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This Land Is Your Land (Our Right to the Environment)

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THIS LAND IS YOUR LAND
(OUR RIGHT TO THE ENVIRONMENT)

Victor B. Flatt

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I. INTRODUCTION

What would you do if someone took your car? Would you call the police? Call your insurance company? Try to get the car back? Now compare your answer to that question with the following: What would you do if someone took your air? If you are like most people, the answer will be different. It is doubtful that you would call the police or even an environmental enforcement agency, if you knew of one. You may only be even vaguely aware that your air was “taken.” If the taking of your air caused immediate health problems, you would certainly be aware but still unsure who to appeal to for help. You might decide simply to give up and move away, the environmental equivalent of simply buying a new car. Your response would mirror the current reality of our world.

When I asked this question of two randomly determined groups in my first-year torts class, the answers to the two questions were strikingly different. Of those who were asked what they would do if someone stole their car, all but one, or approximately 98%, answered that they would report it to the authorities or their insurance agency, with the expectation that they would get it back or be compensated for it. All of the answers, including the one who stated that she would go after the criminal herself, demonstrate 100% agreement that the students owned the car and that no one else had any right to take it.

Compare that with those who answered the same question about their air. In this case, less than 40% said that they would report it or otherwise try to hold the one who took it accountable. All others indicated that they would either do nothing, try to come to a cooperative agreement, or that the answer would depend on the “value” of the pollution to society.

We may not be surprised about the divergence of answers, but I posit that we should be. Why should we treat the loss of our air any differently than the loss of personal property? Why is this the current state of our affairs? Where are the environmental police?

We are all supposed to have clean air. The Clean Air Act, section 7409, states that the administrator of the EPA is to limit the amount of a pollutant in the air so that it is not harmful to human health or the environment, and section 7410 requires the states to ensure that such levels are reached. In other words, we are all supposed to have enough air to maintain our health. The Clean Wa-

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2 Id.
ter Act specifies a similar requirement, and the Comprehensive Environmental Response Compensation and Liability Act ensures that we are not to be exposed to harmful amounts of toxic chemicals.\(^3\) The Clean Air Act also posits that we should be able to enjoy the natural beauty of our national parks free of polluting haze.\(^4\) Additionally, the Endangered Species Act posits that preservation of species is important because of health and aesthetic reasons.\(^5\)

Given such clear legislative injunctions, why are our environmental protections not clearly articulated in this day and time, or as well understood as other rights in our law? Why, if we already have a right to our environment (and I am asserting that we do through legislation), do we need some academic trying to articulate it? Why do we not recognize our environmental protections as rights and treat them as such? Why is it that we debate whether a power plant has the right to sully our air and give our children asthma, or a citizen has the right to breathe clean air?\(^6\)

The answer and response is critical to effective protection of our environment and ensuring that environmental rights are understood, debated, and compared with other important rights. Our current discourse over the environment ignores this crucial issue.\(^7\) If we don’t understand the right to an environment and why we have this right, we may lose it, regulatory or legislatively, to our great detriment. Understanding we have a right is necessary to compare and weigh the right with other rights and entitlements, and thus finding the appropriate balance between competing interests. Without this, we will not understand the optimal way to enforce our environmental laws. Without understanding our environmental rights, we will be unable to protect each individual’s environmental amenities and will move towards greater inequality and environmental injustice.

This article, therefore, seeks not to alter any existing legal regime, but seeks to change our understanding of the current legal regime in the environment. It also seeks to explain why this reconsideration is the proper way to view our environmental protection.

There have been other attempts to articulate the right to an environment, and some countries have gone so far as to simply “create” the right constitutionally.\(^8\) But as famed environmental academic Joseph Sax notes: “If environ-

\(^8\) See Joseph L. Sax, The Search for Environmental Rights, 6 J. LAND USE & ENVTL. L. 93,
mental claims are to be taken as more than rhetorical flourishes or broad aspira-
tional statements and are to be set in the context of rights, it is necessary to ask
how they fit into the values underlying other basic rights.9

Thus, it isn’t sufficient that we have a statutory statement saying that we
have a right to clean air or clean water. We have that, and yet we still don’t
appreciate our environmental amenities as rights. Understanding the nature of
our rights is going to be critical to having them, enforcing them, and balancing
them against other interests. If we do not, we leave an “aura of ambiguity”
around the “right” that prevents the true protection of that right.10

To the extent it was considered consciously, I believe that an individual
right to our environment has de facto been historically present, if for no other
reason than everyone generally had access to water, air, vistas, and other envi-
ronmental amenities. We may have owned it in common because, since it was
not in danger, it was not something that had to be defended individually or even
recognized or discussed.

Certainly, at many points in our human history, when the environment
has come under pressure, various attempts have been made to try to stem such
harms. Whether explicitly recognized as a personal or societal loss, people chal-
cenged interference with the collection of natural resources, the dumping of un-
treated water into rivers as a wrong, the pollution of air, the large scale alteration
of natural landscapes (in strip mining), and later the exposure to risk.11 Moreover,
in response to some amenities pressure, small groups over time have been able to effectively manage common resources that were understood as benefit-
ning more than one person. The motto of the Seattle City Light building, com-
pleted in the 1950s, echoed this understanding of our right to the environment,
stating that electricity should be “as free as the air we breathe and the water we
drink.”

Recently our environmental amenities have come under consistent, 
widely spread, and severe threat, and the law has responded definitively. But
whether because of deliberate manipulation by interest groups or lack of at-
ttempts to articulate what these absolute protections mean in the context of our
society, we find ourselves as a society in a position of flux in which the “owner-
ship” of environmental amenities or the amount of environmental protection is
in debate.12 We also now have discussions concerning concepts of group own-

9 Id. at 94.
10 Id.
REV. 798, 807 (2002); U.S. v. Republic Steel Corp., 362 U.S. 482 (1960); Anderson v. W.R.
1920).
12 See, e.g., DANIEL H. COLE, POLLUTION AND PROPERTY: COMPARING OWNERSHIP
INSTITUTIONS FOR ENVIRONMENTAL PROTECTIONS (Cambridge University Press 2002).
ership of property, such as biodiversity or heritage rights.\textsuperscript{13} We have calls to seek balancing of individual rights versus society rights, but we also have laws that unambiguously protect the environment of each of us. In many ways, the confusion over environmental amenities may be a subset of larger questions of power and control.\textsuperscript{14} Whatever the source of this dynamic state of affairs, we have become confused as to whether we can, or should, have a right to air or any part of our environment that is akin to our rights to our property and our personal autonomy. More importantly, we have not articulated why we should have such amenities. Without the answer to this question, we cannot hope to understand the importance of our environment, how it is connected to the individual, and how such rights are to be compared and balanced with others.

In trying to identify why we have or should have environmental rights, some commentators have looked to human rights in general, claiming that we all deserve a clean and healthy environment as part of a right of health and freedom. This is certainly important, but begs the question of why the environment is so important for us. Professor Sax has sought to explain the reasons for environmental rights by noting the connections between environmental rights and fundamental values of a democratic society, indicating that not protecting environmental rights undercuts democracy, an important value.\textsuperscript{15} His connection of environmental rights to other kinds of human expression is a correct one. However, I think it does not go far enough in explaining why we should have a particular kind of environmental "right" to begin with.\textsuperscript{16} Though I agree that our democratic values of human well-being are related to our rights to an environment, I think it is because our democratic values, our historic legal entitlements, and our environmental rights come from something far deeper, the evolution of human society in response to unmistakable benefits that such evolution brings to all. And this, in turn, is represented and expressed in the rights we have developed at common law. Environmental rights are important and inevitable for human success for the same reasons we have the current common law. I believe this is the key to understanding and articulating our environmental rights, and this forms the basis of this article's thesis and all implications that flow from that.

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, and that this policy currently underlies our environmental


\textsuperscript{14} Steinberg, supra note 11, at 804.

\textsuperscript{15} See Sax, supra note 8, at 93-94.

\textsuperscript{16} See id. at 100.
laws. As a result, this basic right should not be eroded either legislatively or regulatory.

In this paper, I will seek to demonstrate that what we consider our historic or common law rights in torts and property are critical responses to our societal and human evolution, and that they provide us with the template for much of human wealth, comfort, and advancement. Though currently expressed legislatively, the right to our environment is really the same as the right to protection of private property and bodily integrity we have at common law, and should be considered as the same kind of right we have at common law. In order to prove this proposition, this paper will seek to examine and demonstrate three concepts:

1) Our common law entitlements in Property and Torts developed for a reason that is necessary for and thus extremely important to the functioning of our society at its current level of prosperity;

2) Our current environmental laws developed because of the same important reason, but are expressed legislatively because of structural problems with the common law; and

3) This means we should respect, treat, and understand environmental rights the same way we do those historic legal entitlements.

After this is demonstrated, this article will explore more fully the implications this has for how we think about our modern environmental laws and their enforcement. By understanding what the nature of environmental protections are, we can understand how to balance environmental protections and amenities against other interests or legal entitlements. Recognizing environmental protections as rights that are associated with individuals would thus have far reaching implications not only for the future of environmental statutes but also how those statutes would optimally be enforced. While this discussion is undoubtedly anthropocentric in its discussion of environmental rights, even an environmental “human right,” by recognizing human concerns in the environment, may play a “role in the development of an ecological consciousness.”

The article in Part II explores the nature of rights in general. Part III examines how our tort and property rights arose at common law. Part IV notes the

17 Though tort and property rights originated as “common law” in the Anglo-American system, and have generally evolved as judge made doctrine, depending on the legal system in place, they may be expressed in a civil system or even by tradition. The common basis of these legal rights is their provenance, explored infra, their universality, and their importance.

similarity and connection between these common law rights and our environmental legal entitlements. Part V then specifies and defines the right that exists at common law and in the environmental arena, while Part VI explores the implications of the recognition of our environmental rights.

II. THE NATURE OF A RIGHT

To go forward in this discussion, one must first clarify terminology. What do we mean by the term "rights?" There are many theories about what constitutes a right and how it develops. We speak of Constitutional rights, and human rights. There is discussion of property rights, fetal rights, elderly rights, children's rights, women's rights, patent rights, and gay rights. The sources of these rights are different, the rights themselves are different, and some may be only aspirational at this stage. What they all have in common is that they refer to some legal or moral articulation to protect an important value of an individual or group. In the legal sense, this value is generally protected by articulation of a non-interference boundary. In discussing a property right, Professor Goldstein stated that it "is a claim that will be enforced by society or the state, by custom or convention or law." This boundary may be porous or variable, but it is the establishment of such a boundary that articulates a "right." For example, a moral and legal boundary exists to protect individuals from enslavement. Sometimes this boundary may be challenged by new circumstances (are long term contracts without exit provisions slavery?), but we still speak of the "right" nonetheless. In this sense, our common law of torts and property recognizes particular rights of persons because there are established legal boundaries that protect entitlements.

Many legislative protections could be described or expressed with other terminology, but since environmental amenities must often be balanced against things we refer to as "rights" (such as property rights), I think it is prudent to employ the same terminology and structure for the two. Indeed, the nomenclature itself may be one of the reasons that we fail to treat environmental entitlements as true "rights" worthy of protection. Our ability to enjoy or utilize the environment can be and should be described by how far this right extends and its interaction at the border with other rights.

One should also note that though we can use the common term "rights" to express this legal non-interference boundary, and the boundary between rights, the practical expression of "rights" may still look different to the casual observer. Some might assert that this means these "rights" should be treated differently in a case of "function follows form." There are indeed important


20 In this country, the codification is in the XIII Amendment to the United States Constitution.
differences between the various entitlements that can be described as rights, but as I will point out infra, the differences between environmental rights and common law rights are not based on any fundamental difference in the right itself.

For instance, many people think of “rights” as the flip side of “duty,” and that without a duty there is not a “right,” at least not in one sense of the word. While the “duties” associated with environmental rights may not seem as obvious as those at the common law (“if I put a molecule of pollution in the air, have I hurt anyone, or invaded anyone’s right?”), all duties can be expressed as the non-invasion of the right. Thus, if someone puts pollution into a commons, and that pollution singly or in combination causes harm to the right to be free from that pollution, a duty has been breached. Such duties may be harder to enforce when tracing harm is difficult, but this is simply another way of noting that the common law sometimes has a hard time effectively protecting a right.

It does not mean that right does not exist.

Similarly, we may have a harder time asserting the boundary of a right that seems to be a group right (“society has a right to clean air”). Though certain rights can only be explained as a group right, many things we think of as group rights can instead be classified as individual rights. These rights may be easier to understand or enforce in a group, but aside from the complexity of articulating the exact boundary of the right of the individual, these rights are no different. Indeed, one of the purposes of this article in discussing an individual right to an environment similar to common law individual rights is to note that rights should be treated similarly even if the understanding of rights boundaries or the ability to enforce those boundaries is more complicated. This complication is a practical concern and may explain why the common law cannot protect some rights boundaries as it does others, but it should not alter the nature of the entitlement itself.

How the right is enforced also does not make a difference in the legal entitlement, though the practical distinction of how a right is enforced definitely effects how that right is perceived and how effective it is. One of the obvious distinctions between common law torts and property rights on the one hand, and environmental rights on the other, is that common law rights may almost always be enforced by the aggrieved individual by suing for damages or injunction in a court of law.

Many environmental entitlements, such as the one noted in the Clean Air Act, the “right” to breathe healthy air, do not come with a comparable individualized cause of action. Indeed, individualized causes of action, though

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21 See discussion infra pp. 20-21.
22 A right to avoid genocide for example.
preserved in environmental statutory schemes, are tightly regulated.\textsuperscript{25} Though this undoubtedly plays a role in how we perceive the right, it should not change the legal entitlement itself. The lack of statutory causes of action to go along with the articulated rights is due to practical difficulties of asserting the right at common law and not because of any inherent "weaker effect" of the environmental entitlement.\textsuperscript{26}

As will be noted infra, some environmental entitlements can be enforced by individuals under the common law, and these common law rights are explicitly preserved by the statutory regimes.\textsuperscript{27} It is simply that the causation element of a common law cause of action is too difficult to prove for environmental insults with multiple sources, so the right had to be asserted statutorily, with a different mechanism of enforcement.

The difference in enforcement does not change the ideal that the entitlement should still be considered a right akin to the common law rights. Indeed the statutory schemes in the Clean Air Act, the Clean Water Act, and many other environmental laws have powerful enforcement mechanisms (through citizens' suits) that could be considered stronger than that of the common law rights.\textsuperscript{28} In all cases, these entitlements represent our society's and law's establishment of a norm that should be considered at the level of the individual, the non-interference boundary that is the right.

Another preliminary question is why do we have a legal boundary, or in the question of tort and property rights at common law, why did such a boundary evolve? Is it simply social choice? Morality alone? A full discussion of this is beyond the scope of this paper, but some clarifications must be made. There are many theories of why legal rights or entitlements are created, but the two major ones posit that they arise because of moral or public choice, or that they arise due to economic efficiency. Thus, an entire field of law is devoted to the law and economics movement and its somewhat related predecessor the "utilitarian movement." This frames our selection and evolution of law (and thus legal entitlements) to why such an evolution would economically advantage the society for which it evolved.\textsuperscript{29} Similarly, there is a branch of thinking concern-

\textsuperscript{26} See discussion infra.
\textsuperscript{28} Though statistical evidence exists that the statutory provisions have been weakened by judicial interpretation which suspends them in the face of government enforcement efforts. Flatt, supra note 23, at 19-20.
\textsuperscript{29} See Herbert Hovenkamp, The First Great Law & Economics Movement, 42 STAN. L. REV. 993 (1990). It is unfair to lump disparate theories that use economic analysis under the rubric of economics and the law. There are many different sources and ideas about the role and power of economics and efficiency in shaping the law, as well as whether it is a primary source or a source that is applied after moral or values choices are made. See, e.g., Daniel A. Farber, What (If Anything) Can Economics Say About Equity?, 101 Mich. L. Rev. 1791, 1792 (2003). For a fascinat-
ing "natural rights" which posit that legal protections exist (or should exist) because they reflect the "natural state of man," are ordered by God, or are in some sense "inalienable" rights. 30 Richard Epstein sidesteps the question entirely by simply stating that the relationship of rights and law is that what we call law developed and develops to protect our rights from others who would infringe upon those rights. 31 "There is no doubt in my view that this simple view of entitlements between persons lies at the heart of most of our legal system, both as it developed at common law, and as it has come to be modified by statute."32

In this article, I will not utilize either the "economic" or "natural rights" theories precisely, but will look to the wealth generation and human well-being brought about by our common law as it seeks to control and alter human "nature" for the betterment of those involved as explained by behavioral theorists. This model explains both the development and contours of most of the common law of torts and property as well as the parallel development and contours of environmental law, which form the backbone of this thesis. In so doing, I want to emphasize that this articulation about the "why" of our rights should not be construed as denying or accepting any dominant theory about the overall development of law. Instead, it is an attempt to articulate what I believe to be logical cause and effect relationships of human evolution and legal responses to that evolution that seek to increase benefits for society, however that term "benefit" is defined. This is certainly not an attempt to explain our lives in traditional cost-benefit paradigms,33 nor is it a rejection of morality for its own sake, or a rejection of a deity or collection of values. It is utilized precisely because it can also explain morality and religion and because it is not dependent on any particular culture, time, or set of values, beyond the value of survival and enhancement of well-being. 34 This should be particularly apt for an explanation of both common law and environmental laws since they both involve the accumulation

32 See id.
33 See ACKERMAN & HEINZERLING, supra note 6, for a devastating critique of the limited nature of trying to quantify and compare all values with respect to monetary terms.
34 In this construct, what we call morality could be considered the result of a genetic predisposition for behavior that enhances the individual's status. Recently, Robert J. Barro and Rachel M. McCleary have established a statistical relationship between certain kinds of religious belief and how it affects the accumulation of wealth. They speculate that it may be important to internalize thoughts of afterlife rewards and punishments to provide incentives to wealth production. See Felicia R. Lee, Faith Can Enrich More Than The Soul, N.Y. TIMES, Jan. 31, 2004, at B7.
of resources to survive and a protection against direct bodily harm.\textsuperscript{35} As stated by Ted Steinberg, "humankind 'survives biologically or not at all.'"\textsuperscript{36}

The issue of whether the holding of a right implies that the right can be alienated, or is a commodity, is also beyond the scope of this article. By saying that one has a right to clean air, it does not necessarily follow that air is a kind of "property" that can or should be alienable.\textsuperscript{37} As discussed by Michael Sandel, and other leading scholars of "commodification," perhaps some things should not be bought and sold.\textsuperscript{38} Even Richard Epstein, who wholly embraces the power of the market, might limit the buying and selling of environmental amenities because of the extraordinarily high transaction costs involved therein.\textsuperscript{39}

The thesis of this paper does not require a whole-hearted embrace of one view or another. Certainly some kinds of environmental amenities, such as water, are bought and sold under certain legal regimes. But whether actual monetary transactions occur or not, it is clear that much of the environment has aspects of commodity. If someone uses clean air so that another cannot use it, it is effectively owned. This paper seeks to place whatever environmental commodification does exist in individual persons, as are most common law tort and property rights. Articulating this as an individual right is necessary to effectively enforce environmental requirements and balance them against other rights. Whether these can or should be alienable (just as whether a person should be able to give up a right of self-defense) is a question for future scholarship.

III. THE DEVELOPMENT OF OUR TORT AND PROPERTY RIGHTS

How and why did our common law develop? Does legal evolution protect rights, and if it does, what are those rights and how and why does it protect them? At least part of the answer lies in the evolution of human behavior and some remarkable innovations that called for both social and legal systems of modifying that behavior so as to take full advantage of these innovations to create greater wealth.

\textsuperscript{35} Steinberg, \textit{supra} note 11, at 802 ("Such daily and obvious routines as securing enough food and getting rid of bodily waste [are] essential practices that must occur in ways that do not undermine a culture's ecological base.").

\textsuperscript{36} Id. (quoting Roy A. Rappaport, \textit{The Flow of Energy in an Agricultural Society}, in \textit{Energy and Power} 80 (Dennis Flannigan et al. eds., San Francisco 1971)).


\textsuperscript{39} See Epstein, \textit{supra} note 31, at 978-979.
This discussion is not particularly new. Property scholarship has seen a resurgence in the idea that property law develops to protect needs of human society for the benefit of all. As Carol Rose recounts:

Very briefly, the neo-utilitarian view asserts that property rights are a good thing because they encourage people to invest their efforts in things they claim (since each owner reaps the rewards of investment decisions as well as bearing the costs) and because they encourage trade (since clear entitlements are a precondition to trade). All this activity and trade, of course, makes us collectively wealthier. So if we want to reach that result of collective well-being (and who would not, other things being equal?), we need to have clear and secure property rights; the more valuable the resources at stake, the clearer and more secure the property rights should be.

But this version has limits, and these limits are seen in the importance of human interaction and community, the common property theory, to the concept of ownership and rights. Carol Rose says we deal with this dichotomy best when we “bridge the gap between” the utilitarian and the communitarian theories. While this section may not fully integrate all of the relevant concepts that explain the evolution and nature of property, it does seek to work these threads in together, particularly noting the evolution of law in response to changed needs and circumstances. It does not posit that the “law” is static and that the “static” law is always best for current circumstances, but that it, combined with other human institutions, continues to evolve in the direction necessary for the betterment of human society. “The best of all possible worlds?” Maybe. But such evolution to the maximally beneficial system is reflected in much of history and is a very powerful idea. Thus, the following section takes some effort to explain this fully.

The world into which humans evolved must have been a very insecure place. Before the development of agriculture and of animal domestication, food, for much of humanity, was an ongoing concern. With some notable exceptions (such as the Northwest Tribes), scarcity was always a fear, and food storage an iffy affair. Indeed, for humans, as for all animals, the scarcity (or seasonal nature) of food must have been the most important limitation on human popula-

40 CAROL M. ROSE, PROPERTY AND PERSUASION 3 (1994).
41 Id. at 5.
42 Id.
tion. Before the advent of agriculture in approximately 8000 B.C., the best estimate of the population of modern homo sapiens was between 5 and 8 million worldwide, a number that would be consistent with the numbers of other mega-fauna and primates, with a tilt towards the human mastery of certain tools that allowed for spreading out of the natural habitat from Africa.

All evidence indicates that humans lived together in small societies, family groups, or tribes. Presumably, this benefited the species by benefiting the individuals that made up the group. Though one might posit that one member of a species could benefit herself by taking the resources of another, this is not the case with humans. Humans are, and from available scientific evidence, always have been, pack animals. From an evolutionary standpoint, this has been attributed to the synergistic capacity of members in a human pack to produce more food per person when acting together than by acting alone.

A shark might be better off hunting alone since it might lose its kill to another shark and the other shark would not make it a more efficient hunter. This is not so for humans. Perhaps this evolutionary (or economic) need led to familial or moral structures or behavior we see today. For instance, scientists have demonstrated that the ability to trust, cooperate without coercion, and follow through with cooperative behavior is genetically favored in higher primates but only to the extent that it serves the purposes of passing along DNA.

Selfishness might seem the best way for an individual to get the most genes into the next generation, evolution’s only coin of success. But biologists have come to understand how cooperative behavior, under certain definable conditions, can have a greater genetic payoff and therefore how genes that foster such behavior could be favored by evolution.

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44 Id.
45 See Robert S. McNamara, Time Bomb or Myth: The Population Problem, Foreign Affairs, 1107, 1108 (1984) ("[w]ith the advent of agriculture — about 8000 B.C., when the best rough historical estimate of the world’s population approximated eight million..."); PAUL R. EHRLICH, ANNE H. EHRlich & GREThEN C. DAILY, The STork and the Plow 64 (1995) ("The total population at the dawn of the agricultural revolution, around 8000 B.C., is thought to have numbered about 5 million people.").
46 See Wade, supra note 43.
47 WILLIAM H. CALVIN, A Brain For All Seasons 4 (Univ. of Chicago Press 2002).
48 Id.
49 See Nicholas Wade, Genetic Basis to Fairness, Study Hints, N.Y. TIMES, Sept. 18, 2003, at A27.
50 Id. Humans may possess even more altruistic genes. CALVIN, supra note 47, at 5.
51 Wade, supra note 49, at A27.
This limit on cooperation generally extended to a group in which familial ties existed. Too much anonymity would not allow for cooperation in larger groups and thus was not preferred or economically efficient. And because a hunting pack of 10,000 humans received no greater synergistic effect in food production, there was no reason to create a system for such cooperation. Cooperate with your family, but compete with others.

Before there were vast storage capabilities for food or the ability to control supply, there must have been fierce fighting over the most productive areas—the ones where game and berries and nuts were most plentiful. For even with uncertain production, early humans must have recognized the need to protect the few examples of bounty which they could find. Indeed barbaric warfare and slavery were an integral part of pre-agricultural humanity. There is evidence of fierce warfare over the best fishing, hunting, and gathering areas. Life in pre-history was a zero sum game. Like all animals, humans faced a limited supply of resources. Your tribe had access or your tribe did not. That all changed about 10,000 years ago.

With the advent of agriculture and the ability to control food supply, it became technically possible for more humans to survive. However, the technical capability was not enough. It was not long before early societies of humans must have recognized the need for protecting this supply in order for it to be of any use. It would do no good to accumulate goods and food, if the accumulation would be subject to marauders and could be plundered. Though they may not have recognized "economic incentive" as such, it must have been patently obvious that no one would go to the trouble to create or gather more "goods" if those goods would not be protected. Throughout history, in incredibly diverse cultures, when presented with the ability to accumulate goods, societies routinely create systems to protect, improve, and expand community wealth. Just as the protection of life in the tribe engendered loyalty, trust, and work for the tribe, these new systems, perhaps relying on these already developed traits, would modify them to engender the ability to protect incentives to work and accumulate on a large scale.

52 See id.
53 See id.
54 Id.
55 See generally Bruce Bower, Seeds of Warfare Precede Agriculture; War Among Hunter-Gatherers, 147 SCI. NEWS 1, 4 (1995).
56 See id.
57 See EHRLLICH, EHRLLICH & DAILY, supra note 45, at 141-42 ("More people can usually be fed from a given area of land by even primitive agriculture than by gathering and hunting.").
With the advance of agriculture and long term supplies, specialization began to develop in the early cities as more people were freed from subsistence.59 This allowed even greater wealth production through the concept of comparative advantage; it allowed specialization; it produced a need for more formal education; and it probably gave birth to the first written language— all inventions that were produced by the vast increase in wealth and goods made possible through agriculture and domestication.60

How long the development of the concept of property (personal and real) took is not completely clear, but it does seem that it was a necessary response to the ability to accumulate supplies. One need only look at the comparable tribes of the Pacific Northwest to see the lack of societal response when wealth could not be controlled as property. These tribes were wealthy because of an enormous supply of natural resources; however, the tribes could not expand that wealth because they could not exert ownership over their “goods” which were the ever-migrating anadramous fish stock.61

Thus, at least in the newly agricultural/city societies that developed in Africa, the middle east, the far east, Central and South America, and along the Indus river, the old paradigm of taking whatever you could by raiding the other (or foreign) group, had given way to the new paradigm protecting individual accumulation for the increasing wealth of all within a much larger society. This evolution continued with increases in the allowance of who could own property and factors that increased the overall value of property continuing to evolve.62

With the protection of goods, the related need to protect the production of those goods, particularly the human capital, also became clear. The law responded to this as well, creating certain protections for humans to be free from personal harm. Respect for what we now call “human rights” was a long time coming and is not necessarily part of long term biological human evolution according to most biologists, but over the course of time, however, the law overall has moved in that direction.63 From rules prohibiting murder, to the development of torts at common law, to the prohibition of slavery, there has been a movement of respect for autonomy to the body, just as property law recognized the right to accumulate goods.

59 CALVIN, supra note 47, at 50.
60 Id.
61 Even with our modern technology and laws, we still are not able to manage the complex salmon life cycle so as to preserve and protect it. See Endangered and Threatened Wildlife and Plants, 50 C.F.R. §§ 17.11, 17.2 (2002).
62 Goldstein, supra n. 19, at 353-54. (Noting that the evolution of American property law was dynamic, and though similar to Britain, had freeing innovations that increased wealth).
Over time, certain classes of people were given the right to be free from kinds of intentional harm to bodily integrity and autonomy. Later, as interaction increased and more sophisticated societies emerged, there also arose doctrines that sought to protect personal autonomy from accidental invasion. Though gender and tribal discrimination and even slavery remained fairly common, codes developed to protect bodily integrity for a certain class of people believed to be necessary for wealth production. Though these legal protections were applied inconsistently, in successful societies they were generally growing over time as it became possible to use them to assist in ever more wealth production. The story of this emergence reflects the importance of the recognition of "property" rights in the body for societal flourishing and wealth creation, just as the recognition of rights in personal and real property were critical to human flourishing and wealth creation.

During the development of much of the common law, ancient protections for chieftains and/or royalty (those who controlled wealth by force) slowly expanded to "commoners," the so-called yeoman farmers and then the merchant class, who, not coincidentally, were finding ways to use their ingenuity to create wealth. These "productive" members of society were gaining political rights. Even serfs gained more freedom as it became clear that doing so would provide more economic benefits for the landowners.

For much of this time traditional women's work, though clearly necessary for survival, was not recognized as "productive" for purposes of wealth generation and was owned by husbands or other men. Moreover, for much of history, women's work could be coerced, and unless the women had other attributes, such as the ability to cement alliances and property through marriage, external productivity was not sought in women.

64 From the Ten Commandments, Exodus 20:12-17 (New King James) ("You shall not murder. . . You shall not covet"), to the XIII Amendment, abolishing slavery.

65 ROBERTSON, POWER, ANDERSON, AND WELLBORN, CASES AND MATERIALS ON TORTS 73 (3d ed. 2004).

66 The fall of Sparta, considered the most powerful of the ancient Greek city states, has long been attributed to the accumulation of rights in too small a class to allow that city-state to flourish. Almost all energy had to go to repressing and subjugating others. ENCYCLOPEADIA BRITANNICA MACROPAEDIA, VOL. 20, GREEK AND ROMAN CIVILIZATION 225-26 (1998).

67 Note the differences in the early emergence of protections in England which had less of a serf system than the European continent where such protections came in later in association with the wealth of the merchant classes. NORMAN DAVIS, A EUROPEAN HISTORY 584 (Oxford Univ. Press 1996).

68 Id. at 602-03.

69 Id.


71 Id. Women with property and women with systemic legal rights started appearing in Roman
Slavery attempted to capture the productivity of the slaves, and even though it was clear that forcing brute work from a person who did not wish to do it lowered total wealth maximization, it was economically sound for the slave-owners, those whom it benefited.\footnote{Ira Berlin, Generations of Captivity: A History of African-American Slaves 3, 10 (The Belknap Press of Harvard University Press 2003).} Even if overall wealth production were lessened, those in control forcibly redistributed what was generated to them, producing great wealth concentration.\footnote{See id.} Thus, it is no surprise that though the wealthiest persons in the American colonies lived in the South, the overall wealth of the South lagged behind that of the North.

Nevertheless, as with serfs in an earlier time, for those slaves whose work could be considered uniquely wealth productive (for the owner), custom or law often arose to provide bodily and property protections to encourage this production.\footnote{See id. at 78-79.} While one may be able to force brute labor, it is much harder to enforce creativity, intellect, or artistry. Thus, slaves skilled in a craft or with a recognized talent of the mind, such as music, often were allowed to profit from that talent, working for hire for others to earn money to buy freedom.\footnote{See id.} This carrot was held out to encourage hard work and to improve craftsmanship so that more wealth could be created and captured by the slave-owner.\footnote{See id.} Over time, even with brute labor, some slave-owners realized that they could get more productivity by requesting a fixed amount of work, which left an incentive for the slaves to do the work well so that they could have time for themselves.\footnote{See id. at 77-78.}

Although consistent protections for bodily integrity arose somewhat later than did widespread conceptions of property, they are similar in that they arose in connection with opportunities for greater wealth production for society as a whole, and for those in power. They also arrive at the same basic principle: the right of individuals to their "property" - be it accumulated goods or the control of their own bodies - shall be secure.\footnote{The other major strand of common law is contracts, which allows individuals to tailor the fallback rights recognized in torts and property.} At least in western society (and it could be argued in most societies the world over) the dominant pattern of law was, and is, to protect these tangible rights, at least for some.
The phenomenon is illustrated by the rise and fall of other legal systems. Other legal systems have attempted to produce material goods by simply requiring individual accumulation to be redistributed to others. Those laws attempt to force the creativity and work necessary for wealth creation and accumulation. That, in turn, has formed the basis of groups living according to religious systems (such as the early Christian communes) as well as political systems (such as communism in the former Soviet Union), but it is generally regarded as a failure with respect to wealth accumulation.\(^7\) Indeed, legal changes in the newly independent states of the Eastern Bloc appear to be primarily oriented towards wealth creation and protection.\(^8\) Even in areas that have no law to speak of, time and again patterns emerge to protect rights to allow wealth accumulation and the personal autonomy necessary to produce that wealth.\(^9\)

IV. OUR PROTECTIONS IN THE ENVIRONMENTAL ARENA ARE LIKE RIGHTS IN TORTS AND PROPERTY

It is easy to think that our legal right in a clean environment is different from our rights at common law. The specific, articulated entitlement in the Clean Air Act for instance is not thousands, or even hundreds of years old. It arose in 1970 from a statute, not the evolution of judge-made doctrine or successor statute.\(^10\) It also primarily looks forward and does not usually concern itself with compensation.\(^11\) But these differences do not make the "why" of the entitlement any different. Though the mechanism of protection may be different, I believe that the protection of air and other environmental amenities arose for precisely the same reason as the development of a historic right in property and torts. Our environmental rights also trace primarily to long standing principles of human interaction that generally increase societal welfare.

We often look at statutes as new innovations or programs that the legislature puts into practice because of a new desire on the part of society or be-

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\(^9\) In Somalia, which is ruled by various factions, rudimentary commerce and capitalism have developed by relying on the protection of a clan, group, or mercenaries.

\(^10\) There were predecessor protections for the air that attempted to protect the right. Act, July 14, 1955, c. 360, 69 Stat. 322, as amended, was known as the Clean Air Act, and was recodified after the 1977 amendments.

cause of a change in resources or technology. We may distinguish statutorily created benefits as "public benefits," "public" rights, and "private" rights.\textsuperscript{84}

Within the "rights" construct, "public" rights are similar to "private" rights, though generally "public" rights are almost always created through legislation, since the public cannot usually enforce its rights because of "commons" problems.\textsuperscript{85} However, "private" rights may be protected by statute as well, and the United States Constitution prohibits interference with certain "private" rights, whether legislatively created or created at common law.\textsuperscript{86} The United States Constitution presumably allows Congress to do away with welfare protections for all or to change tax deductions while it may not take away private property or someone's life except for narrowly defined exceptional reasons.\textsuperscript{87}

A rigid distinction between statutory and common law rights is not accurate. The more notable distinction is between rights and benefits. Common law protections and legislative protections may be identical and simply depend on the "law" itself and what it protects. Laws can be created by the legislature to redistribute income or to temporarily create a program of limited application, or the legislature can choose to alter the common law or to create an absolute right. The level of protection accorded legislatively created rights can be different or similar to that accorded to common law rights. Generally, why these laws are created effects how they are administered. This relationship between common law rights and legislative codification or modification thereof was explored in the case of \textit{L. v. Yellow Cab Co. of Cal.}, in which the California Supreme Court noted that sometimes statutes were created to assist in the propagation of common law and should thus be respected as such and also subject to the same changes as the common law.\textsuperscript{88}

\textit{[T]he enactment of section 1714 of the Civil Code in 1872 codified the doctrine [of contributory negligence] as it stood at that date... [I]t was not the intention of the Legislature in enacting section 1714 of the Civil Code, as well as other sections of that code declarative of the common law, to insulate the matters}


\textsuperscript{85} If all suffer equally, theoretically no one has an incentive to bring the case; rights are to be asserted by the state for the benefit of its citizens. \textit{Robertson et al.}, supra note 65, at 593.

\textsuperscript{86} The Fifth Amendment to the United States Constitution asserts that no life, liberty, or property may be taken without due process of law. United States \textit{Const. amend. V.}

\textsuperscript{87} With compensation in the case of property or due process in the case of property and life. The United States Constitution states, ("[N]or be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."). United States \textit{Const. amend. V.}

\textsuperscript{88} 532 P.2d 1226, 1232-33 (Cal. 1975).
therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution. 89

The bottom line is that whether solely existing at common law or in statute, if a law creates an entitlement in a person such as an entitlement to healthy air, rights exist that are to be protected in similar ways. In the broad range of our laws and protections created by our laws, our environmental laws are much more like our common law rights protections and historic entitlements than are the minutiæ of tax policy. This fact is important, for while it does not state that an environmental entitlement is necessarily constitutionally protected like some property rights, it does indicate how society values environmental rights and how such rights are to be protected once they are created. Therefore, it is important to demonstrate this fact and to set out why environmental protections created by our legislature are like common law rights in property and torts. Once the similarities are established, we can then examine what the implications of this similarity are.

We start with the question of why environmental rights are not part of our historic common law system of property and torts in the first place if they are like the common law rights of property and bodily integrity. The simple answer is that, of course, some are. Some environmental harms have been the subject of common law protections for a long time. People have challenged environmental harms on their property under the common law such as trespass or nuisance. In that sense, it is well established that we have a "right" to keep unwelcome things, including pollution, off of our property. 90 We generally can also protect our property from alteration or debasement, whether hazardous or sometimes even aesthetic. 91

But most environmental harm differs significantly from other harms that the law seeks to correct. Much of environmental harm does not lend itself to the common law’s protection of property or bodily integrity. Though many who experience environmental harm may feel as if they have lost something that was theirs, no one had a deed to the clean air or the quiet forest. It was simply always there for them and their ancestors. Thus, there was no need for an assertion of the right. Moreover, under the common law of torts and property, in order for there to be recovery, the person or persons who harmed or caused loss had to be identified.

89 Id.

90 See Borland v. Sanders Lead Co., 369 So. 2d 523, 526, 528 (Ala. 1979).

Also true is that there was less interest in some environmental amenities (such as wilderness or vistas) in older times because of other social concerns. As interest in such amenities increased, common law altered, but usually too slowly to fully protect the newly developing interest. When the first historic loss of fish runs occurred from development in New England in the Nineteenth Century, citizens found that common law protections, while theoretically applying to the loss, were not sufficient to stem the tide. As stated in a discussion of the problem, "[t]he Rhode Island legislation reinforced this common-law avenue of redress, but the fact that it had to do so is evidence that such rights to fish had already been compromised."  

So in the loss of our environmental amenities, the common law entitlement had not yet come into being. Even when persons could recognize harm to their environment (a loss of their environmental amenities), and express it in the common law context, who would pay or who could enforce the common law without clear rights of protection?

For those situations where the property interest was clear (because of the development of property concepts for other reasons) and causation of loss was clear, the common law was used as a response, and could do so relatively successfully. There are many cases in which the common law successfully enjoined harmful pollution from neighboring land, upholding a common law right to be free from harm to an environment associated with real property. But for the majority of environmental impairments that did not fit the standard common law model, it became clear that other action would have to be taken. A mechanism had to be created to preserve what common law conceptions did not protect. In the United States, as around the world, the response was government intervention in the form of statutes to protect various aspects of the environment that the nation and its citizens treasured. The mature generation of these laws (the CAA, the CWA, the ESA, and the CERCLA for instance) unambiguously protects human health and other environmental amenities from the encroachment of others who would infringe on those interests. Thus when the threat to general human desires and needs in environment and health became clear, these were protected like rights.

Since these rights are statutorily created as a result of common law shortfalls, it is no surprise that the reason for environmental protection is similar

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92 See, e.g., Prah v. Maretti, 321 N.W.2d 182 (Wis. 1982).
93 Id.
94 See Steinberg, supra note 11, at 806-807.
95 Id.
to the reason for the protection of our common law rights. Environmental rights are similar to rights in property and in human autonomy in that harm to these rights is injurious to human society as a whole. Just as stealing property is a disincentive to invest in wealth accumulation to the detriment of all, so de-spoiling a commons resources is a disincentive for anyone to invest in care of the commons, leading to the ruin of a resource that all must depend on or that all wish to preserve. This is true whether the commons resource is necessary for health, beauty, or some other reason.

It is also hard not to see that some “environmental rights” are critically related to the right to “security of the person.” Indeed much of environmental law concerns injunctions to stop persons from harming the health of others.

Yet because responsibility of harm to humans or amenities is hard to trace, we do not see full protections in tort, a “tragedy of the commons.” General conceptions of property law have not helped to protect these common resources even though the protections would be economically efficient for the same reasons that they are economically efficient in the common law.

But there has been a response. It is primarily legislative in nature, and is found in the CAA, the CWA, the ESA, the CERCLA, and the RCRA. Is it different or less important because it is recent? No. Indeed the very “when” of its creation (at the moment of need) parallels the “when” of the creation of common law and historic rights, furthering demonstrating “why” both were created.

Just like common law rights, environmental rights protections arose only when it became necessary to protect nascent incentives that were giving rise to an increase in wealth, or to protect interests that had become common to almost all humans. The common law of protection of individual interests arose over time because it was necessary to accommodate human and societal needs to create wealth and opportunity for all (or at least vast wealth and opportunity for some), but it did not arise until conditions made it necessary. Similarly, environmental protections did not arise until they became necessary.

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99 See, e.g., 33 U.S.C. § 1312 (2000); 42 U.S.C. § 7409 (2000) (specifying that no one shall put anything in the air or water, respectively, that will harm the health of others).

100 Garrett Hardin, The Tragedy of the Commons, 162 Sci. 1243 (1968) (When benefits are specific and harms diffuse, there is an incentive to harm the commons more than would be economically efficient.).


102 Conditions like the technological feasibility of creating and storing valuable goods, such as food, durables, and art; and the protection of the methods of creating those (such as human ingenuity).
Legal responses have costs and should only arise when benefits outweigh the costs. Taking prime hunting areas and killing competing tribes would not decrease benefits for early humans who did the marauding as they were competing for a limited pot of resources. There was no need to protect incentives to accumulate wealth of others because the ability to generate any surplus wealth was limited by the existing state of technology at that time.

Without the ability to generate large amounts of goods (such as through agriculture) there is no need for an intricate system to store or protect those goods from marauders. Without the freedom that a steady food supply brings there is not vast wealth creation of other things to protect from other individuals or groups. The response to a need only arises when the need exists. Therefore, with respect to concepts of property before agriculture, there was no need to protect large food supplies from each other since such supplies did not exist.

People were also not protected from intentional harm to the person until their role in wealth production was realized or recognized. There was similarly no need to protect each other from unintentional harms until interactions giving rise to those harms and the technology to create such widespread harms came about later in our society.

The timing of the development of these rights is remarkably consistent. A legal right arises as it is needed to protect against a harm that could lessen benefits to society as a whole. Just as the incentive for a legal control to protect property was needed before the legal control arose, so the incentive had to exist in the environmental context. Until recently however, no widespread incentive existed primarily because the common usage was not uniformly so intense that all commons were in danger of falling into ruin.

But when environmental problems came to the fore, environmental historians note that the law usually responded quickly. Since environmental amenities have only recently come under widespread threat, this is the primary reason that we do not have an as extensive legal history addressing or protecting those rights. The chemical and nuclear industry that can cause widespread poisonings or cancer has only existed on a large scale since World War II. Air pollution has been around in limited amounts for a few hundred years, but only became a widespread problem with the advent of the vast fossil fuel burning since the industrial revolution. Water pollution became a widespread prob-

104 Steinberg, supra note 11, at 807.
lem with the advent of sanitary sewers, which could concentrate biologic pathogens that sickened others, and along with air, as a delivery device for the proliferation of chemicals from the aforementioned chemical industry.\textsuperscript{107} Large scale intentional destruction of aesthetic amenities has only been possible recently. Therefore, we did not need to worry about protecting our breathable air or drinkable water because until recently there was no feasible way for it to be taken from us.

However, because of the slow pace of legal reform and the diffuse nature of environmental harms, the response of the common law to correct these newly arising problems has not been immediate.\textsuperscript{108} Instead, it fell to the legislature to articulate these protections and, in the United States at least, they have been articulated as absolute rights.\textsuperscript{109} Moreover, these legislative articulations came remarkably quickly after pressure on the resource. The fact that environmental rights and common law rights arose at precisely the moment that they were threatened, further illustrate their similar natures.

An examination of the statutes and how and when they arose allows us to say that environmental rights are analogous to common law rights.\textsuperscript{110} They are like property to the extent that we need or want natural resources such as fish stock or pharmacological products, or something as mundane as a view, or like torts to the extent that they protect human autonomy through protection of human health and thus the ability to produce.

The recognition of the connection of environmental law to common law and the recognition that the environmental statutes were meant to protect property and bodily integrity that could not be protected at common law due to causation issues, tell us where we need to look to understand the nature of our environmental rights and how they are to be protected and balanced against other rights. We need to look to our common law.

V. THE NATURE AND DEFINITION OF OUR RIGHTS

To understand the importance of conceptualizing our environmental statutes as individual entitlements, we must understand that entitlement. What


\textsuperscript{108} Though there have been changes afoot even in the common law of torts to deal with the problems inherent in protecting environmental rights from others. These changes include industry wide liability and the recognition of alteration of risks. See Sindell v. Abott Laboratories, 607 P.2d 924, 928, 933-38 (Cal. 1980); Herskovits v. Group Health Coop., of Puget Sound, 664 P.2d 474, 476-77 (Wash. 1983).


\textsuperscript{110} The Clean Air Act was passed in 1970 in response to increased and visible air pollution, while the Clean Water Act was passed in 1972 after highly publicized pollution of important waterways. See e.g., PERCIVAL, MILLER, SCHROEDER, AND LEGGE, ENVIRONMENTAL REGULATION (LAW SCIENCE AND POLICY) (3d. ed.) 544, 625 (2000).
exactly is the nature of our environmental and common law rights? How far do they go? In the terminology set forth at the beginning of the article, what is the actual legal boundary or boundaries that define our “rights?” What actions cross the non-interference boundary? Though in the environmental context, we may say that the right is created by statute (our “right” to clean air, supra111), it is still critical to understand the boundary of that right with respect to others. This in turn assists us in knowing how to enforce those rights.

Because of its longer history, the common law’s rights boundaries in torts and property are fairly well established and identifiable. Due to their similar nature, as discussed, supra, to define the extent of environmental rights we should look to the common law. Despite its long evolution and its alterations by legislative intervention, the articulation of one rights principle in the common law is clear—individuals and their legally acquired goods have the right to be free from interference and to act freely as long as that “right” does not cross over and infringe the “rights” of others. This is explained in more detail, infra.

A. Protection of Property and the Line of Entitlement

The law is quite clear in what rights an individual has in property and how far that right extends if there is a conflict. As expressed in its modern form, a person has a right in her property to exclude others and to use that property in any way that does not interfere with another’s rights.112 The contours of the right are definitive and do not depend on a balancing of societal costs and benefits. Through the doctrine of trespass we learn that property is protected from physical invasion without any proof of harm even if the invasion would otherwise be beneficial or benign to society.113 The only exception is when this might bump up against a right historically recognized as more important, such as the protection of life, and even then the common law recognizes that the cost of saving the life (or other property) cannot be imposed on the rights holder, but must be borne by the party who benefits.114

The right to property is also protected against non-invasive detriments through nuisance law, and nuisance law elegantly illustrates the point of resolution of competing rights. Nuisance law imposes liability on a defendant for interfering with the plaintiff’s reasonable use and enjoyment of land, without regard to fault or cost.115 Despite the occasional assaults against this doctrine

113 RESTATEMENT (SECOND) OF TORTS § 158 (1965).
with attempts to insert a "balancing" of rights, the contours of the plaintiff's right to be free from any intrusion into reasonable enjoyment have been maintained – even if the other use would be more socially beneficial.\textsuperscript{116} Reasonable enjoyment can even be peace.\textsuperscript{117} Thus, nuisance and trespass, two major doctrines which protect property, provide that everyone has the right to use his or her own property in any way he or she wants, as long as it does not interfere with the reasonable rights of others. The reasonable rights of others would include the mirror ability to use their property to the maximum extent feasible.

\textbf{B. Protection of Human Autonomy and the Demarcation of Entitlement}

In torts, the emphasis is on the strength and primacy of the individual's right with lesser consideration given to the possibility of a clash of those rights. This is probably because the right to be free from imposed harm upon the person would rarely infringe on another's similar right, unlike the continuously dueling nature of property rights. When it does, there are indeed legal rules that mark this boundary, and this will be explored infra. As explained infra, the articulation of the strength and absolute nature of the right itself, however, is very clear from the common law. The nature of this right can be seen in the emergence of negligence from strict liability and the reemergence of exceptions to the negligence doctrine.

The earliest cases concerning compensation for the interference with a right to bodily integrity dealt with the compensation for harm from the so-called intentional torts.\textsuperscript{118} In its earliest appearance at the common law, this right to bodily integrity was recognized without regard to fault.\textsuperscript{119} In other words, the right was not to be balanced against benefits to the person causing the harm or to society as a whole. Thus our earliest cases concerning the individual's right to be free from externally imposed harm allowed recovery for all harms caused by the action, not just those intended – a form of strict liability.\textsuperscript{120} Nevertheless, neither could the plaintiff throw the costs of self protection onto the defendant. If the plaintiff contributed to her own harm, this obviated the liability, a crude balancing of entitlements.

Thereafter, new forms of actions arose that could recognize harm that was not proximate to its cause.\textsuperscript{121} This was called "trespass on the case" as op-

\textsuperscript{116} See id.

\textsuperscript{117} See SINGER, supra note 91, at 317-318.


\textsuperscript{119} ROBERTSON ET AL., supra note 65.

\textsuperscript{120} See EPSTEIN, supra note 115, at 93-97.

\textsuperscript{121} See id. at 104-05.
posed to "trespass" and came to be associated with what we call negligence.\textsuperscript{122} Though negligence is often expressed in terms of "reasonableness" in fact the common law still did not allow one person to purposefully benefit at the expense of another.\textsuperscript{123} Though only required to take "reasonable" precaution, which has been theorized as requiring precaution from the lowest cost provider of that precaution, practically speaking, this rarely benefits a defendant by throwing costs onto a plaintiff in a way that our society would consider unfair.\textsuperscript{124} Indeed, the rise of "trespass on the case" was not associated with any lessening of responsibility of the tortious actor since it actually extended liability to less immediate harms.\textsuperscript{125} Instead, it expanded the protection of plaintiffs to situations in which the historic "trespass" actions could not apply.\textsuperscript{126}

Therefore, the emergence of what came to be known as negligence was not associated with a lessening of legal entitlements of the potential plaintiffs that they already enjoyed, but instead an expansion of potential harms that could be compensated. The emergence of negligence is thus an example of how the common law continued to evolve to recognize rights of individuals to be free from externally imposed harms.

The re-emergence of strict liability in a modern context firmly recognizes the limits of "reasonableness" as not allowing a shift of knowing or expected harm to another for one party's (as opposed to society's) personal gain. Thus, modern strict liability also emphasizes that the individual has a right to be free from any externally imposed harm.\textsuperscript{127} Most common law jurisdictions now recognize that a plaintiff may recover from harm from an abnormally dangerous or ultra-hazardous activity even if the defendant is without fault.\textsuperscript{128} The origin of this modern strict liability is in the English case of Rylands v. Fletcher.\textsuperscript{129} This doctrine, as expressed by Justice Blackburn in the lower court, stated that "the person ... brings on his lands ... anything likely to do mischief ... is prima

\textsuperscript{122} See id.


\textsuperscript{124} During the rise of negligence, there are examples which might be considered shocking by today's standards in which a defendant did potentially benefit by allowing "accidental" harm to fall on a plaintiff. But these industrial revolution horror stories are unusual, and also may involve the balancing of the defendant's property interest as well. See Robert Addie & Sons (Collieries), Ltd. v. Dumberock, A.C. 358 (1929).

\textsuperscript{125} See Flatt, supra note 123, at 363.

\textsuperscript{126} Id.

\textsuperscript{127} See id. at 369-370.

\textsuperscript{128} See 57A AM. JUR. 2D NEGLIGENCE § 396 (2004).

\textsuperscript{129} 3 L.R.-E. & I. App. 330 (H.L. 1868).
facie answerable for all the damage which is the natural consequence of its escape.’”\(^\text{130}\)

This recognition of the plaintiff’s absolute right to be free from an externally imposed harm was intentionally created for the benefit of the defendant. Similar strict liability cases recognize this absolute culpability when the defendant has chosen a particular course of action for her own enhancement. “[T]he defendant acting for his own profit or pleasure is more at fault than the innocent plaintiff …”\(^\text{131}\) This theory, sometimes known as “enterprise liability,” states that costs resulting from the practice of lawful enterprises are to be borne by the defendant’s enterprise since they are a routine cost of doing business.\(^\text{132}\) This principle is also recognized in the concept of products liability.\(^\text{133}\)

Moreover, tort law also evolved a temperance of strict defenses to tort liability that balance the rights of the plaintiff to be free from externally imposed harm with the rights of the defendant not to have unreasonable harm in the form of precautionary costs imposed on her. This remarkably sophisticated balancing can be seen in the evolution of contributory to comparative negligence. Contributory negligence as a complete bar to recovery has evolved to a balancing of infringements of the plaintiff’s right to be free from harm with the defendant’s right to act freely with the assumption that a cost of protection of another is not imposed on them.\(^\text{134}\) In other words, a system that ensures “fundamental justice.”\(^\text{135}\)

These cases all point toward liability attaching to a conscious choice of the defendant to engage in an activity that might bring harm to others through an infringement on their right of self-protection. The entitlement of the plaintiff to be free from externally imposed harm is recognized. The primacy of the individual’s bodily integrity is not sacrificed to a society’s balancing of costs and benefits. Thus, we, as a society, have evolved the common law to protect each individual’s entitlement to protection of her own health or well-being.\(^\text{136}\)

\(^{130}\)Fletcher v. Rylands, 1 L.R.-Ex. 265, 279 (1866)

\(^{131}\)Peneschi v. Nat’l Steel Corp., 295 S.E.2d 1, 5-6 (W. Va. 1982).

\(^{132}\)See Mower v. Ashland Oil & Ref. Co., 518 F.2d 659, 662 (7th Cir. 1975) (citing Enos Coal Mining Co. v. Schuchart, 188 N.E.2d 406, 408 (Ind. 1963); Sterling v. Velsicol Chemical Corp., 647 F. Supp. 303, 313 (W.D. Tenn. 1986) (“The judicial rationalization seems to be that one who conducts a highly dangerous activity should prepare in advance to bear the financial burden of harm proximately caused to others by such an activity.”)) (quoting C. MORRIS & C.R. MORRIS, MORRIS ON TORTS ch. XI at 231 (2d ed. 1980)) aff’d in part, rev’d in part, 855 F.2d 1188 (6th Cir. 1988).

\(^{133}\)RESTATEMENT (SECOND) OF TORTS § 402A (1965).

\(^{134}\)ROBERTSON ET AL., supra note 65, at 76.

\(^{135}\)See Li v. Yellow Cab Co. of Cal., 532 P.2d 1226, 1229 (Cal. 1975).

we have even balanced this with protecting potential defendants from having unreasonable costs of the protection of another thrown on them. The central theme of torts is not economic efficiency of society, but the preservation of the individual's right to personal autonomy from interference with another balanced against the individual freedom of action. The border between entitlements, and thus the extent of the personal rights, is that the individual acts with maximum freedom free of undue interference, until the point at which that freedom of action infringes upon another's similar right.

Importantly then, the right of the individual to property and bodily integrity is strong in our common law history, subject only to general societal conceptions of what is reasonable in protecting that right against other assertions of individual rights. And the definitions of what is reasonable still respect primarily the holder of the right from those who assert their right into the holder's domain.137

The limitations on this right over time are noted for their exceptionalism and the strong recognition that if such a right is to be infringed, it must occur through legislative intervention and a thorough political vetting of the issues. Thus, though zoning restricts an individual's choice in the use of his property, it does so only because such limits are perceived to be necessary to accommodate conflicts between equally valid rights of enjoyment.138 This in turn was and is accomplished through careful weighing of policy choices (which generally protect a wide array of uses) and the rights of property owners in cities and counties throughout the country.139 It might be that zoning may at times enhance one entitlement at the expense of another, but such is an unintended exception, not the rule.

The way strands of laws interact define the contours of individual rights, so that the freedom to expand and occupy is always stopped by the freedom of the localized space and right. You can exercise maximum freedom if no other's rights are affected. But, when they are, the exercise of your freedom must stop at that limit.

Thus, the common law recognizes that in protecting the personal right, the competing right to act with as much freedom as possible may be lessened. The more people in a crowded space, the more care needed to navigate it. The freedom to move is thus somewhat restricted by the boundaries of the other party. Similarly, in nuisance law, existing uses may be affected by a change in the character of the area.140 The existing pig farm that has to close may feel it

137 See SINGER, supra note 91, at 312 (discussing how the defendant cannot be enjoined because of plaintiff's unreasonable sensitivity.)
140 ROBERTSON ET AL., supra note 65, at 594.
has lost something when the closure is caused by the emergence of neighbors who will be disturbed by the activity.

The law may also recognize broad categories of balancing of interests that no longer must focus on each individual. This is true in the concept known as "reciprocal risks."\footnote{See Gregory Keating, Rawlsian Fairness and Regime Choice in the Law of Accidents, 72 Fordham L. Rev. 1857, 1858-59 (2004).} These reciprocal risks, that tend to be imposed equally on all, may seem to impose a burden on an individual's right to personal autonomy, but in actuality represent the situation in which enforcement of the rights is high and everyone's burden in shouldering risks tends to be equal.\footnote{Id.} Therefore, we do not have strict liability for certain profit enhancing behaviors. One example of this is the risk associated with automobile usage. First characterized as an ultra-hazardous activity, the driving of vehicles became so universal and of such wide benefit through transport of goods and services, that all who were exposed to the risks associated with such vehicles can be seen as benefiting on an individual level from an alteration of the liability scheme.\footnote{See Rodney A. Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U. Pa. L. Rev. 1, 26 (1983).} Though it is always difficult to ascribe reasons for common law development, it seems that the concept of reciprocal risks explains certain liability anomalies because certain risks are truly shared equally by all and also equally benefit all; one person is not exposed to harm unilaterally for the harmful choice of another.\footnote{Id. See, e.g., Hammontree v. Jenner, 20 Cal. App. 3d 528, 532-33 (1971).} This is a particular exception that should not be seen as a lessening of rights but an enhancement thereof.

In general, the actual invasion of another's right is allowed, and then only briefly, if it is necessary to protect another right. If one harms another's personal autonomy, that person (or another) may also invade the offender's personal autonomy to stop the invasion.\footnote{Restatement (Second) of Torts §§ 63-65, 76, 261 (1965).} But only the minimal amount of force may be used.\footnote{Id.} Similarly, one may infringe another's property to stop an interference with one's own property right, but only to the extent necessary.\footnote{Id. at §§ 77,79,84-86, 260.} The limits on interference with rights are carefully crafted. Personal autonomy and human life are always more important than a property right, but one may have a limited, non-injurious invasion of personal autonomy to protect a property right.\footnote{Kalko v. Briney, 183 N.W.2d 657, 660 (Iowa 1971) (limiting the privilege to use force intended to cause harm against another whom the possessor sees about to enter his premises or meddle with his chattel, unless the intrusion threatens death or serious bodily harm).} So, if someone is stealing your purse, you may touch them in order to...
regain the purse, but you may not injure that person unless there is threat of injury to yourself.149 If someone attacks you, you may defend yourself.150 If a neighbor’s tree encroaches on your property, you may cut down the offending branch, but you cannot do more property invasion than is necessary to remedy your invasion.151 The law is remarkably consistent with respect to these boundaries – invasion of your or someone else’s right is usually the only justification for infringing upon another individual’s rights.152 The limits of another’s right are generally clear: It is the right that you yourself would be expected to assert.

The protection of the maximum activity allowed before another is harmed is found in other arenas besides our common law. As noted in Article 29 of the Universal Declaration of Human Rights:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.153

So the nature of our common law rights in torts and property is clear. Their universality and consistency, along with their examination and debate in certain legislative contexts reveals that at least in modern western society they are strongly protected and desirable from a policy standpoint. We know that our environmental rights arose to create protections that had existed at our common law, but that the common law could not replicate immediately when the need arose. We know the nature of that common law right, why it arose, and its boundaries. Our environmental statutes could not be clearer that we have rights to be free from harm to our environment. These rights are similar to our common law rights to be free from externally imposed harm. Thus, when the common law failed, legislative deliberation again adopted protection as a policy choice.154

149 Hogedon v. Hubbard, 46 Am. Dec. 167 (1846) (upholding the principle that one clearly has the right to retake property, fraudulently obtained from him, if it can be done without unnecessary violence, or without breach of the peace).
150 RESTATEMENT, supra note 145.
151 See, e.g., The Thorns Case, Y.B. Mich. 6 Ed. 4, f. 7, pl. 18 (1466).
152 The one notable exception is for “public necessity.” But this privilege is limited and is only usable for immediately threatening harms. Moreover, not all jurisdictions allow a public necessity defense without compensation; and necessity is only allowable for property harm, not serious invasions of personal autonomy. See EPSTEIN, supra note 120, at 61-63.
153 Universal Declaration of Human Rights art. XXIX § 2.
Recognizing that our environmental law is really a statutory attempt to replicate the protection of rights at common law tells us that truisms and features of our common law rights in torts and property must (or at least might) be true about our environmental law. This suggests two things: 1) as a policy matter, recognizing personal rights in the environment is desirable for many of the same economic and socially beneficial reasons as the creation and protection of common law rights in torts and property and should not be altered without consideration, and 2) these similarities also indicate that analogizing environmental laws to common law rights can demonstrate how our environmental law should be administered and provide an explanation as to why our current enforcement and administration of environmental law hasn’t clearly articulated and protected those rights.

If we see that our environmental rights are the same as our common law rights, the history of our common law development can best tell us how those rights are to be protected. We have thousands of years of history that tell us about the societal importance of such rights and how to enforce and protect our common law rights to property and bodily integrity. We don’t need to alter these rights statutorily or experiment with environmental enforcement to the detriment of us all; by examining the history of the development of our rights at common law, it is clear why we should have these rights and how we should protect the environmental rights that our law has articulated.

VI. WHAT ARE THE IMPLICATIONS OF OUR ENVIRONMENTAL RIGHTS?

A. Don’t Eliminate the Right Without Understanding It

Recognizing clean air, water, freedom from poison and other environmental amenities as “rights” has many implications. Importantly, this understanding of environmental rights first calls for an avoidance of any wholesale change in our own country’s environmental legislation. Because, whether intentionally or not, our laws in fact currently reflect an understanding of environmental amenities as rights that are not to be infringed. This is not to state that our laws recognizing absolute rights should ignore the realities of the complexity attending the clash of these rights, but simply that those laws be aware that rights have been articulated and have been articulated for a reason.

The common law often de facto recognizes the altering of rights’ boundaries. For instance, we note that the unlawful nature of touch in battery is


156 See Flatt, supra note 155.
to be determined by the context of the situation.\textsuperscript{157} If we are accidentally jostled in a crowd, it is an infringement that we expect in society.

Also, as noted \textit{supra}, the common law has also developed similar exceptions to enterprise liability where all share equally in the risks and benefits.\textsuperscript{158} But environmental rights are not like this. Automobile usage, which is ubiquitous and benefits even the non-drivers in relation to the risk they accept, can be said to be equally applied across society. Though we all breathe air, pollution does not fall equally on our country, or even equally on residents of a single city. Thus, environmental rights are not like reciprocal rights and interferences at the common law, and if they are to be altered, it must be done carefully.

The preservation of these rights through legislation does allow for the difficulty of defining said rights due to their communal and shared nature and could accommodate other interventions, but such interventions can be dangerous if not based on an understanding of the original rights. Legislation can strike a thoughtful balance about contours of collective rights when identifying the exact boundaries of the rights is difficult or even when the facilitation of the transfer of these rights may be goal-worthy. Thus, the laws governing the regulation of hazardous air pollutants were altered in 1990 from an absolute theoretical bar to the presence of any air pollutant hazardous to human health to a requirement that such pollutants be controlled in the tightest manner possible.\textsuperscript{159} This, however, was not an alteration of the entitlement to be free from harm. Rather, this was an understanding that the technical complexities needed to understand the threshold level of harm were too difficult to define, and that command and control legislation might better protect the current understanding of that right.\textsuperscript{160} As long as the recognition of the right exists and is understood, changes in accommodating this right due to technical complexities are appropriately considered in the political arena. But this accommodation does not mean that these rights as a policy matter should be eliminated or abridged at any time.

In general, legislative changes in the environmental arena that seek to move us towards the balancing of one person’s rights against those of society should be recognized as a derogation of the common law – individual rights that we and history have recognized. Though this does not mean that we can never alter where those rights lie, I assert that it does mean that such changes must be transparent, and should not be accomplished without an acknowledgement of same. The alteration of rights is not unprecedented, but it has usually been ac-

\textsuperscript{157} See Vosburg v. Putney, 50 N.W. 403, 403-04 (Wis. 1891).

\textsuperscript{158} See Smolla, supra note 143.


\textsuperscript{160} Flatt, supra note 123 at 364 ("[O]ther environmental laws allow technological standards in a nod to the realities of regulation. But this is not an unrestricted license to harm human health up to a cost-beneficial level.").
companied by deliberate debate and recognition of the tradeoffs involved. For instance, in capping the potential liability of nuclear power plants, the United States Congress was aware that this might be construed as a “taking” of some hypothetical person or group of person’s right (and possibly even be considered a constitutional due process violation), and therefore the proposal was structured to impinge the right as little as possible, and was done only because of the perceived importance of retaining nuclear power as an energy option. This was also accompanied by the great care in which the rights to be free from harm of the public surrounding Three Mile Island were accomplished. The shutdown and long offline examination of the Three Mile Island Nuclear Power facility cost over one billion dollars as balanced against the remote likelihood of a nuclear accident. Nevertheless, it was expected that those living near the plant had a right to their safety, which was not to be sacrificed for the “good of the country.”

The current proposals regarding the alteration of CERCLA to change the clean-up level usually fail to even mention that this would work a shift in entitlements to the detriment of the person living near the waste site. Generally, we would never consider balancing the right of a person to be free from grave bodily danger as recognized in tort law with society’s rights of convenience on a pure cost benefit basis. We do not apply benefit-cost analysis to whether we would allow someone to be murdered. But we currently have serious conversations about allowing neighborhoods to remain exposed to low levels of carcinogens at a risk of loss of life because in monetary terms that is less than the cost to the polluter of cleaning the site.

For some, the hard questions may not be about rights, but about the actual methods of determining risk or the cost of protection. But even this paradigm carries its perils. Over-focusing on the technical complexities of risk analysis, while not denying environmental rights, invariably lessens them. If we recognize environmental protection as rights, like common law rights, it should mean that the burden of proof in showing no harm to rights should be borne by those that seek to change the status quo.

163 It is noteworthy that in countries that did espouse the idea that behavior is to be altered not through economic incentive but calls to goodness or loyalty (the former Soviet Union) far less care was taken with the far more severe accident at the Chernobyl nuclear plant.
164 See Flatt, supra note 123, at 350-51.
165 Id.
By recognizing these rights, we also inherently preserve them for future generations. If we all have a right to a clean environment, any bargaining away of that right can only be with the person or persons who bargain, not with persons yet unborn. For various reasons of economic efficiency, people may wish to trade or define their individual rights differently and can even do so on a collective basis, but such a change is temporally limited. We allow many people to engage in property infringements or to cross the boundary, which protects human autonomy, but one person generally does not give consent for another. By utilizing environmental amenities as simply a commons’ good without recognizing them as the right of all, we also take from the future.167 Again, while we can have legislative decisions that do so, it must be made with an awareness of the rights at stake – both of those currently living and those yet to come.

B. Environmental Rights Were Not Created from Thin Air, and Thus, Have a History Which Explains How They Are to Be Balanced Against Other Rights

Recognizing this right as similar to common law rights is also critical to any understanding of how our statutorily created environmental protections interact with our common law rights and the rights provided in our Constitution. By failing to grasp this analogy, our courts have misinterpreted the importance of environmental protection and its connection to other rights. In the seminal case of Lucas v. South Carolina Coastal Council, the court (through the opinion of Justice Scalia) announced a new test for determining whether government regulation that reduces the value of land to zero could be considered a taking.168 The opinion indicated that regulation that amounted to such reduction in value could only be justified if it were of the kind of regulation that was utilized to control recognized nuisances at common law.169 This case created quite a stir with many pointing out that this could gut much environmental regulation, particularly habitat and wildlife protection, since it was not “historic” in the same manner as the regulations cited by Justice Scalia.170 Others began to search for historic evidence of environmental-like regulations.171 The problem with Scalia’s opinion is not in the conception that people should be aware of potential regulatory burdens in order that it not be a taking – indeed that has been part of

167 See Kysar, supra note 7, at 679 (analyzing that ecological economics and conventional economics do not tend to recognize the rights and needs of future generations or sustainability).

168 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030-31 (1992) (announcing a “total taking” inquiry and noting that wetlands and wildlife protection were not recognized nuisance controls).

169 Id. at 1031.


171 Susan L. Smith, Saving Swamps and Salmon: Strategies to Protect Biodiversity From Compensation Threats, SA83 ALI_ABA 469, 481-84 (1996).
the regulatory takings test historically. The problem is the narrow way in which this awareness is defined. I would assert that the test should be construed as not what specific things were regulated at one time but whether a certain use infringed on the rights of others. As noted by Holly Doremus, "[r]egulatory takings claims are fundamentally conflicts over legal transitions." By recognizing environmental rights when balanced against other property rights, it is apparent that persons had no legitimate right to expect free reign of their actions if they interfered with the environmental right of another.

In this construction, modern environmental regulation as the state's expression of that right should not be a taking if it can be defined as law that preserves the right of an individual to his or her environmental right that others should not have the right to infringe. So, the "right" to a bio-diverse world, to wilderness, and to natural systems could be recognized. However, since environmental amenities were not thought of as a "right" that was being infringed by Mr. Lucas' construction in Scalia's opinion, the "right" to property use of Mr. Lucas trumped state regulation. Thus, if there had been a focus on environmental rights and what those are, our court might not be moving in a direction that seeks to weaken environmental protection vis-a-vis other rights that we hold dear.

C. Recognition of Environmental Rights Requires Environmental Protection to Be Practiced on an Individual and Not Aggregate Level

Clearly defining environmental rights is also critical to their administration. Current environmental regulation must follow statutory requirements, but generally does so in a way that is ignorant of the underlying individual rights basis of the statute. Because environmental protection has been repeatedly defined as an "externality problem," its "rights" basis is ignored. The wholesale adoption of environmental intervention as an externality-based problem misses something.

Regulation focused on getting parties to have an incentive not to sully the environmental commons does meet the overall goal of a clean environment. But this fails to recognize that the incentives may themselves be secondary to what they are trying to protect. Our incentives to protect property and human autonomy in the common law world, civil damages, are not simply an arbitrarily assigned mechanism to better society as a whole. Although some argue that the common law is solely developed to alter behavior (for deterrence), most recognize the importance of the distributive aspect of the common law which protects

174 See Lucas, 505 U.S. at 1030-31.
175 Even in this paper, supra.
an individual's right.\textsuperscript{176} Thus common law can be seen, at least partially, as the manifestation of the protection of individual rights. It represents our time honored and ancient societal condemnation of harming another's right which forces a transfer of resources from the one who harmed to the one who has been harmed. A sole focus on deleting the incentive for profiting from externalities without examining why that incentive existed at common law allows a focus only on the societal good that would come if we could make decisions as a society when our overall externalized harms were internalized. But the protection of a societal good is inextricably linked to the individuals that make up that society. Environmental commons are important to save, precisely because they are needed and used by all members and should not be available to those that can take them the quickest.

When looking only at the overall protection of the commons and not who is using the commons, the protection of the individual's right is lost. Those individuals that would have been most directly harmed by another's failure to internalize decisions that were harmful to the environment have been replaced by the diffuse "us" in implementing environmental laws. Though the nature of environmental harm resulting from multiple, difficult to trace sources may make this understandable, it represents a radical change of focus from the common law from which it arose. It removes from our system of environmental control the question of who is losing what, what is being taken, and what, if any, compensation should be forthcoming. The examination of this problem through societal, and not individual, eyes, leads to decisions based solely on benefit-cost analysis, which in measuring aggregate harms with aggregate benefits, overlooks where those harms and benefits fall.\textsuperscript{177}

D. 

Environmental Rights Recognition Provides the Normative Basis for Environmental Justice

Paying attention to the individualized nature of environmental rights also clarifies the issue of environmental justice. Currently, we have some administrative pronouncements and commentators that correctly identify environmental justice as a problem but have not always been able to articulate why it is a violation of our current laws and thus must be considered in the implementation of these laws.\textsuperscript{178} It does not fit comfortably in the context of intentional discrimination, nor in the context of our environmental administration. Nevertheless, as put by Ackerman and Heinzerling in their book, \textit{Priceless}, one must

\textsuperscript{176} See Schroeder, supra note 83, at 587-88.


still query "why a market economy produces and condones such a marked inequality of hazard."\textsuperscript{179}

When environmental and health and safety agencies utilize aggregate risk data to determine an acceptable level of risk for society over all, they will overlook the rights of some. The agency can technically state that it is regulating a risk so that there is only a small chance that any one person will be harmed by an environmental insult. That may ignore not only the very clear command in most of our environmental laws to ensure "no harm" to human health, it also ignores the fact that the "aggregate" environmental risk may fall disproportionately on some.\textsuperscript{180} This problem can only be addressed by recognizing the right of everyone to an individually clean environment. If our current laws are interpreted as protecting everyone's \textit{individual} right to be free from environmental degradation, then racial minorities and low income persons would gain these protections on an individual basis and not as the low (and thus effectively unprotected end) of a bell-curve average aggregated over all of society. It is not enough to have a generalized average protection. Our laws should be seen as additionally requiring that protection for all as an individual right.

Indeed the very recognition of environmental justice problems explains why it has taken us so long to articulate our rights vision. Our society would clearly see the problem and strengthen environmental enforcement if the rights of all were obviously threatened. But they are not only the rights of the poor because when environmental rights of the rich are threatened, they can buy them back. Just as wealthy parents can ignore failing public schools by sending their children to private schools, so too can individuals ignore the lack of clean water and air and toxic waste sites because they can buy bottled water, medical care, and habitations that are not inundated with toxic air or ground pollution. Since these rights aren't as visible as property or rights to immediate bodily integrity, there is an enormous differential in the way they are protected.\textsuperscript{181} It is a differential that our modern society would not tolerate if it applied to traditional property.\textsuperscript{182} Thus, the very nature of environmental amenity inequality, or environmental injustice, is based on the failure to recognize and protect our rights in the environment.

\textsuperscript{179} ACKERMAN \& HEINZERLING, \textit{supra} note 6, at 142.

\textsuperscript{180} For instance, if the average level of exposure for a community was .1 mg/l, which might be considered acceptable, the level for some members of the community might be ten times higher, which would not be an acceptable, safe level.

\textsuperscript{181} Not that all rights of the poor may be less likely to be enforced if for expense reasons if noting else.

\textsuperscript{182} Interestingly and sadly, even clearly articulated rights such as property have been systematically taken from the weak, such as the property taken from many African-Americans in the late 19th and early 20th centuries. Whether this is an extension of the story of the late recognition of how African-Americans could be wealth producers in our society remains to be examined at another time, but this fact would be consistent with that story.
E. "Voluntary" Environmental Enforcement Will Be Problematic

The recognition of this right as arising from the need to check the original human pathology that the strong take from the weak for higher societal benefits also has major implications, particularly for methods of enforcement. In the history of the development of common law rights, they can be seen as a derogation of what had existed "naturally" before that time, and what exists in most animal species. That is, humans took whatever they could, in whatever way they could, without restraint, at least from non-cooperating family or tribal units. This suggests that humans will work around any prohibition that is not clear, or will be tempted to take any right that is not clear unless there is an incentive not to. Examples from the common law are instructive.

We assume that most people will not engage in deliberate or even highly reckless behavior in automobile usage because it usually harms them as well. So most enforcement of safety laws that protect a "right" to be free from externally imposed harm in an accident is essentially voluntary.\(^{183}\) However, we would never seek to protect private property from those who would appropriate it by simply saying we will "work with those that are stealing property to make sure they don't steal so much." Nor, would we say that we do not need deeds and ownership concepts because everyone will leave everyone else's valuable property alone. No, we have strict rules and punishments that are enforced. Without clear requirements and enforcement of these requirements, there is a return to the "taking" by individuals of whatever is available because it is to their advantage and no incentive exists not to. The occurrence of "squatting" on another's property exemplifies this maxim in property. Despite the fact that it is illegal, "squatting" does occur, but can usually only occur when the true owner fails to avail himself or herself of the legal code to eject the squatters.\(^{184}\) This is particularly acute when the party in interest is a "disinterested" government such as New York City, where some two dozen city owned properties are currently illegally occupied, or where there is otherwise no means of asserting that right, such as property subject to the protection of a weak government.\(^{185}\) This provides a powerful example of not only the need for the legal right but also the need for the enforcement or assertion of that right.

No one seriously proposes that all property rights could be protected simply be exhortation and cooperation. The reason that we do not propose such solutions is that they clearly do not work where there is an incentive to invade the right. Absent an enforceable requirement to the contrary, the default of hu-

\(^{183}\) We do have speed limits, traffic rules and tickets, but there is not an individualized report or enforcement surveillance on every person.


\(^{185}\) Id. See also David Gonzalez, Port-au Prince Journal: In Katherine Dunham's Eden, Invaders From Hell, N.Y.TIMES, Aug. 6, 2002 at A4.
man behavior is to take that which is available.\textsuperscript{186} Human behavior will also fill in any interstices of ambiguity. Unclear requirements present a greater possibility of not being followed.\textsuperscript{187} Indeed, human ingenuity in exploiting whatever situation is presented is recognized as the efficiency of capitalism.\textsuperscript{188} As noted in a prior article, "[t]he evolution of common law is designed to correct this problem when it interferes with a right."\textsuperscript{189}

The taking of an environmental amenity carries in general no built in disincentive, so it is more like the taking of property than the avoidance of an automobile accident. According to the tragedy of the commons, people will even foul their own nest if they receive comparatively larger advantages by doing so. Yet devolution of environmental enforcement with its concomitant protection of environmental rights in a "cooperative" enforcement manner is being proposed in many areas of environmental regulation, and indeed, has been a cornerstone of state reinvention of environmental regulation.\textsuperscript{190} Such an approach also clouds the issue of the right by indicating that we must help people not to pollute, not prevent them. Discomfort with this approach to regulation, whether of the environment, or other private activities, has been discussed, but generally simply asserts its ineffectiveness without explaining why, or by noting that it is counter to human nature.\textsuperscript{191} Recent examples of the failure of this as a strategy in other regulated areas abound. Energy companies came up with many legal, but not necessarily socially desirable ways to profit by creating energy shortages in the California energy crisis of 2001.\textsuperscript{192} Our history of common law

\textsuperscript{186} This is not to discount the role that morality has come to play in our society and its ability to control certain behavior. However, I posit that morality alone can rarely enforce the right; there must be occasional enforcement of transgressors or the whole system collapses as everyone realizes the commons are being taken to their detriment. See Rose, supra note 103. Indeed, what we call "morality" may be another enforcement mechanism crafted by human evolution to coincide with the evolution of common law.


\textsuperscript{188} Id.

\textsuperscript{189} Id.


\textsuperscript{191} See RECHTSCHAFFEN & MARKELL, supra note 189.

\textsuperscript{192} See generally Timothy P. Duane, Regulation's Rationale: Learning From the California Energy Crisis, 19 YALE J. ON REG. 471 (2002); Darren Bush and Carrie Maynes, In (Reluctant) Defense of Enron: Why Bad Regulation is to Blame for California Power Woes . . ., 83 OR. L.
rights as a derogation of the natural human incentives predicts this. Similarly
with respect to the accounting debacle, many companies created as many cre-
ative accounting principles as the law allowed.193 The reason lax enforcement or
cooperative enforcement fails is related to human behavior. It illuminates the
problem in a clearer manner to see it as a failure to replicate the common law
regime designed to protect rights from encroachment.

When clean air, clean water, and freedom from poisons are seen as
rights, their protection from "taking" as a right becomes clearer, and the neces-
sary mechanisms for protection also become clearer.

This does not mean that we have to do "inefficient" things as a society.
Just as contract law arose at common law to allow for the alteration of property
and torts rules for purposes that are mutually beneficial, so too can environ-
mental rights be traded or altered for mutual benefit. If a neighborhood honestly
believes that its risk of cancer is small and wants to sell its rights to demand a
clean up of a site for a fixed amount of money, our law could allow this to be
possible.194 Indeed it already does in some instances by allowing the purchase
of environmental amenities when that might be more favorable than another
kind of environmental remedy.195 Granted, the collective bargaining issue is
difficult, but not insurmountable and really only relates to the problem of who
will be capturing the profits that spur the transaction in the first place. As long
as it recognizes the right, the government is also free to use condemnation pow-
ers for the public good as it does for other forms of property.196

Without recognizing these as rights at all, what we instead get is no
compensation for the public or individuals who have been harmed. Though
cheaper land costs may still allow for a disproportionate impact on poorer com-
unities, at least recognizing this as a personal right and not as "sacrifice for the
common good" means that these people will be paid something, and that will
also serve as a break on the infliction of less necessary environmental harms
since they will be bought with actual money and not just the luck of governmen-
tal influence.

VII. CONCLUSION

I would remind you that the air we breathe, the water we drink, the
wildlife that populates our great country, the health we hold dear, do belong to


193 See Flatt, supra note 187.

194 Though there are issues of justice involved in allowing alienability of environmental ameni-
ties. See discussion of commodification of the environment in Section II, supra.

195 See e.g. 33 U.S.C. § 1319 (g)(3) (authorizing the reduction in civil penalties based on con-
siderations of justice, which can include the creation of other environmental amenities).

196 U.S. CONST. amend. V.
us. This is recognized by our statutory law and is consistent with our common law. By understanding the origins of our common law and the similarities to our environmental rights, we also learn that the recognition of these rights is desirable from a policy standpoint.

The right to our environment is really the same as our rights at common law and should be treated as such. Failure to do so will be detrimental to our society as a whole. To paraphrase Woody Guthrie, from the Redwood Forests to the Gulf Stream waters, this land, this environment, belongs to you and me.