of Worry*, *N.Y. TIMES*, Sept. 30, 2012, at A11 (discussing risk perception in the context of the "fear of vaccines" and alluding to a tension between individual and societal concerns).

risks and focus on themselves.¹⁸⁰ This individualistic focus is motivated by the fear of loss; the impact of this attitude is likely to make it self-reinforcing.¹⁸¹ Again, without a base of security, the best fruits of social cohesion are lost.¹⁸²

It is now an accepted position of one of the major political parties in our country that environmental protection should be rationed according to benefit.¹⁸³ This position undermines any concept that a person may have a “right” to environmental protection.¹⁸⁴ Instead, according to economists, it does not matter where rights fall because the rights will go to those who value them the most.¹⁸⁵ Of course, these rights have to be “bought,” and one has to have the assets to do that. Thus, Americans are urged to protect their jobs as opposed to being concerned with potentially harmful environmental impacts.¹⁸⁶

This American attitude about individualism can be compared to the prevailing attitude in other developed countries, such as Japan and countries in the European Union, where income equality and the social safety net are perceived as more valuable.¹⁸⁷ Income inequality

180. *Cf. id.* (“A societal risk, well off in the future, tends not to trigger the same instinctive alarm—in part, because the hazard isn’t singling any one of us out, individually. This helps explain why concern over climate change is broad, but thin.”).

181. *See* Ross Douthat, Op-Ed., *Obama’s New Normal*, N.Y. TIMES, Sept. 30, 2012, at SR11 (suggesting that “voters can adapt to stagnation, and approach it as a kind of grim ‘new normal’ rather than a disaster requiring an immediate response”).

182. *See* David Brooks, Op-Ed., *The Conservative Mind*, N.Y. TIMES, Sept. 25, 2012, at A23 (expressing concern at the disappearance of traditional conservatism, which “wanted to preserve a society that functioned as a harmonious ecosystem, in which the different layers were nestled upon each other: individual, family, company, neighborhood, religion, city government and national government” and suggesting that because Republicans “no longer speak in the language of social order,” the Republican party “appeals to people as potential business owners, but not as parents, neighbors and citizens”).

183. *See* John M. Broder, *Bashing E.P.A. Is New Theme in G.O.P. Race*, N.Y. TIMES, Aug. 18, 2011, at A1 (“[T]he leading Republican candidates are all linking environmental regulation to jobs and the economy, suggesting that the nation cannot afford measures that impose greater costs on businesses and consumers.”).

184. *Cf.* John M. Broder, *E.P.A. Sets a Lower Limit for Soot Particles in the Air*, N.Y. TIMES, Dec. 15, 2012, at A11 (reporting that “[s]ix senators, led by Orrin G. Hatch, Republican of Utah, wrote [to the administrator of the EPA] expressing concern about [a] new rule,” which aims to reduce soot pollution, even though health studies have found that exposure to particles from soot pollution “brought a marked increase in heart and lung disease, acute asthma attacks and early death”).

185. *See supra* text accompanying notes 107–116.

186. *See, e.g.*, AmericanJobCreators, *Cuccinelli on Cost of Obama EPA’s Utility MACT Job-Crushing Regulation*, YOUTUBE (Nov. 1, 2011), <http://www.youtube.com/watch?v=PJp4cV6r32I> (expressing concern that the EPA’s Maximum Achievable Control Technology (“MACT”) will drive up energy costs and move jobs overseas).

187. *See, e.g.*, Deller, *supra* note 126, at 2 (noting that “[w]hile there is evidence of a widening income gap across nearly all developed countries, the gap is . . . much more modest in European economies,” in part because “[w]ithin Europe, unions remain strong and government has retained a commitment to social support programs”); Eduardo Porter,

in the rest of the developed world is less than that in the United States, where it has been increasing at a faster rate.¹⁸⁸ While few can deny the increase in rational regulation and market power the world over, it has come through a very different rhetorical mechanism; the issues of entitlements, government inefficiency, and protectionism are universally salient, but while the scope of these benefits and issues has been roundly debated, the developed world outside of the United States still adheres to a broad communal safety net.¹⁸⁹

This American polity that assumes separation of those that can be harmed from those that can be benefitted, in turn reinforces these notions of individualism and moves people away from understanding common harms. As Professor J.B. Ruhl has noted in his discussion of “climate change winners,” in the United States people can perceive differences in exposure to environmental harms or benefits, even in the face of divergent evidence, because their perception is influenced by “biased assimilation,” in which information on environmental topics such as climate change passes through a prism of polarizing political views.¹⁹⁰

IV. WHAT DO WE DO?

Perhaps these factors—less visible environmental harm, the emergence of a new theory of regulation, and an increase in inequality—are related only by coincidence, but there has been an undeniable sea change in the discussion and public perception of the envi-

Inequality Undermines Democracy, N.Y. TIMES, Mar. 21, 2012, at B1 (mentioning the European Union and Japan as examples of “advanced economies with a more egalitarian distribution of income”); Yellen, *supra* note 153, at 2–3 (“[T]he U.S. has done little to move closer to the European model of social protections and the reduction of inequality and poverty.”). *But see* Deborah J. Milly, *Book Review*, 20 GOVERNANCE 549, 549 (2007) (reviewing TOSHIKI TACHIBANAKI, *CONFRONTING INCOME INEQUALITY IN JAPAN: A COMPARATIVE ANALYSIS OF CAUSES, CONSEQUENCES* (2006)) (“While the image of an egalitarian Japanese income distribution propagated inside Japan and internationally was based on income data from the late 1960s . . . this pattern has reversed dramatically, particularly since the mid-1980s.”).

188. Tami Luhby, *Global Income Inequality: Where the U.S. Ranks*, CNNMONEY (Nov. 8, 2011, 4:18 PM), http://money.cnn.com/2011/11/08/news/economy/global_income_inequality/index.htm.

189. *See, e.g.*, Richard Cudahy, *From Socialism to Capitalism: A Winding Road*, 11 CHI. J. INT’L L. 39, 63 (2010) (describing the welfare state benefits in Western Europe, which includes universal health care, easily available education, and long-term unemployment insurance).

190. *See generally* J.B. Ruhl, *The Political Economy of Climate Change Winners*, 97 MINN. L. REV. 206, 242–47 (2012) (“Even without experience of climate change benefits, many people and businesses are generally dug in against investing in effective mitigation. One factor is biased assimilation of mixed evidence about a topic, which leads people to select the evidence that strengthens their preconceptions.” (footnote omitted)).

ronment. This change must be related to the relative loss in enforcement and protection of the environment.¹⁹¹ Without a will, there is no way, and no funding, focus, or public pressure to stem this tide. Numerous studies have shown that persons and societies will take action on environmental problems when and if they perceive high risks from inaction.¹⁹² The exception to this trend is also informative. Individuals whose behaviors diverge from these studies are generally those who evidence particular concern for others and intergenerational equity and who, as a result, may push for political and policy environmental changes even if they themselves do not directly benefit.¹⁹³

This fact alone would suggest that we should try and help people understand that environmental harms are more immediate to spur them into supporting stronger environmental policies and enforcement for themselves and for others. One need only look at advertisements from environmental public interest organizations to see that they have taken these lessons to heart. Every cute or majestic endangered mammal, from whales to pandas to polar bears to eagles, has been used at one time or another to advertise the consequences of environmental despoliation.¹⁹⁴ More recently, this phenomenon has extended to human health, in particular the health of children. One of the most compelling advertisements has to be the one used by the Sierra Club's "Beyond Coal" campaign, which juxtaposes a photograph of a coal-fired power plant next to one of an asthmatic child

191. *See supra* Part III.

192. *See, e.g.*, Sammy Zahran et al., *Climate Change Vulnerability and Policy Support*, 19 SOC'Y & NAT. RESOURCES 771, 781 (2006) ("[I]ndividuals who perceive climate change as harmful to their personal welfare are significantly more likely to support climate change mitigation and adaptation policies.").

193. *Id.* ("Citizens with an integrated concern for intergenerational equity, carrying capacity, and resource scarcity, and who regard the biosphere as deserving of moral consideration, are more willing to assume the costs of climate change prevention.").

194. *See, e.g.*, Duncan Macleod, *Would You Care More for Blue Fin Tuna*, INSPIRATION ROOM (Apr. 3, 2011), <http://theinspirationroom.com/daily/2011/would-you-care-more-for-blue-fin-tuna/#.UUTSxtaceYT> (discussing a print ad campaign created for World Wildlife Fund France that "connect[s] the plight of the Bluefin Tuna (Thon Rouge) with the popular causes of the panda, rhinoceros and gorilla" by depicting bluefin tuna wearing panda, gorilla, and rhino masks with the tagline "Would you care more if I was a panda?"); WWF: *Homeless Polar Bear*, ADS OF THE WORLD, http://adsoftheworld.com/media/print/wwf_homeless_polar_bear (last visited Mar. 16, 2013) (showing a print ad, created by EuroRSCG for the World Wildlife Fund Finland, that depicts a "homeless" polar bear in a city alley with the tagline: "Animals around the world are losing their habitats due to climate change. By choosing a hybrid or fuel efficient car, you can help prevent this. Take action right now.").

and states: “Your local coal burning power plant has a new filter. His name is Danny.”¹⁹⁵

But despite the immediacy and the effectiveness of advertising, it is not clear that these ads work or that they do so consistently in getting the message across that environmental harms are immediate or that they can be solved in an understandable way. It is not enough that we see the problem; we also have to understand it and how it can be solved. Zahran, Brody, Grover, and Vedlitz, citing the work of Paul Stern on the four causal variables that influence environmentally significant behavior—attitudinal variables, personal capability variables, contextual variables, and habits and routine¹⁹⁶—remind us that personal capability is a prime causal variable in effecting environmentally positive behaviors.¹⁹⁷ If you do not know what to do, then you will not do anything.¹⁹⁸ The connections between hunting and extinction and visible pollution and visible harm meet this criteria, but concerns about loss of habitat and the future effect of climate change, possibly the most serious problems we have faced, do not.

Compare the images from the 1960s and 1970s with the images of today. The “silent spring” could be made vibrant by getting rid of something clear like DDT, and because there were substitutes, easy enough to do.¹⁹⁹ But, we had to have the political will to ask for it. The Cuyahoga River was polluted, so we could stop pouring foul things from factories into it (as the Dennis the Menace comics urged).²⁰⁰ Trash was everywhere, so we could stop throwing it or pick it up. But, these problems were easy to address outside the legal

195. *New Filter Danny*, BEYOND COAL, http://www.sierraclub.org/designarchive/ads/beyondcoal/print/003%20New%20Filter%20Danny/03_DC_CoalAd_Danny.pdf (last visited Mar. 16, 2013); see also *Burning: Smog, Soot, and Asthma*, BEYOND COAL, <http://content.sierraclub.org/coal/burning-smog-soot-and-asthma> (last visited Mar. 16, 2013) (detailing the way air pollution can affect the health of children); “*My name is Peter*” *Clean Air Campaign Draws Wide Attention*, LITTLE VILL. ENVTL. ORG. (Sept. 26, 2011), <http://ljejo.org/archives/1504> (reporting on the reactions to the Beyond Coal “My name is Peter” advertising campaign in Chicago).

196. Zahran et al., *supra* note 192, at 773–77 (citing Paul C. Stern, *Toward a Coherent Theory of Environmentally Significant Behavior*, 56 J. SOC. ISSUES 407 (2000)).

197. *Id.* at 775 (“[P]ersonal capability . . . emphasizes an individual’s perceived and actual environmental knowledge, the skills and human capital required for environmental action, the perceived ability of a person to positively affect environmental outcomes, and whether a person ascribes responsibility to him- or herself for action.”).

198. *Cf. id.* (“Persons of higher education are more likely to absorb the costs of environmental action because they tend to possess more civic skills, assimilate environmental information more quickly, and are better able to target their activities.” (citation omitted)).

199. See *supra* text accompanying notes 31–37.

200. See *supra* text accompanying notes 38–47, 84.

framework.²⁰¹ More recently, dolphin-safe tuna was a rallying cry of the 1990s, and there is no doubt that this clear message found many adherents.²⁰² Why? Because each adherent could identify the problem and bring to bear her own energy to address it, and could do so in a way that, when combined with others' actions, would be effective.²⁰³

But the problems of today are different. Maybe coal-burning plants are using Danny and Peter as "filters," but we are not sure what to do about it. Do we tell the plants to add filtering equipment? Do we ask Congress to shutter all coal-fired power plants, which have existed in our world for decades?²⁰⁴ Maybe, but so far there has been no consistent message like the one to end DDT.²⁰⁵

And what about the polar bear? Cute to be sure, and endangered as well, but we cannot solve the problem by just stopping or restricting the use of one chemical like DDT, or one activity, like hunting. Instead, everything we do affects the climate, and thus the polar bear's habitat.²⁰⁶ We are not even sure what we should want to do.

201. See *supra* text accompanying notes 72–80.

202. See *Flipper Seal of Approval: Dolphin-Safe Tuna Certification Program Fact Sheet*, EARTHTRUST, <http://www.earthtrust.org/fsa.html> (last visited Mar. 16, 2013) (discussing the history of the dolphin-safe tuna movement that began in 1990 and included the 1991 U.S. Dolphin Protection Consumer Information Act and the "Flipper Seal of Approval" program organized by Earthtrust). But see Tom Miles, *WTO Rules Against U.S. "Dolphin Safe" Tuna*, REUTERS, May 16, 2012, available at <http://www.reuters.com/article/2012/05/16/us-usa-mexico-trade-idUSBRE84F1EY20120516> (reporting that "[a] World Trade Organization appellate panel [concluded that] U.S. 'dolphin safe' tuna labeling rules unfairly discriminate against Mexico, [which] rais[es] the possibility of sanctions on U.S. goods if the rules are not modified or dropped").

203. See, e.g., LORRAINE MITCHELL, ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., AGRIC. ECON. REPORT NO. 793, DOLPHIN-SAFE TUNA LABELING 22 (2001) ("Private firms had an incentive to produce and label dolphin safe tuna because enough consumers were willing to pay for this quality attribute (and many were unwilling to accept the alternative). The first widespread manifestation of consumer concern over dolphin deaths came in the late 1980's with the canned-tuna boycott.").

204. Julie Wernau, *Clean Is in the Air: Battle to Close Coal Plants Is a Lesson in History and Politics*, CHI. TRIB., Sept. 2, 2012, at B1 (explaining the long struggle to shut down the Fisk and Crawford coal plants in Chicago, which began operating at the beginning of the twentieth century).

205. See Eliza Griswold, *The Wild Life of 'Silent Spring'*, N.Y. TIMES MAG., Sept. 23, 2013, at MM36 (discussing the impact of *Silent Spring* on the American public and noting that "[Rachel] Carson is widely credited with banning DDT, by both her supporters and her detractors").

206. See generally KASSIE SIEGEL & BRANDON CUMMINGS, CTR. FOR BIOLOGICAL DIVERSITY, PETITION TO LIST THE POLAR BEAR (*URSUS MARITIMUS*) AS A THREATENED SPECIES UNDER THE ENDANGERED SPECIES ACT 20–64 (2005), available at http://www.biologicaldiversity.org/species/mammals/polar_bear/pdfs/15976_7338.pdf (detailing the dangers posed to polar bears from global warming, oil and gas exploration, hunting, contaminants, disease, and predation).

The Center for Biological Diversity's petition regarding polar bears pointed out the dangers to polar bear habitats posed by oil and gas exploration, but it could just as easily have focused on ending a myriad of federal activities that are related to greenhouse gases.²⁰⁷ If an individual wants to reduce greenhouse gas emissions, what can that individual do? Reduce driving? Yes.²⁰⁸ But more difficult questions follow. What products do we buy? Where should we get electricity? In which kinds of neighborhoods should we live? The solution to this problem is not as clear as the solutions to the traditional problems were.

Some environmentalists try to list the necessary actions, but even this can seem simplistic.²⁰⁹ Moreover, people may perceive these actions as not having an effect on the problem as a whole.²¹⁰ A 2009 article from a group of environmentalists and sociologists documented how much individual behavior could impact climate change, making such behavior a truly important factor for reducing greenhouse gas emissions.²¹¹ But that message has yet to make its way fully into policy.

Today, there is also a concerted opposition to effective messaging, which did not exist as much in response to the environmental

207. *Id.* at 61–62 (detailing several ways in which oil and gas exploration and development harm local polar bear populations).

208. *See On the Road: What You Can Do on the Road*, EPA CLIMATE CHANGE, <http://www.epa.gov/climatechange/wycd/road.html> (last visited Mar. 16, 2013) (“Leaving your car at home just two days a week can reduce your greenhouse gas emissions by an average of two tons per year.”).

209. *See, e.g.*, Doug Struck, *Climate Scientist Fears His “Wedges” Made It Seem Too Easy*, NAT'L GEO. NEWS (May 17, 2011), <http://news.nationalgeographic.com/news/energy/2011/05/110517-global-warming-scientist-concern/> (noting that one of the authors of a 2004 paper on how to curb global warming admits that “his theory was intended to show the progress that could be made if people took [certain] steps[, but that] instead of providing motivation, the wedges theory let people relax in the face of enormous challenges,” resulting in “a whole lot of simplification, that this is no big deal”); *see also* John Thøgersen, Jim Curtis, & Liam Smith, *Simple Steps to Save the Environment May Not Make Much Difference*, THE CONVERSATION (Apr. 20, 2012, 6:22 AM), <http://theconversation.edu.au/simple-steps-to-save-the-environment-may-not-make-much-difference-6507>

(“[C]ampaigns calling for simple behaviours with relatively small environmental benefit should only persist if there is evidence showing that they lead to more far-reaching and environmentally significant behaviours.”).

210. *See, e.g.*, Zahran et al., *supra* note 192, at 775 (“Perceived efficacy is a powerful predictor of environmental behavior[, as] individuals with higher personal control and optimism are significantly more likely to support environmental preservation efforts.” (citation omitted)).

211. *See generally* Thomas Dietz et al., *Household Actions Can Provide a Behavioral Wedge to Rapidly Reduce U.S. Carbon Emissions*, 106 PROC. NAT'L ACAD. SCI. 18,452, 18,452 (2009) (exploring the reductions in harmful environmental emissions that can be achieved “from behavioral changes involving the adoption and altered use of available in-home and personal transportation technologies, without waiting for new technologies or regulations or changing household lifestyles”).

campaigns of the 1970s. Rather than having one company that makes one product such as DDT, advocates for controlling climate change have to face a whole fossil fuel industry made up of the largest companies in the world, whose motivations are clear. This opposition has been shown to be quite sophisticated and even capable of misinformation.²¹²

Perhaps then, slogans and advertising are necessary but not sufficient. What has to be advertised is not only a catch phrase, but also the truth in all its complexity. When people are told that coal-fired plants are bad, they need to see more than pictures of only one part of the story. They need to be told about the effects of closing coal-fired power plants on electricity prices and workers, other electricity options, and the impacts on competition and climate change.²¹³ Clearer education and greater lists of choices have seemed to work in other Western cultures,²¹⁴ and I believe could work here in the United States.

The issue of our citizens not caring because they think that they can escape the harm or that they can be relatively advantaged is harder to reverse. These attitudes have been reinforced and co-opted by those opposing environmental protection and enforcement.²¹⁵ Many, if not all, of the messages opposed to doing more about air, water, species extinction, or the climate, focus extensively on not having to respect the benefits to and rights of other people.²¹⁶ Recognizing and directly addressing this phenomenon is important and may do some good,²¹⁷ but to the extent that it is part of a broader societal fragmentation, I cannot claim to know what is to be done. Moreover, increased poverty means that many people are not able to directly effectuate changes that may be necessary.²¹⁸

212. See Jay Michaelson, *Geoengineering and Climate Management: From Marginality to Inevitability*, 46 TULSA L. REV. 221, 229–33 (2010) (describing a “campaign of misinformation surrounding climate change” through which “private interests will spend enormous sums on climate change denial”).

213. See, e.g., Wernau, *supra* note 204 (“For some, the gravity of Fisk and Crawford closing came in the final moments. Some workers were so emotional as they went through the motions of closing the plants that they could barely speak.”).

214. See, e.g., Michaelson, *supra* note 212, at 223 (acknowledging the “widespread understanding of the climate crisis in Europe”).

215. See *supra* text accompanying notes 105–111, 117–121, 183–186.

216. See *supra* text accompanying notes 178–182.

217. See Flatt, *supra* note 2, at 5–6 (“By understanding and definitively articulating an environmental right, we can cut through the rhetoric and complexity of environmental administration, and assert and understand unequivocally that we each should have a right to a clean environment . . .”).

218. See Mollie Bloudoff-Indelicato, *Americans Need Sea Change to Reach Large Scale Sustainability*, CLIMATEWIRE, Sept. 25, 2012, available at <http://www.eenews.net/climatewire/>

There have been some interesting rumblings from religious organizations that emphasize the moral underpinnings of action, including protection of the environment and caring for those who are harmed by environmental degradation.²¹⁹ Most recently, for example, the newly elected Pope focused on care for the environment in his first public homily.²²⁰ This type of multi-faceted approach may be part of the solution.

V. CONCLUSION

Both the perception of less harm and the move to hyper-individualism are to blame for the waning sense of environmental immediacy, and together, these phenomena exacerbate the perceived remoteness of environmental harm or an ability to do anything about it.²²¹ If we at least try to be clearer about the complex nature of the problems we face and their potential solutions, point out that people still do have rights in the environment, and explain that this is a moral issue, perhaps we will bring back some immediacy and communitarian ideals.²²² Again, proposals to recognize the policy gains that could come from individual behavior would bring a helpful imprimatur.²²³

Because of the nature of the interaction between societal norms and perception of harm, the message of environmental protection

2012/09/25/6 (“[P]oor economic conditions and a sense of apathy often slow the process, making crucial changes challenging.”); *see also* Crowder & Downey, *supra* note 175, at 1116 (“[R]elatively low average socioeconomic resources among Latino and African-American families likely limit opportunities for members of these groups to move out of, or avoid moving into, neighborhoods with high levels of pollution, thereby increasing their overall proximity and exposure to pollution.”).

219. *See* Marlise Simons, *Orthodox Leader Deepens Progressive Stance on Environment*, N.Y. TIMES, Dec. 4, 2012, at D3 (discussing the environmental activism of “Ecumenical Patriarch Bartholomew I of Constantinople, the spiritual leader of the World’s Orthodox Christians”); *see also* *Evangelicals Stand up for the EPA on Climate Change*, CHRISTIANNEWSWIRE, June 21, 2012, available at <http://www.christiannewswire.com/news/4920920007.html> (announcing the Evangelical Environmental Network’s decision to run “TV spots highlight[ing] the extreme weather that has been plaguing the United States and point[ing] out that the poor in lesser developed nations are and will continue to experience more frequent and intense heatwaves, droughts, floods and other harmful impacts due to climate change”).

220. Claudio Lavanga & Alastair Jameson, *At Inauguration, Pope Francis Appeals for Protection of Poor, Environment*, NBCNEWS (Mar. 19, 2013, 4:07 AM), http://worldnews.nbcnews.com/_news/2013/03/19/17367434-at-inauguration-pope-francis-appeals-for-protection-of-poor-environment?lite.

221. *See supra* Parts II.B–III.

222. *See supra* Parts III–IV.

223. *See* Dietz et al., *supra* note 211, at 18,455 (arguing that future policies for reducing greenhouse gas emissions “should incorporate behavioral as well as economic and engineering elements”); *see also supra* text accompanying note 211.

and regulation must come from those in leadership positions. If that occurs, then we might see the powers of the religious and moral movements combine with the facts provided by the scientific movement begin to reverse the decline in concern about our environment and its enforcement of its laws. Then, the problem will not be “too big,” just “big.” We can attack the big problems in the environment; we have done it before.²²⁴

224. *See supra* Part II.A.