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In Search of an Environmental Ethic

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I. INTRODUCTION

Some thirty years ago, American society awoke to a fundamental flaw in the status quo. Existing patterns of economic activity, law and policy left certain widely-shared values unprotected. In particular, human health and the environment were suffering unprecedented and unacceptable degradation. The legal and policy response to this awakening was a dramatic and prolonged one: the enactment and implementation of a massive structure of statutory law, beginning with the National Environmental Policy Act (NEPA).[1]

In the thirty years since NEPA's enactment, statutory environmental law[2] has become a fixture of the American legal landscape. We have moved from outrage over the absence of laws adequate to protect environmental quality and human health to a systemic and institutionalized recognition of such laws' necessity and desirability.[3] Whether to eliminate all of our environmental

1. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2000).

2. I use the term environmental law to describe the vast realm of law, largely statutory, that addresses human actions affecting the rest of the natural world. Although the contours of environmental law are somewhat murky, most can agree that laws dealing with pollution control (including waste disposal and the regulation of toxic substances) form part of environmental law. I also include within my definition of environmental law the related field commonly known as natural resources law, encompassing, for example, wetlands and endangered species protection. The laws that compose this vast body are commonly dubbed "environmental" laws presumably because the motivating force behind new laws was public pressure for greater consideration of the environment. And although they incorporate attention to non-human elements of the natural world previously lacking in statutes, they are better characterized as focused on human interaction with the environment.

3. For example, in a 1994 poll, 76% of Americans polled supported legislation to insure that businesses protect the environment. SUSAN MITCHELL, THE OFFICIAL GUIDE TO AMERICAN ATTITUDES 98–101 (1996). Fifty-seven percent supported government regulation of individuals' activities to insure that we protect the environment even if it interferes with peoples' right to make their own decisions. *Id.* at 99. The 1992 Health of the Planet Gallup survey found that 62% of Americans rated environmental problems as the most important in

laws is not a frequently asked question;[4] the need for some environmental laws is a given.

One might take the volume of law, as many people do, as proof that our society shares some set of values or norms governing human interactions with the environment, what we might call an "environmental ethic."[5] We may even assume that this ethic is at least partly reflected in the law.[6] This article suggests, however, that

the nation or as "very serious." RILEY E. DUNLAP ET AL., HEALTH OF THE PLANET, Table 1 (1992). Ninety percent favored stronger environmental protection laws for business and industry. *Id.* at *Support for Stronger Laws for Business and Industry* (unpaginated section). More recent polls suggest that this level of support has lessened considerably to about 50% of the population in the last five years. *See infra* note 162.

4. Even the strongest supporters of market-based approaches generally focus their critique on the command-and-control regulatory approach and seem to accept a role for law and government both in creating markets for desired public goods and providing incentives for desired conduct. *See, e.g.*, James L. Huffman, *Markets, Regulation, and Environmental Protection*, 55 MONT. L. REV. 425, 427, 432 (1994). While not a "market purist" himself, Huffman also articulates the purist view that rejects government intervention, focusing largely on eliminating political interference with markets. *Id.* at 430–32.

5. In this article, I refer frequently to the related concepts of "value(s)," "ethic" and "environmental ethic." I use the term "environmental ethic" to describe a set of principles and justifications for distinguishing good from bad human conduct insofar as it affects the environment. *See* BARBARA MACKINNON, ETHICS: THEORY AND CONTEMPORARY ISSUES 5 (1995); G.E. Moore, *The Subject Matter of Ethics, in* CONTEMPORARY ETHICS, SELECTED READINGS 21, 24 (James P. Sterba ed., 1989). In the study of ethics generally, philosophers identify values and analyze the justification and merit of principles derived to explain why those values are good. *See* MACKINNON, at 5–6. I use the term ethic to denote the set of principles that implement and justify a given set of values. Ethics and environmental ethics in the plural sometimes refer to more than one such ethic, but they can also refer to the disciplines that study ethics and environmental ethics. When referring to these academic fields, I will capitalize the terms Ethics and Environmental Ethics for clarity. By the term value or values, I refer to something about which one cares, which caring may motivate one's conduct. For example, human autonomy, aesthetic beauty, avoidance of pain for sentient creatures, human health, and biodiversity are all values. Acting consistently with a set of values is one element of seeking the "good." "[E]thics aims at discovering correct *reasons* for thinking this or that is good." Moore, at 21 (discussing why the most critical question is what is meant by good). Ultimately, when we examine why someone has an ethical position regarding a particular action, analysis of its justification and merit takes us back to a question of something of value—something we care about. James Rachels, *Can Ethics Provide Answers?, in* APPLIED ETHICS AND ETHICAL THEORY 3, 18–20 (David M. Rosenthal & Fadlou Shehadi eds., 1988). So for example, a biocentric rights-based ethic reflects a number of values that an individual might hold that are justified by a certain theory about the value of all life forms and their entitlement to respect. In this article, I also use the term ethic in a non-technical sense that may be closer to Aldo Leopold's use of the term—to refer to the amalgam of values that exist not in a particular individual's mind, but which as a society we have in fact adopted and are enacting by virtue of adopting and implementing our laws.

6. This approach of finding an ethic through the study of how we conduct ourselves seems consistent with Anna Peterson's focus on environmental ethics as "lived ethics." *See*

despite this impressive consensus and legacy, it is not clear that environmental laws do reflect any clearly articulated ethic that should be called environmental. As a nation, we lack an adequate understanding of the values that undergird these laws. Characterizations by advocates often attribute ethical content to these laws, but few have seriously analyzed (or critically challenged) these assertions.[7] It may be that the ongoing development of law in this area is in fact impeded by the lack of such an understanding.[8]

The aim of this article is to explore whether and how we can know if our laws relating to the environment accurately reflect values held by a majority of people. Such a massive body of law must reflect something.[9] Thus, this article posits the value of a

ANNA L. PETERSON, ON BEING HUMAN: ETHICS, ENVIRONMENT AND OUR PLACE IN THE WORLD 4–5 (2001).

7. Yet, with increasing frequency, the goals of environmental laws have been challenged as being in conflict with other values, such as the right to property or human freedom and autonomy. Environmental law has also been challenged increasingly as extremist, in part because of scientific uncertainty, but also because it conflicts with other human values. *See* GREGG EASTERBROOK, A MOMENT ON THE EARTH: THE COMING AGE OF ENVIRONMENTAL OPTIMISM (1995); BJORN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD (2001). These are serious attacks and merit serious attention. But little groundwork has been laid for a public debate of these issues.

8. Others have made observations consistent with this contention. *See, e.g.*, Michael P. Vandenbergh, *An Alternative to Ready, Fire, Aim: A New Framework to Link Environmental Targets in Environmental Law*, 85 KY. L.J. 803, 861–64 (1996–97) (criticizing a command-and-control regulatory approach in part for its failure to cope with underlying uncertainties about values); Victor B. Flatt, *Saving the Lost Sheep: Bringing Environmental Values Back into the Fold with a New EPA Decisionmaking Paradigm*, 74 WASH. L. REV. 1, 4–5, 13 (1999) (detailing the inadequacy of benefit-cost analysis as a tool for considering the full range of values implicated by environmental decisions); Eric T. Freyfogle, *The Ethical Strands of Environmental Law*, 1994 U. ILL. L. REV. 819, 843. Richard Delgado's critique of the public trust foundation of modern environmental law also suggests that the public trust theory approach has forestalled coming to terms with environmental problems. Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209, 1211 (1991).

9. In using the term law, I refer not just to the statutes, but also to the statutes as implemented through regulations, judicial decisions, and enforcement and implementation decisions. Others have demonstrated how statutes that apparently embody a strong value of health or environmental protection may not protect that value when implemented. *See, e.g.*, John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233 (1990). Dwyer focuses on the pressures inherent in the political and legislative processes that produce strong but intentionally unenforceable commands to protect human health and the environment. However, debunking the notion that these statutory commands can be taken at face value and that they are the complete expression of the values embedded in the statutes, is only a first step. The question remains, what values are in fact embedded in the laws as written, interpreted, and implemented. This article argues that we need a more comprehensive analysis focused explicitly on the values that underlie our laws and regulations.

concerted effort by legal scholars to articulate more clearly the values and ethics that underlie our environmental laws and that are promoted by them.[10] The premise is that, as a democratic society, our laws in some measure reflect the public's values and ethics, and if they do not, we may seek to reform them.[11] If we are ignorant of the values that our laws serve, our ability to participate in the democratic process is impaired.[12] If lawmakers and regulators are also ignorant of the values that their laws, regulations and enforcement and budget decisions advance, then there is a failure of accountability by these public officials that ought to concern us.

It is time we ask ourselves these obvious, but frequently overlooked questions. Are our environmental laws simply extensions of the ethical structure of our tort, property and criminal law, designed to protect person and property from certain insults not adequately addressed under the pre-existing common law? Or are they "environmental" laws in another sense, in that they embody a special valuing of the environment, a different ethical stance toward the environment not found in other laws? Do they help us distinguish between social and anti-social conduct in some different way than other laws, a way that accounts for the environment particularly? Or do they merely reflect the morality that governs all other human conduct?

Some may argue that this inquiry is not needed, that we already know what values environmental laws seek to promote. From this view, it is obvious what we care about: clean air, clean water, endangered species, or environmental protection.[13] However,

10. The research agenda this question invites is descriptive rather than normative. It focuses on identifying the values we currently express through our laws rather than arguing that we ought to pursue a particular set of values.

11. I assume here and accept that vast inadequacies and failures exist in our democratic process that prevent the direct translation of majority values into law.

12. Richard Lazarus has made a similar observation with regard to the Supreme Court's inability to develop a coherent environmental law jurisprudence. Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 706, 748–51 (2000). He targets the Justices' failures to recognize the unique values at stake in environmental cases as a critical factor that has constrained the development of a coherent body of law in this area.

13. The easy answer to why we care about the environment, as expressed in statutes and public debate, is frequently a litany of different reasons for caring, including aesthetic, scientific, recreational, health, safety and the catchall "human welfare" values. Rights of future generations may be invoked along with those of present generations, and the value inherent in non-human elements of the environment may even be mentioned. This easy but superficial response to why we care, frequently echoed in the preambles to our laws, is

these values and the reasons for caring for them are not given equal weight by the laws enacted to advance them. Further, the litany often omits economic wealth, autonomy and freedom—values recently highlighted in environmental policy and law debate by property rights advocates. Yet our statutes and their implementation are often as heavily influenced by these hidden values as by the more prominently featured environmental values. [14]

The superficiality and inadequacy of our knowledge of the values embedded in these laws becomes still more apparent when we ask *why* we care about the environment.[15] Even if the list of values were complete and its elements always compatible, any particular value on the list may be compatible with several different *theories* of why we care.[16] To understand the ethic underlying our laws, we must uncover not just the objects of concern but the bases for our concern. Without a better understanding of why and to what extent we value species and how that compares with our valuing of economic activity or some health, safety or welfare interest, we have said little about what we value that will be helpful in practice.

Very different policy and legal implications may ensue depending on which theory best explains our social intuition in favor of protecting, for example, endangered species.[17] So identifying the ethics that explain a given law or policy may help us to determine whether the law is accomplishing its purpose and may help to guide decisions about reform.

inadequate. I will focus my discussion largely on the issues posed by resource protection statutes like the wetlands provision of the Clean Water Act and the Endangered Species Act because they pose the greater ethical challenge for us. Statutes that are more directly, although not exclusively, focused on human health, like the Clean Air Act, raise more traditional ethical questions. Although I will not use these statutes as examples in this piece, the same problem and need for further work exists.

14. William F. Pedersen, *"Protecting the Environment"–What Does that Mean?*, 27 LOY. L.A. L. REV. 969, 972 (1994) explains how the American predilection for single-statute responses to problems, as opposed to development of a true national policy in response to environmental problems, enables us to avoid resolving these questions of conflicting values. Pedersen urges scholars to describe utopian visions of what environmental protection could mean as an aid to promoting this type of policy discussion. *Id.*

15. *See* Rachels, *supra* note 5, at 20.

16. When we identify "species" or "wildlife" as values, is that because we view them as having inherent value? Or because they are instrumentally valuable for economic and recreational purposes? Or because we believe we owe some duty to future human generations?

17. For the view that debate on this question may not be essential, *see* Freyfogle, *supra* note 8, at 844 n. 74.

The project I describe builds on, but is distinct from, the work of most environmental philosophers. This article doesn't enter into or comment on the lively debate over environmental philosophies. Nor does it imply that environmental lawyers need to become environmental philosophers.[18] Rather, it suggests that awareness and development of individual and societal environmental ethics is critical to sound development of law and policy and that better translation of our laws into a language of ethics is needed to facilitate this process. In contrast with philosophers' efforts to develop plausible and coherent ethical theories,[19] this article advocates a role for legal scholars, looking at our laws in action to determine the content of society's ethics *in practice*. Rather than engaging in the creative effort to envision a coherent ethical framework, I advocate that we look in the mirror at our current relationship to the rest of the natural world and determine what ethics are embodied in our current laws and policies, however incoherent and partial they are.[20] Having surveyed the work done to date at the intersection of environmental law and ethics, I conclude that we have reached a point at which a more systematic inquiry into the ethics of our law is both possible and necessary.

18. For those with an interest, the effort spent to acquire some familiarity with the literature is well rewarded. However, as is noted *infra* p. 83, many of the theories debated by philosophers reflect ethics that are clearly removed from the ethics expressed in our laws and embraced by the dominant American culture today. Nonetheless, for those seeking ideas on how our ethics may evolve, the literature provides guideposts towards which conservation-oriented individuals may aspire.

19. Part IIA describes in greater detail the work undertaken by philosophers in theory-building as well as other aspects of the work of environmental philosophy.

20. My use of the term "ethic" to refer to something that is expressed through law but latent and therefore not consciously intended or chosen freely by any given person may give philosophers in the modern Kantian tradition pause. This use of the term ethic may be consistent with the definition accepted by ancient classical philosophers, and with Aldo Leopold's concept of ethics as "a kind of community instinct in-the-making," a mode of cooperation to promote survival. ALDO LEOPOLD, A SAND COUNTY ALMANAC WITH OTHER ESSAYS ON CONSERVATION FROM ROUND RIVER 238–39 (Sierra Club / Ballantine 1966). The terminology is not essential. Indeed, if one adopts the modern view of ethics as only descriptive of a set of values freely and consciously chosen, the importance of the work I describe may become even clearer. What I perceive as our lack of knowledge about the values we are promoting or expressing through law means not just that our ethic is latent or we are unconscious of it, it means that we lack an ethic. Until we become cognizant of the values or moral implications of the choices we are making as individuals, both in our actions under the laws and through our indirect responsibility for the law, we are by definition acting without a coherent environmental ethic. I am grateful to my colleague Charles Collier for pointing out the problematic nature of the use of the word ethic in this context.

To extract the environmental ethics embedded within, our laws must be examined both as drafted *and* implemented. The ethical content of our laws results from a dynamic process of lawmaking that continues even as we study it.[21] One cannot simply look at the hortatory statements of policy in a statute and accept them as stating "an ethic."[22] Even scholars who are intimately familiar with an area of law may not know and may not have tried to identify with precision the ethics embedded in the laws they study. To the extent that some scholars have addressed this question, the inquiry is often limited. My goal is to suggest the value of systematic attention to this question, to indicate how the work done to date has set the stage for the project and to begin to envision the work involved.

A preliminary analysis of several core environmental provisions[23] suggests that the mix of values embedded in our environmental statutes is substantially similar to the values found in the common law and non-environmental statutes. That is, the environmental statutes tend to reflect human concerns that predate any dawning of environmental awareness—with only a modest introduction of new values or reasons for caring that are uniquely attributable to concern for the human relationship to the environment.[24] If this is true, it seems to undermine a tenet of the public debate. It may call into question the very naming of these as "environmental" laws

21. Note that I am not advocating the dynamic approach to statutory interpretation when I use the term dynamic. *See* William Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). Whatever method one adopts to interpret the statutory text, I am interested not just in the text of statutes, but the meaning the statute develops as it is implemented.

22. Indeed it is not clear whether these reflect something that could be fairly called an ethic even if one adopts the view that an ethic can exist outside an individual's conscious choice of a path. As will be discussed in greater detail below, the ethic or ethics we have embraced in our laws appear to be nuanced, not absolute, and perhaps inchoate or incoherent. If this is correct, deriving and describing them requires a serious inquiry that bridges law and philosophy.

23. My initial focus has been the law governing the dredging and filling of wetlands under section 404 of the Clean Water Act and the "take" prohibition of the Endangered Species Act, along with the provisions that qualify and implement these provisions. Other scholars' general assessments are consistent with this conclusion. *See supra* note 8.

24. This is a preliminary impression that requires more work to confirm or correct it. Indeed, the goal of this essay is to make the case for the need to undertake this type of analysis. I do not take a position on whether the ethic *should* be truly "environmental." My contention is that it is almost impossible to know whether or not these laws accurately reflect our values as a democratic society. Until we know more precisely what values the laws currently reflect, we are only guessing at what non-technical reforms are needed.

and their easy identification with "environmentalism" and environmental ethics. Apart from this, my goal is to focus attention on the nature of the values included and those excluded from consideration under our various laws. I envision a study of the process by which our law and our values evolve. This study should enhance our understanding of the law and of the role of various institutions in the development of both the law and its ethical content.

To begin the inquiry, this article considers how work already being done in Environmental Philosophy relates to the work I describe. Part II introduces the subject known as Environmental Philosophy or Environmental Ethics and shows how the concepts and vocabulary particular to the field may provide a starting point for a more rigorous discourse about the ethics underlying environmental law. Part III surveys the relevant work to date by legal scholars, highlighting its specific relevance to the synthetic analysis I argue is needed. Part IV sets out in more detail the goals and scope of the search for environmental ethics and describes one approach to uncovering the ethics embedded in our law. Part V suggests why our understanding of the ethics of our environmental laws is so limited, and argues for committing greater effort to developing the connection between environmental law and ethics.

II. ENVIRONMENTAL ETHICS

An important threshold question is how this search for the ethics embedded in our laws relates to the well-studied topic of Environmental Ethics. This section briefly introduces the field of philosophic inquiry and then briefly describes the work being done by some philosophers and its relationship to the work I propose.

A. Environmental Ethics and Its History

For purposes of this article, Environmental Ethics is defined broadly, to describe the morals that humans adopt in their interactions with the non-human natural world.[25] However, some

25. I use the term "environmental ethics" in a broad and non-technical sense, to refer to any ethical theory or group of theories that accounts for or applies to human interactions with non-human nature in a way that ethical theories focused exclusively on human interactions do not. For purposes of clarity, I capitalize the term "Environmental Ethics" to refer to the study of environmental ethics. Some have suggested that the term Environmental Philosophy may be more accurate to describe the field often called

philosophers who work in the field of Environmental Ethics use the term more narrowly to describe a coherent theory of morality to govern human interactions with the environment that could eliminate the perceived social harm that these interactions currently generate.[26] In other words, in theorizing about Environmental Ethics, philosophers seek to create new theories or apply existing ones creatively to solve what they see as a philosophical lacuna—the absence of ethical approaches that directly consider the ethical dimensions of human relationships with the natural environment.[27] One philosopher has described the field of Environmental Ethics in this way:

> Although ethics traditionally has been the branch of philosophy concerned with the criticism and proper ordering of values governing interactions among persons, the values that have fueled our environmental crisis are norms not so much of personal interaction as of interactions between nature and human society generally. Because of this difference, a new branch of ethics has been initiated to oversee our dealings with the rest of nature.[28]

Environmental Ethics, because the academic literature is not focused primarily on applied ethics, but on other traditional fields within philosophy, such as aesthetics, metaphysics, epistemology, philosophy of science, and social and political philosophy. EUGENE HARGROVE, FOUNDATIONS OF ENVIRONMENTAL ETHICS 2 (1989). Others have used the term ecophilosophy, or Arne Naess's term "ecosophy" to describe the more radical and expansive approaches to environmental philosophy, like deep ecology, which demands that "we . . . understand the nature of the problems in terms of the interrelationships between our desires, concepts, beliefs, characters and cultures, and how these produce technology practices and lifestyles that affect on [sic] the Natural world in various ways." DONALD EDWARD DAVIS, ECOPHILOSOPHY: A FIELD GUIDE TO THE LITERATURE xii, xix (1989). I won't draw this distinction.

26. Joseph DesJardins offers a useful definition:

> [E]nvironmental [E]thics presents and defends a systematic and comprehensive account of the moral relations between human beings and their natural environment. Environmental [E]thics assumes that human behavior toward the natural world can be and is governed by moral norms. A theory of environmental ethics then must go on to (1) explain what these norms are, (2) explain to whom or to what humans have responsibilities, and (3) show how these responsibilities are justified.

JOSEPH R. DESJARDINS, ENVIRONMENTAL ETHICS 13 (1993). However, some philosophers argue that no single ethic or ethical justification will emerge or need emerge for environmental ethics to have an important role in our social development. *See* CHRISTOPHER D. STONE, EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM (1987) (envisioning the possibility of moral pluralism as the future of environmental ethics); *see also* HARGROVE, *supra* note 25, at 8.

27. As Eugene Hargrove states in his introduction to *Foundations of Environmental Ethics*, "[P]hilosophy has traditionally refused to acknowledge or directly face up to the physical existence of the Earth." *Id.* at 3.

28. Kenneth M. Sayre, *An Alternative View of Environmental Ethics*, 13 ENVTL. ETHICS 195–96 (1991) (arguing that the pressing need to which environmental philosophy should respond

Whether one defines environmental ethics narrowly or broadly, the root concept is a set of principles and justifications for distinguishing good from bad human conduct insofar as it affects the environment.[29] The study of Ethics and of Environmental Ethics involves an identification of values, and then an analysis of the justification and merit of the principles derived to advance those values.[30] Ultimately, when we examine why someone has an ethical position regarding a particular action, analysis of its justification and merit takes us back to a question of value—of what we care about—such as pleasure, or protecting life.[31] Indeed, values lie at the heart of an inquiry into ethics. One can study ethical questions with a focus on individuals' ethics and behavior or on the ethics of groups of people, or the ethics or values expressed through social institutions, like law.[32]

is not the need for more theories or for agreement among philosophers on the best theory; rather we need to replace the norms that have led society to environmental degradation with others that are less degrading).

29. Ethics is a branch of philosophy that deals with questions about what is good or right and how we know what is good or right. *See* MACKINNON, *supra* note 5, at 5; Moore, *supra* note 5, at 21. "[E]thics aims at discovering what are those other properties belonging to all things that are good." *Id.* at 24. In the study of Ethics, people give reasons that support their argument that a given thing is good or bad. MACKINNON, *supra*, at 5–6. "[T]he main object of Ethics, as a systematic science, is to give correct *reasons* for thinking that this or that is good . . . ." Moore, *supra*, at 21 (in the course of discussing why the most critical question is what is meant by good).

30. The essence of ethical discourse is a rational inquiry into the justification for a course of conduct or adoption of a principle to distinguish good from bad conduct. These rational explanations and arguments are tested against our moral intuitions. *See* SHELLY KAGAN, NORMATIVE ETHICS 13 (1998). "Ethics, or moral philosophy, asks foundational questions about the good life, about what is better and worse, about whether there is any objective right and wrong, and how we know it if there is." MACKINNON, *supra* note 5, at 5. In the study of ethics, people give reasons that support their argument for a given choice. *Id.* at 5–6. Facts, feelings and emotions may all play a role in the judgment as to what is good in Ethics. *Id.* at 6. The facts provide an empirical basis for our judgments. But our feelings and emotions may play a role in our morality too, shaping our values. *Id.*

31. Rachels, *supra* note 5, at 18–20.

32. *See supra* note 20. Aldo Leopold's often-quoted definition focuses not on the possibility of varied ethics adopted by individuals, but on ethics as they develop and are expressed socially. His definition searches out the ecological analogue for human ethics:

> An ethic, ecologically, is a limitation on freedom of action in the struggle for existence. An ethic, philosophically, is a differentiation of social from anti-social conduct. These are two definitions of one thing. The thing has its origin in the tendency of interdependent individuals or groups to evolve modes of co-operation. The ecologist calls these symbioses. Politics and economics are advanced symbioses in which the original free-for-all competition has been replaced, in part, by co-operative mechanisms with an ethical content. . . . An ethic may be regarded as a mode of guidance for meeting ecological situations so new or intricate, or involving such deferred reactions,

Within the discipline of philosophy, most say that Environmental Ethics is a branch of applied Ethics, like bio-medical Ethics or business Ethics.[33] Applied Ethics often involves inquiry into how general ethical principles are applied in fields involving complex or controversial questions.[34] Environmental Ethics, then, is concerned with the principles that distinguish good from bad in human conduct that relates to the environment, the justification for considering given conduct as good or bad, and the values that underlie the definition of what is good. A particular decision or action can be tested against a given environmental ethic to see if it in fact serves the values of the ethic and if the outcome of the decision challenges the coherence or logic of the ethic.[35]

> that the path of social expediency is not discernible to the average individual. Animal instincts are modes of guidance for the individual in meeting such situations. Ethics are possibly a kind of community instinct in-the-making.

LEOPOLD, *supra* note 20, at 238–39.

33. *See, e.g.*, HARGROVE, *supra* note 25, at 1. Other scholars distinguish applied ethics (the application of existing ethics to unique environmental problems) from (1) "extensionism" (the extension of duties to other species, e.g., animal liberation) and (2)the ecocentric "nothing less than a sweeping philosophical overhaul" to incorporate ecology into philosophy. *See* J. BAIRD CALLICOTT, IN DEFENSE OF THE LAND ETHIC: ESSAYS IN ENVIRONMENTAL PHILOSOPHY 2–4 (1989).

34. KAGAN, *supra* note 30, at 3. Others, like Eugene Hargrove, describe Environmental Ethics as more diaphanous. To Hargrove, the many topics studied in the field called Environmental Ethics spill over into other branches of philosophy unlike other branches of applied Ethics. HARGROVE, *supra* note 25, at 2. On this view, an environmental ethic, if one truly develops, will disappear into the fabric of philosophy. An environmental ethic's maturity will be signaled not by a new set of rules, but by a transformation of aesthetics, metaphysics, economics, etc. to take account of the unique characteristics and values embodied in our relation to the natural world. *Id.* at 2–3. In short, the disappearance of a separate ethic, its integration into our broader sense of ethics, will mark its true success.

35. Some may mistakenly understand Environmental Ethics as a futile search to identify a set of principles that will provide clear and certain answers to any interaction or situation. While some philosophers may work to identify and refine a single ethic, the enterprise is much broader than this. Eugene Hargrove offers interesting insight into the content and meaning of an ethic. Instead of thinking of ethics in terms of a set of principles or rules by which society evaluates right from wrong conduct, Hargrove draws on the work of Adriaan de Groote, who analyzed the role of textbook strategies that operate as "rules" in chess, to elucidate how ethical rules operate in practice. *See* HARGROVE, *supra* note 25, at 5–8 (citing THOUGHT AND CHOICE IN CHESS 90 (George W. Baylor ed., 1965)). Hargrove uses the term rules to describe not the rules that define the game of chess, but common "textbook" strategies that are "useful because they produce good results when we follow them," such as the "rule that it is better to trade a knight for a bishop than a bishop for a knight, since the value of a bishop increases during the game as its mobility increases and the value of a knight decreases as it becomes more vulnerable to attack." *Id.* at 6.

De Groote's work demonstrates that effective rules are not necessarily consciously or expressly invoked and rigidly followed. In his research, De Groote discovered that above-average chess players may know and employ common textbook rules about how best to gain

Environmental Ethics provides a necessary foundation for the work this article advocates. However, a close look at the substance of the work done by environmental philosophers highlights the divergence between Environmental Ethics and the intellectual effort I envision. The work done by philosophers in this field often involves an effort to expose and develop one or more possible ethical theories,[36] or the justifications or foundations for such theories, that could govern human-non-human interactions. Traditional ethical theories are viewed as either insufficient or incoherent when applied to human interactions with the non-human world and as justifying destructive patterns of human conduct. In general, writing about Environmental Ethics focuses on developing new ethical theories that are in some way *appropriate* to govern human relations with the rest of the natural world, that are informed by ecology or an awareness of elements of nature, or that will promote a beneficial relationship with the rest of the natural world.[37]

To this end, environmental philosophers engage in an ongoing debate about candidate environmental ethics: their justification in logic; their consistency with our moral intuition, our history, our cultural and social traditions; and their implications for our

an advantage, but that the effect of the rules is to "unconsciously affect perception during the decision-making process." Rather than dictating an inevitable outcome, the rule helps to improve the player's perception of the situation, and may act as an aid to learning or "as principles of justification" to which players advert in explaining choices they made. *See* HARGROVE, *supra* note 25, at 6; *see also* KAGAN, *supra* note 30, at 2–3 (describing how the application of normative ethics to a controversial situation may be difficult and the correct outcome may not be apparent). In other words, ethics can perform an important function by helping us to see problems, even if they are only partial tools for solving these dilemmas. This explication of the role a chess rule plays seems to present a more useful picture of how an environmental ethic would operate than does the conception of an ethic as a rigid set of rules.

36. "An *ethical theory* is a systematic exposition of a particular view about what is the nature and basis of good or right. The theory provides reasons or norms for judging acts to be right or wrong and attempts to give a justification for these norms." MACKINNON, *supra* note 5, at 8.

37. *See, e.g.*, ALAN R. DRENGSON, *Foreword* to ECOPHILOSOPHY, *supra* note 25, at xiii–xiv (defining the measure of depth of an ecophilosophy in terms of "its capacity to create practices, traditions, cultures and characters which are able not merely to exist, but to dwell and *flourish* on this Earth"); CALLICOTT, *supra* note 33, at 3–4 (describing his work and that of other "ecocentric environmental philosophers" as a response to seeing the need for a radical change in philosophy in response to nature's repudiation of modern Western civilization's attitudes toward and valuing of the environment).

ongoing conduct.[38] The work of these philosophers can help us in our quest to understand the ethics embedded in our laws in several ways. First, this work provides important background by inquiring into the implications of applying traditional human-centered ethics to human relationships with the non-human world. Second, these philosophers explore and theorize about alternative ethics. These ethics are based on alternative ways of, and justifications for, valuing the environment that may already be incorporated in our laws or at least somewhat compatible with them. This work—building new theories and identifying candidate values—is particularly likely to help lawyers and legal scholars to develop a vocabulary for a deeper discourse about the values and ethics of our laws.

What follows is a brief survey of (1) some of the formative writing on Environmental Ethics, (2) examples of work by philosophers that bridges ethics and law, and (3) an introduction of some core concepts that anchor philosophical debate.[39] These concepts and terminology may form the basis for a vocabulary that can be used in the effort to extract and identify the ethical strands, as Eric Freyfogle has aptly called them,[40] embedded in our laws.

38. Within the field of environmental philosophy, scholars can pursue quite different endeavors. Professor DesJardins categorizes these as: descriptive ethics, normative ethics and philosophical ethics. *Supra* note 26, at 14–15. Description or classification of the ethics held by a person or group of people is an endeavor that has been called "descriptive ethics." *Id.* at 14–15. Normative ethics includes the type of debate where competing "oughts" are argued as the proper norms for conduct. *Id.* at 15. This has also been described as concentrated on "presenting and defending a moral view." KAGAN, *supra* note 30, at 2. Normative ethics is also concerned with attempting to derive a basic set of moral principles, or some of the most important ones and defending them. These principles may be rights, duties or virtues. *Id.* at 2. Philosophical ethics, or metaethics, operates at "a higher level of generality and abstraction in which normative judgments and their supporting reasons are analyzed and evaluated." DESJARDINS, *supra* note 26, at 16; *see also* KAGAN, *supra* note 30, at 4. In metaethics, philosophers evaluate the merits or limitations of various ethics, to locate them in relation to general philosophical theory, or to clarify concepts and their potential application to a given problem by focusing on the strength of their factual premises, their internal coherence and consistency, etc. DESJARDINS, *supra* note 26, at 16. Finally, philosophers may also engage in theory building, the most abstract and creative type of thinking about environmental ethics. *Id.* at 16.

39. What follows is only a partial survey of leading thinkers and approaches whose work has had early or enduring impact on the legal discourse about environmental ethics. For a more complete, but dated, survey, *see* DONALD EDWARD DAVIS, ECOPHILOSOPHY: A FIELD GUIDE TO THE LITERATURE (1989). The journal *Environmental Ethics* remains a leading site of academic dialogue and the website and quarterly *Newsletter of the International Society for Environmental Ethics* include an indispensable bibliography. Http://www.unt.edu/ISEE.html.

40. Freyfogle, *supra* note 8, at 828.

1. Formative Writings

Aldo Leopold was one of the first conservationists to suggest the need for an "ethic" that addressed our relation to the natural world.[41] In his Foreword to *A Sand County Almanac*, in 1948, Leopold wrote:

> Conservation is getting nowhere because it is incompatible with our Abrahamic concept of land. We abuse land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect. There is no other way for land to survive the impact of mechanized man, nor for us to reap from it the esthetic harvest it is capable, under science, of contributing to culture.[42]

In "The Upshot" Leopold argued that the key to remedying our flawed relationship to the land (a strictly economic relationship "entailing privileges but not obligations") was the development of a "land ethic."[43] In Leopold's words:

> A land ethic, then, reflects the existence of an ecological conscience, and this in turn reflects a conviction of individual responsibility for the health of the land. Health is the capacity of the land for self-renewal. Conservation is our effort to understand and preserve this capacity. . . . A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.[44]

In the early 1970's, Environmental Ethics began commanding attention among scholars of religion and philosophy. Lynn White's article *The Historical Roots of Our Ecologic Crisis*,[45] and then John Passmore's book *Man's Responsibility for Nature*,[46] carried forward the scholarly discussion.[47] By the late 1970's,[48] a number of academic

41. Leopold's work has influenced the debates about environmental ethics both among philosophers and legal scholars. *See, e.g.*, CALLICOTT, *supra* note 33; J. BAIRD CALLICOTT, BEYOND THE LAND ETHIC: MORE ESSAYS IN ENVIRONMENTAL PHILOSOPHY (1999); Eric T. Freyfogle, *The Land Ethic and Pilgrim Leopold*, 61 U. COLO. L. REV. 217 (1990).

42. Leopold, *supra* note 20, at xviii–xix.

43. *Id.* at 238.

44. *Id.* at 258, 262.

45. Lynn White, Jr., *The Historical Roots of Our Ecologic Crisis*, 155 SCI. 1203 (1967).

46. JOHN PASSMORE, MAN'S RESPONSIBILITY FOR NATURE: ECOLOGICAL PROBLEMS AND WESTERN TRADITIONS (1974).

47. Both of these works focused on how elements of the religious and cultural traditions of the West, specifically Judeo-Christian beliefs and morality, shaped human relations with the rest of the natural world. Their writings contributed to the early debate over whether industrial western society was in some measure programmed by its existing ethics to degrade and destroy the natural world, or whether some alternative ethic was either latent or even potentially consistent with existing Judeo-Christian ethics, a topic still debated today.

philosophers had begun working on problems of philosophy related to the environment.[49] Around this same time, the term "environmental ethics" gained currency to describe both a special type of ethics or values that an individual or society might develop and the academic study of that topic.

During this period, Mark Sagoff and Christopher Stone undertook significant work that bridged the gap between philosophy and law. In a series of articles,[50] Sagoff responded to the strong emphasis on economic efficiency in public policy and law debates. He argued that environmental problems are not properly conceived as problems of market failure, that they are primarily "moral, aesthetic, cultural, and political."[51] Thus, Sagoff rejected the trend toward favoring reliance on cost-benefit analysis to direct environmental policy. In the concluding chapter of his book collecting his early writings, Sagoff addresses most directly the question of the values underlying our environmental statutes. He canvasses the relative priority accorded to human health protection and other competing values under several statutes.[52]

Christopher Stone explored whether an environmental ethic should incorporate values then excluded by our legal system, particularly by the limited recognition of parties with standing.[53]

48. Other authors and thinkers concerned with this topic can be identified throughout history. For example, Passmore notes Victor Hugo's conviction that a new ethic to govern human relations with nature would develop in time. PASSMORE, *supra* note 46, at 3.

49. One prominent figure within this group, Eugene Hargrove, founded the journal *Environmental Ethics* in 1979, which represented a landmark in the development of the topic as a field of professional interest.

50. These were later collected in MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW AND THE ENVIRONMENT (1988).

51. *Id.* at 6. Sagoff's work sought to establish a dichotomy between what he termed consumers' preferences and citizens' values and to argue for the need for debate in terms that reflected the latter. Sagoff sought to establish that values, not market failures, were the motivation for environmental statutes and that selection of societal values through a deliberative process is an important part of our tradition of liberty. *Id.*

52. SAGOFF, *supra* note 50, at 196–98. Contrary to some who argue for absolute protection of these values, Sagoff ultimately argues for incorporating consideration of competing values into our deliberation. *Id.* at 210–24. Sagoff focused his attention on the proper approach and values to incorporate in implementing statutes. Therefore his inquiry focused on the relevant values expressed in the bedrock language of the statutes, where competing values may not be explicit. *Id.* at 201–02. Nonetheless, he seems implicitly to accept that these competing values are legitimate, and advocates their incorporation through limited consideration of the costs that protection of environmental values demands. He rejects an ethic that imposes a duty to prevent all environmental degradation. *Id.* at 218–20.

53. CHRISTOPHER D. STONE, EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM

Stone rejects "moral monism," the quest for a single unifying body of principles that reduces the identity of what has moral considerateness to one quality,[54] and instead posits "Moral Pluralism" as a position that enables us to conceive of moral standing and duties as variable.[55] Bryan Norton, another philosopher whose work has emphasized convergence rather than theoretical monism, has consistently sought to bridge philosophy and ecological science, in the quest to inform policy development.[56]

A number of other philosophers have sought to bridge the gaps between environmental science, philosophy and policy or law. For example, Laura Westra begins with the goal of biological integrity articulated in various pieces of legislation. Westra then develops a new moral theory to fit the stated legislative goal which challenges existing morality.[57] Kristin Shrader-Frechette undertakes detailed analysis to uncover the values embedded in risk assessment policy[58] and in decisions applying these policies.[59] Her work highlights instances where claims to scientific objectivity obscure the imposition of particular values[60] and where the values articulated as guiding a given decision are in fact not well served due to flawed methodology and data.[61] This convergence of the issues addressed

(1987). This book explores more broadly the reach of law and morals in dealing with things other than human individuals. *Id.* at 11–12. It also surveys how and why the law might expand "legal considerateness" to a broader range of entities. *Id.* at 43–62.

54. *Id.* at 13.

55. *Id.* at 115–18, 132–37. These include spatial and temporal distance between actors, duties to other humans and to other species, and whether questions relate to character or actions. *Id.* at 13, 120–24, 132–52, 205–40. In a later book, CHRISTOPHER D. STONE, THE GNAT IS OLDER THAN MAN: GLOBAL ENVIRONMENT AND HUMAN AGENDA (1993), Stone notes how law, to be effective, must draw on morals. *Id.* at 242. Stone also notes the role that education "in both fact and spirit" can play in effecting change to our ethics and law. *Id.*

56. *See, e.g.*, BRYAN G. NORTON, TOWARD UNITY AMONG ENVIRONMENTALISTS (1991).

57. LAURA WESTRA, AN ENVIRONMENTAL PROPOSAL FOR ETHICS: THE PRINCIPLE OF INTEGRITY (1994). Westra argues that legislation incorporating integrity as a value signals a public inclination toward an ethic centered on this novel value. *Id.* at xvi. She then explores how her principle of integrity could be operationalized in law and policy as a new moral imperative. *Id.* at 6.

58. Kristin S. Shrader-Frechette, *Evaluating the Expertise of Experts*, 6 RISK: HEALTH, SAFETY & ENV'T 115 (1995).

59. Kristin S. Shrader-Frechette, *Academy Recommendations on the Proposed Yucca Mountain Waste Repository: Overview and Criticisms*, 8 RISK: HEALTH, SAFETY & ENV'T 25 (1997).

60. Shrader-Frechette, *supra* note 58.

61. Kristin S. Shrader-Frechette, *Environmental Justice and Procedural Safeguards: The Ethics of Environmental Restoration*, 42 ARIZ. L. REV. 525 (2000); Shrader-Frechette, *supra* note 59. Ultimately, Shrader-Frechette calls for a "practical ecology" that relies on case studies rather than general theory. Shrader-Frechette, *Practical Ecology and Foundations for Environmental*

by scholars in philosophy and law highlights the timeliness of an effort to systematically assess the role of ethics in our law.

2. Core Concepts from Environmental Philosophy

As the inquiry by environmental philosophers has grown broader and deeper, certain concepts have taken on central importance. The now-common philosophical axes of anthropocentrism versus biocentrism and rights-based or deontological approaches versus utilitarian or consequentialist approaches serve as important landmarks in discussing environmental ethics. Some writing adopts an iconic approach, locating ideas in relation to John Muir's preservationism or a conservationism identified with Gifford Pinchot or Aldo Leopold's land ethic. An understanding of these core concepts and how they fit into the debate among philosophers may help us to develop a common vocabulary that will promote deeper inquiry and dialogue.

Anthropocentric utilitarian ethics suggest that our guiding principle of the good should be to maximize welfare for humans. Incidental protection of non-human nature reflects "the good" only insofar as it advances humans' interest or values.[62] Such an approach is rejected by the majority of environmental philosophers as inherently insufficient to address the problem of human relations with the non-human environment. Nonetheless, an anthropocentric utilitarian ethic is a familiar justification for many regulatory statutes, including many environmental laws.

Some environmental philosophers, including Bryan Norton, have worked to develop variations on the anthropocentric utilitarian ethic that correct the deficiencies that have led to conservation and ethical dilemmas.[63] These theories—which seek a way to measure costs and benefits that takes into account the limitations of market economics, as well as our knowledge about the interdependence of elements of the environment, our imperfect information and methods for understanding the non-human world, and the need

Ethics, 92 J. PHIL. 621, 635 (1995). She suggests a path towards conservation that protects humans and human welfare by shifting the burden in cases of uncertainty to those who maintain that an action has no adverse effects. *Id.* at 632.

62. *See, e.g.*, BRYAN G. NORTON, WHY PRESERVE NATURAL VARIETY (1987) (surveying anthropocentric utilitarian arguments for preserving species); HARGROVE, *supra* note 25, at 9–11 (characterizing his approach as focused on anthropocentric intrinsic value arguments).

63. *See, e.g.*, NORTON, *supra* notes 56, 62.

for a coherent response to uncertainty—may best be captured by the phrase *ecological utilitarian ethics.*

Anthropocentric rights-based ethics—ethics that are grounded in respect for the rights of humans—are less frequently candidates for an environmental ethic among environmental philosophers because they represent the characteristic exclusion of nature from philosophy. By definition, this type of ethic cannot be "fixed" to incorporate the non-human world. Nonetheless, for purposes of developing a vocabulary, an anthropocentric rights-based ethic is an important concept since many of our laws are arguably consistent with such an ethic.[64] Moreover, the recent interest in environmental justice suggests the desire to reincorporate distributive justice—a notion grounded in an anthropocentric rights-based framework—into the ethics that guide our environmental laws.

Important discussion of *biocentric* or *lifeform-centered ethics* has also flourished in the environmental philosophical debate, focusing on ethics that posit rights for, or other valuing of, non-human natural entities.[65] The term biocentric ethic is sometimes used to refer specifically to a *holistic biocentric ethic*—an ethic that makes wholes, such as species or ecosystems, rather than individuals, primary. Biocentric theories often embrace values and justifications that diverge sharply from the traditional human-centered ethics they seek to expand and thus are rarely represented in current American environmental law.

Aldo Leopold's *land ethic* is perhaps the most widely known holistic biocentric ethic; it has been widely cited and its ramifications and potential applications developed by many

64. An ethic consistent with Western traditions and philosophy, grounded in aesthetic appreciation for nature and scientific attitudes, which the author identifies as "weakly anthropocentric," is posited by Eugene Hargrove in his book *Foundations of Environmental Ethics. See supra* note 25, at 10, 11. This particular focus on the intrinsic value of nature and the values associated with scientific inquiry and aesthetics can be subsumed within our human-centered ethics, though they represent an intrinsic value approach rather than one focused on rights.

65. *See,* for example, CALLICOTT, IN DEFENSE OF THE LAND ETHIC, *supra* note 33, at 3–4 (characterizing his view as ecocentric). Deep ecology would also be considered a biocentric ethic. These and other ethics that focus on the collective of lifeforms that comprise an ecosystem or all forms of life are distinguished from ethics focusing on rights of or duties to individual creatures, such as the animal rights perspective of Tom Regan. *See infra* notes 69–70 and accompanying text.

philosophers, including Baird Callicott and Holmes Rolston.[66] In Leopold's formulation, the land ethic is grounded in a conception of community that embraces both humans and other elements of the land community. It is encapsulated in his maxim, "A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise."[67] This ethic embraces a redefinition of the relationship between humans and the non-human world in which humans are not conquerors but citizens alongside all other members of the "land-community."[68] The land ethic employs the insights of ecology as a guide for determining the good for this broad ecologically-linked community. For purposes of identifying whether strands of this ethic exist in our laws, we might distinguish this ethic as an *ecological communitarian ethic.* It explicitly eschews utilitarianism and locates the good in the stability, integrity and beauty of the community as a whole. It is the community whose interests we must look to in guiding our conduct, not the rights of individual members of the community.

Individualistic biocentric theories that invoke rights for non-human individuals (*animal rights*) have been described and advocated by Peter Singer[69] and Tom Regan.[70] Theories that embrace respect and duties short of rights for a broader range of life forms include Paul Taylor's theory outlined in *Respect for Nature.*[71]

The thinking of Arne Naess is at the root of *deep ecology*, more recently termed *Ecosophy-T*, which outlines a process of deep questioning about nature and oneself. Deep ecology has subsequently been embraced and widely written about by others[72] and is part of an important strain of debate regarding

66. *See* CALLICOTT, *supra* note 33; HOLMES ROLSTON III, ENVIRONMENTAL ETHICS: VALUES IN AND DUTIES TO THE NATURAL WORLD (1988) (developing the case for an ethic reflecting the intrinsic value of nature and incorporating ecological focus on the community rather than the individual).

67. LEOPOLD, *supra* note 20, at 262.

68. *Id.* at 240.

69. PETER SINGER, ANIMAL LIBERATION 1 (2d ed. 1990).

70. TOM REGAN, THE CASE FOR ANIMAL RIGHTS (1983).

71. PAUL W. TAYLOR, RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS (1986).

72. *See, e.g.*, Arne Naess, *The Deep Ecology Movement: Some Philosophical Aspects*, 8 PHIL. INQUIRY 10 (1986); BILL DEVALL & GEORGE SESSIONS, DEEP ECOLOGY: LIVING AS IF NATURE MATTERED 7–8 (1985) (describing the process as one of cultivating ecological consciousness); *see also* WARWICK FOX, TOWARD A TRANSPERSONAL ECOLOGY (1990).

environmental ethics that reflects a fundamental critique of Western industrial society.

Ecofeminism describes a theoretical approach to human-nature interactions that seeks to highlight the parallel between male oppression of women and oppression of nature, and which draws on this commonality in seeking alternative modes of interaction.[73] Others have theorized environmental ethics with more explicit spiritual dimensions.[74]

In undertaking to analyze the ethical content of our current laws, these coherent environmental ethics, both new and old, may provide a useful starting point by describing various ethical impulses—bundles of values that our laws advance or with which they are arguably consistent.[75] Of course, these ethical frameworks are all avowedly aspirational. They are efforts to envision an ethic, not to describe what is embraced by the majority today. Therefore, the ethics described above tend to be far more ecological and to reflect a greater valuing of the non-human world than do our current laws. Nonetheless, the terminology derived from Environmental Ethics may help orient us, and the theories advanced by philosophers may serve as useful beacons, marking out points on the ethical landscape in relation to which we can locate our position and consider our next steps.

B. Building a Vocabulary

We currently lack a sufficiently nuanced vocabulary to enable us to discuss the values and ethics embedded in our environmental statutes. The language of Environmental Philosophy focuses on pure principles and coherent theories that *could* be adopted by

73. *See* REWEAVING THE WORLD: THE EMERGENCE OF ECOFEMINISM (Irene Diamond & Gloria Feman Orenstein eds. 1990) for a collection of essays from varied perspectives, including Charlene Spretnak, Susan Griffin, Carolyn Merchant, Vandana Shiva and Ynestra King.

74. *See, e.g.*, DHARMA GAIA: A HARVEST OF ESSAYS IN BUDDHISM AND ECOLOGY (1990).

75. A provision of a given law will often be consistent with several different ethical theories, not just one. For example, a prohibition on the taking of members of endangered species, standing alone, could reflect a biocentric ethic or an anthropocentric utilitarian ethic. Absent the rare statement of an ethical principle within the law, one can only identify the various candidate ethics with which the law is arguably consistent. However, both because of the vast differences among the environmental ethics that have been theorized, and because implementation decisions may further refine the ethical content of the law, one can still draw significant distinctions and gain insight into our ethical bearing from the effort to articulate the ethics embedded in our law.

humans. To talk about the somewhat messier and perhaps dysfunctional bundles of values and justifications underlying our statutes and decisions, we need a slightly different vocabulary.

The paradigms of utilitarian and rights-based ethics, and of anthropocentric and biocentric approaches, are useful anchor concepts.[76] For instance, the values reflected in our environmental laws are often consistent with some variant of an anthropocentric ethic. But this insight does not take us far. Identifying them as anthropocentric reveals little about the precise values promoted or the possible justifications for caring. The extent to which the values reflected in the statute diverge from those that would underlie a pure anthropocentric utilitarian or rights-based ethic is enlightening and important, and often cannot be explained by any coherent pure philosophy. Without a supplementary vocabulary to differentiate the ethical impulses that underlie our laws, it is hard for a broad discussion to develop about them.

To fill this gap, I offer a provisional list of "ethical impulses" that supplements the existing terminology. These ethical impulses are not ethics in the philosophical sense, but provide (1) a shorthand to describe bundles of values that frequently appear embedded in our environmental laws and policies and (2) an associated justification for caring that may be a variant of a true ethic (such as anthropocentric utilitarianism), or in some cases may lack the coherence of an ethic. A single statutory provision and its implementation may be consistent with one or several impulses. The ethical impulses I propose are as follows.[77]

1. The Nuisance Impulse (Utilitarian or Rights-Based)

The Nuisance Impulse invokes an anthropocentric ethic that replicates and advances the values protected by the common law nuisance doctrine. The term signals that the statute or rule in question mimics the limited array of values that nuisance law typically protects—human health, safety and property—and also that the consideration of these values may be limited by common law standards of proof and concepts of causation. Thus, the term

76. The four pairings: anthropocentric rights-based, anthropocentric utilitarian, biocentric rights-based and biocentric utilitarian ethics are useful starting points and provide some vocabulary to help us describe ethics embedded in laws. Arguments grounded on the intrinsic value of non-human nature represent an important variant of these approaches.

77. The list is not intended to be definitive. It is a first step, not a final product.

also suggests at best a limited incorporation of ecological principles such as interdependence and scale and a relatively crude approach to uncertainty.

In seeking to analyze the ethical impulse of a statute that advances this limited array of values there are two distinct possible answers to the question of why we care about human life, health and property sufficiently to limit another property owner's rights. The answer may reflect a rights-based or a utilitarian justification, either concern for protecting human autonomy or the goal of achieving the greatest good for the greatest number.

The term Utilitarian Nuisance Impulse may best capture the blend of values considered in a utilitarian balancing that approximates the cost-benefit balancing sometimes performed under common law nuisance doctrine. If the statute protects human health, safety or property, without explicit consideration of costs, then the statute may be said to be consistent with a Rights-Based Nuisance Impulse. Under either variant, as under nuisance law, disruption of aesthetic or spiritual values associated with the non-human world that does not cause physical injury to humans or interfere with a human right to use property is not discouraged.

2. The Ecological Utilitarian Impulse

An Ecological Utilitarian Impulse underlies standards that incorporate a broad and ecologically-informed measurement of relevant costs and benefits; it is an anthropocentric utilitarian ethic, but one that incorporates the insights of ecology. Many statutory standards that embody a traditional utilitarian ethic lack any explicit mandate for consideration of attributes like interdependence, irreversibility, and uncertainty. Decisions under such standards generally reveal similar inattention to ecological science. An Ecological Utilitarian Impulse differs from this traditional utilitarian approach in that the decisionmaker accounts for these scientific insights in evaluating the social utility of a course of action. Because of the limits of human knowledge and analytic techniques, one might fairly claim that no utilitarian assessment can comprehend all the ecological costs and benefits of a particular action or decision. Therefore, the term Ecological Utilitarian Impulse describes analyses or standards that approximate this ideal, taking account of current limitations on

human understanding and endeavoring in some way to overcome them.

3. The Sustainability Impulse

The notion of sustainability, while still evolving, may capture an array of values and a justification for caring about them that differs from the impulses described above, while similarly not rising to the level of a coherent philosophical ethic.[78] This ethical impulse emerges from the central focus of sustainability—ensuring that decisions satisfy current needs without compromising the ability of future generations to provide for themselves, taking into consideration social equity, environmental protection and economic development. A decisional process promoting a Sustainability Impulse distinguishes itself from a traditional anthropocentric rights-based or utilitarian ethic in that it would dictate consideration of the rights of future generations and would be ecologically informed. Yet, the Sustainability Impulse differs from an Ecological Utilitarian Ethic in that concern for the environment is motivated by a desire to preserve values for future generations in a context of social equity. Like the related intergenerational equity approach developed by Professor Edith Brown Weiss,[79] a law embodying a Sustainability Impulse is focused on the rights of humans. The explicit focus on economic development reveals the extent to which sustainability represents a variant of a traditional utilitarian approach applied within the current global economic context.

4. The Land Ethic Impulse

The Land Ethic Impulse evokes a biocentric communitarian ecological ethic that values stability, integrity and beauty of the land community, including humans. It values non-human life forms as members of the community along with humans and explicitly incorporates the insights of ecology. A law that incorporated this ethical impulse would incorporate a valuing of individuals and groups because of their relationship to and role in the land

78. *See, e.g.* William D. Ruckelshaus, *Toward a Sustainable World*, 261 SCI. AM. 166 (1989).

79. EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989); *see also* Bryan G. Norton, *Intergenerational Equity and Environmental Decisions: A Model Using Rawls' Veil of Ignorance*, 1 ECOL. ECON. 137 (1989).

community. It explicitly rejects a purely human-centered utilitarian approach. The privileging of beauty suggests that despite this biocentrism, human cultural values inevitably form a part of the idea of the good.

5. The Development Impulse

The term Development Impulse may be useful to describe a statutory command or a decision that reflects a narrowed anthropocentric impulse that may be grounded in either a rights-based or utilitarian tradition, but is narrower than either and lacks a broader philosophical coherence. The Development Impulse reflects a privileging of human activity that alters the non-human natural world. This may be justified by a narrow focus on the rights of the individual to undertake development activities (without regard to other humans' rights that may be affected) or it may reflect a very narrow assessment of costs and benefits that weighs heavily the benefits of development activity without accounting for external or spillover costs.[80]

6. The Environmental Justice Impulse

An Environmental Justice Impulse can be used to describe a statute or decision that incorporates considerations of distributional justice, social equity and fairness among humans. This impulse is anthropocentric in that it reflects human valuing of other humans rather than human valuing of non-human elements of the environment and generally is justified by a focus on rights rather than social utility. It is environmental in that it dictates fairness in the distribution of the benefits and burdens that result from policies and laws that govern human activities that affect the environment. It does not dictate a particular outcome in terms of the quality of the environment, but only that the distribution of environmental quality and human health and safety be fair. Thus, an Environmental Justice Impulse only indirectly affects human relations with the non-human world and will always be paired with

80. John Sprankling's analysis of the effect of the law of adverse possession on land preservation in *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816 (1994), and Fred Bosselman's description of the ethic of opportunity epitomized by Justice Scalia in *Four Ethics: Order, Reform, Responsibility, Opportunity*, 24 ENVTL. L. 1439 (1994) both capture an impulse akin to this Development Impulse.

some other environmental ethic or impulse. It is consistent with, but more narrowly focused than, the Sustainability Impulse.

Following a survey of legal scholarship relevant to environmental ethics, we will return to this proposed vocabulary in an illustration of how it might help in the effort to uncover the ethical strands of environmental law.

III. ENVIRONMENTAL ETHICS IN THE LEGAL LITERATURE

In the early years of the development of our modern environmental laws, debate on their ethical content and justification received prominent public attention, in much the same way as assisted suicide and surrogate parenthood captured public attention following more recent high-profile, novel conflicts.[81] Like the legal-ethical dilemmas involving these other social issues, the conditions that inspired the development of environmental law posed a challenge to society. Public outrage over the burning Cuyahoga River[82], the oil-soaked seals in Santa Barbara[83] and the exposure to hazardous waste at Love Canal[84] suggested a dramatic conflict between American society's ethical impulses and a legal regime that provided little environmental protection. As in the other legal-ethical dilemmas described above, the Golden Rule provided no complete answer to how we ought to conduct ourselves in relation to the air, water and other species in these situations. The myriad possibilities for an ethical foundation for environmental law seemed open to us, and scholars debated

81. Some early examples include Martin H. Krieger, *What's Wrong with Plastic Trees*, 179 SCI. 446 (1973) (suggesting the use of technology for the creation of artificial environments through substitution and simulation) and the response: Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974) (rejecting the argument that plastic trees are beneficial and setting forth a new environmental ethic); Christopher Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1970) (proposing that environmental objects should have legal rights).

82. *Environment: The Cities: The Price of Optimism*, TIME, Aug. 1, 1969, at 41 (discussing Cuyahoga river water pollution and ignition as a result of waste dumping).

83. Gladwin Hill, *Santa Barbarans Wait for Oil 'Powder Keg' to Blow Up*, N.Y. TIMES, May 30, 1969, at A10 (informing about oil pollution in Santa Barbara including the oil-soaked seals).

84. Joseph Dunmire & Mrs. Joseph Dunmire, *Every Mother is Scared to Death*, NIAGARA GAZETTE, April 27, 1980 (discussing the fears of citizens living near Love Canal); Mike Brown, *Evacuation of Kids Urged*, NIAGARA GAZETTE, Aug. 27, 1978, at A1 (discussing the declaration of Love Canal as an emergency situation).

them as part of the discourse on law.[85] The flourishing of ideas, however, was brief.

Apparent agreement that we needed to change the way we did business to account for the environment may have truncated any useful debate about why we cared, how much we cared and how these newly expressed values related to values already espoused by society and our laws. Politicians fell over one another seeking to claim credit for environmental laws that protected health, safety and the environment. By the late 1970's, as the skeleton of our laws took shape, the public and legal scholars shifted their focus to the implementation process: Were the laws being implemented appropriately? What results were being achieved in practice, what unforeseen obstacles encountered? As we reached the 1980's and 1990's, the necessary task of improving the regulatory tools for implementing the sea of environmental laws occupied legal scholars with questions about the potential of tools like emissions trading, habitat conservation planning and cost-benefit analysis, and broader questions about how better to integrate science into our regulatory processes. Issues about the proper role of risk assessment and the problems of command-and-control statutes and no-risk standards became a central focus of scholarship and law reform.[86]

The power of economics and markets as tools to account for individuals' preferences in decisionmaking carried the day and persuaded many that they could even substitute for any messy discussion of values.[87] However, some legal scholars continued to focus on questions about the ethics underlying our statutes explicitly,[88] or implicitly.[89] In recent years, a resurgence of interest

85. *See supra* note 81 (discussing Krieger, Tribe, Stone).

86. *See, e.g.*, Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985).

87. *See* Huffman, *supra* note 4. The argument is that if our laws incorporate cost-benefit analysis as a basis for decisions, and if people's values are expressed in those analyses, then we can reflect society's ethics through our decisions without identifying or debating the abstract ethical principles that underlie the laws and the individual decisions. *See* SAGOFF, *supra* note 50, at 99–123, for a discussion and critique of this. Professor Rose, although embracing the value of economics as a tool for expressing individual preferences, *see* Carol M. Rose, *Environmental Faust Succumbs to Temptations Of Economic Mephistopheles, or, Value By Any Other Name Is Preference*, 87 MICH. L. REV. 1631 (1989) (reviewing SAGOFF, *supra* note 50), also emphasizes the role of morality in shaping norms. *See* Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1 (1991).

88. *See infra* notes 94–123, 137–149 and accompanying text.

89. *See infra* notes 124–129 and accompanying text.

has produced a considerable body of work by legal scholars that incorporates a focus on environmental ethics. These works have laid important groundwork and renewed the dialogue about the relevance of ethics to the past and future evolution of environmental law.

The recent growth in this field suggests a spreading awareness of the relationship between ethics and environmental law. However, though analyses of the values embedded in the common law of real property have been done, similar work on the values underlying our statutory environmental law is quite limited and scattered. The survey that follows first categorizes the existing legal scholarship on environmental ethics to highlight both the contributions it makes to the inquiry I propose and the extent to which it differs from it.[90] In addition, it seeks to describe how both environmental ethics scholarship and environmental law scholarship that is not explicitly focused on ethics can contribute to the larger project I propose.

Among the different approaches I identify, I first look at work that recognizes and advocates greater attention to values. Second, I identify scholars who use ethical theories in the course of advocating a particular interpretation or reform, work I call "ethics advocacy." A third group, which I call "theory builders," includes those who, like environmental philosophers, have focused on developing ideal theories that promote a more harmonious relationship with the non-human environment or better incorporate what we know about the environment.[91] A fourth group I call "norm theorists" has incorporated a discourse about social norms into its analysis of legal provisions and tools.[92] I also identify a fifth group of writings that incorporates close analysis of the meaning of laws as enacted and as implemented. This careful systematic analysis is a significant piece of the work needed. It lacks a translation into a language of values and ethics, but provides the systematic close reading of law and the study of the impact of implementation and enforcement that is essential to uncovering the values embedded in our laws as implemented. The last group, whose work I call "ethics analysis," has undertaken to identify the

90. This survey is not comprehensive, but provides a sense of the major voices in legal scholarship about environmental ethics. As will be apparent, a number of authors' works fall in more than one of these categories.

91. *See infra* notes 102–116 and accompanying text.

92. *See infra* notes 117–123 and accompanying text.

values underlying law, much as I advocate, but has focused largely on the common law of property.[93] This group has identified ethical themes in the history of American land law, translating the meaning of property law into a vocabulary of ethics. Included in this last group, I note some of the many scholars whose work contributes somewhat to this analysis, while not systematically considering the relationship between ethics and law.

A. Recognizing the Challenge

Among the legal scholars who focus on environmental ethics, several seem explicitly or implicitly to acknowledge the project I describe. In *The Ethical Strands of Environmental Law*, Eric Freyfogle articulates the challenge:

> In the many laws that deal with the natural environment, society implements its ideas on how humans ought to interact with the land. By environmental laws, I mean the rules on owning and using land and other natural resources, as well as the numerous laws that limit pollution and toxic substances. By probing these laws and unraveling their strands, we can gain a new sense of how we have, as a people, interpreted the value of nonhuman nature and sought to acknowledge that value in our communal lives.[94]

Michael Vandenbergh and Victor Flatt have both written about the absence of a discourse concerning the underlying values associated with particular environmental statutes.[95] Mary Wood's *Environmental Scholarship for a New Millennium*[96] frames the challenge for environmental law scholarship in a way that demands an awareness of underlying values. Holly Doremus also articulates the need for a broader discourse on environmental values, but takes an approach similar to that of many philosophers—advocating for a new and coherent theory that is truly an environmental ethic:

> What is needed to foster further progress in nature protection is not a better explanation of the economic value of nature, but a better

93. *See infra* notes 130–149 and accompanying text.

94. *Supra* note 8, at 819–20. As is discussed *infra*, Freyfogle focuses on particular controversies as emblematic of certain values and value conflicts and generally characterizes the extent to which laws incorporate these values.

95. *See* Flatt, *supra* note 8; Vandenbergh, *supra* note 8. Both of these articles critique the existing framework for decisionmaking under pollution control statutes focusing on the exclusion of some environmental values. Victor Flatt sets out a series of questions that seek to identify the relevant values that are at stake in a given regulatory decision. *Id.* at 17–18.

96. Mary Christina Wood, *Environmental Scholarship for a New Millennium*, 26 ENVTL. L. 761 (1996).

> explanation of why nature should be protected when economics points in the other direction. That explanation must come from the esthetic and ethical discourses, which can address nature's other contributions to a fulfilling and honorable human life.[97]

In a recent article,[98] Richard Lazarus argues powerfully that the Justices of the Supreme Court have ignored the distinct identity and character of environmental law as a body of law. Although Lazarus is not writing explicitly about environmental ethics, his ultimate conclusion directs our attention toward how we view the environment—what we value about it and why. Among the qualities that Lazarus highlights as distinctive about environmental law is the "noneconomic, nonhuman character" of the injuries.[99] Lazarus's concluding observation that Justices' life experiences may be the single most important quality affecting their ability to appreciate the importance and coherence of environmental law[100] reflects in part a recognition that the values the Justices bring to deciding these cases, their appreciation of the ethical dimensions, may be the missing link to a coherent jurisprudence.

B. Ethics Advocacy

The second category of scholarship, Ethics Advocacy, is the broadest and involves the most tangential consideration of ethics. These are writings that begin from a premise that a certain ethic is either widely shared or desirable and thus a given. The ethic provides a context for understanding the value of a legal tool or analysis being advanced.[101] So, for example, Leopold's land ethic may be invoked as a justification for a proposal for legal reform. This literature draws on ethical concepts solely as a backdrop for

97. Holly Doremus, *The Rhetoric and Reality of Nature Protection: Toward a New Discourse*, 57 WASH. & LEE L. REV. 11, 65, 70–72 (2000).

98. Richard Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703 (2000).

99. *Id.* at 748.

100. *Id.* at 764–66.

101. *See, e.g.*, Bradford C. Mank, *Protecting the Environment for Future Generations: A Proposal for a "Republican" Superagency*, 5 N.Y.U. ENVTL. L.J. 444 (1996) (exploring the possibility of a superagency as a remedy for the inadequate consideration of future generations' interests under existing agency structures); James Salzman, *Sustainable Consumption and the Law*, 27 ENVTL L. 1243 (1997). Building on the ethic of sustainability, Salzman argues for a baseline awareness of our level of consumption and how it relates to a goal of sustainability. Extended producer responsibility is offered as a policy tool that can help to achieve this.

legal analysis, and limits their role to that of a foil or a motivating force for advocacy.

C. Theory Building

The approach I call theory-building involves conceptual work. The scholars who engage in this work seek to articulate what we might value as a society and why it is desirable, logical and coherent to hold these values. They draw on the work of philosophers and other thinkers to advocate adoption of a set of values as a way to solve the dilemmas caused by current patterns of human interaction with the non-human environment. Eric Freyfogle has written extensively about ethics in this way. In *Ownership and Ecology*,[102] he elaborates on the relationship between conceptions of property and ecological wisdom; *The Construction of Ownership*,[103] and *The Ethical Strands of Environmental Law*,[104] are calls for a new vision of the human-land relationship that incorporates respect for the land in property law and statutory environmental law, respectively. In much of his work, he explores and builds on the ideas of Aldo Leopold to advance understanding of what these ethics mean or could mean for law.[105] Several writings by Carol Rose, also entail theory building. In *Given-ness and Gift: Property and the Quest for Environmental Ethics*, Rose draws on the ethical intuitions that accompany the act of giving and receiving gifts as a model for an environmental ethic.[106]

102. Eric T. Freyfogle, *Ownership and Ecology*, 43 CASE W. RES. L. REV. 1269 (1993).

103. Eric T. Freyfogle, *The Construction of Ownership*, 1996 U. ILL. L. REV. 173 (1996).

104. *Supra* note 40.

105. *See, e.g.*, Freyfogle, *supra* note 41 (charting elements of Leopold's intellectual and ethical development as reflected in his writings, exploring why they endure and what they can teach us). Freyfogle highlights the need for "scholars who can express values with a clarity, a lyricism, and a sincerity that captivates us and gets us, not just to see and know, but to feel and experience its rightness." *Id.* at 255.

106. Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENVTL. L. 1, 7–11 (1994). An interesting point Rose's analysis raises is the subtle but significant shift we can make, even within an anthropocentric utilitarian framework, if we tell a different story about the role of human users. Rose emphasizes the shift in how we value nature—from a crude commodification to a more spiritual, less hard-nosed valuing—when we shift from viewing it as a given to a gift. *Id.* at 11–12. Rose also surveys three different ethics with what she calls an instrumental purpose. She isn't assessing their inherent merit or coherence as a philosopher would, but wants to see if they will lead us to a beneficial environmental ethic—a notion of use with care and respect. *Id.* at 14, 21. Indigenous peoples' attitudes offer some benefits, notably a sense of respect for and identification with nature. *Id.* at 18–19. However, Rose points out how some views held by indigenous peoples

Edith Brown Weiss's work developing the intergenerational trust theory is another example of a groundbreaking exposition of a new ethical framework.[107] Richard Delgado's writing has exposed and assessed the value of several candidate environmental ethics.[108] Joseph Sax's early work in excavating the public trust doctrine and exploring it in the service of modern conservation law[109] has generally been viewed as development and application of a new legal theory. However, it simultaneously created a vision of a rights-based ethic and should be seen as theory building. The foundations that support the public trust doctrine point us in the direction of certain values in the environment and certain reasons for caring. Indeed, the dominance of this doctrine and idea as a foundation for modern statutory law may have contributed to the lack of attention to ethics by legal scholars for some years. We may have accepted the public trust as an answer to ethical as well as legal questions, rather than recognizing the questions it doesn't resolve about what we value and for what reasons. Richard Lazarus's critique of the doctrine in part seems to hint at this, in its suggestion that the contours of the doctrine don't cover everything we need to protect—in other words, everything we value.[110]

Holly Doremus has also written extensively about the need for a new ethic and has explored the contours of such an ethic, notably in *The Rhetoric and Reality of Nature Protection: Toward a New Discourse.*[111] Doremus argues that the rhetoric we use to describe what we value is an aspect of what we value. She critiques the rhetoric of values found in the Endangered Species Act and the

are at odds with accepting responsibility for human impacts and with our technical and rationalistic approach to conservation. *Id.* at 17–18. Similarly, biocentric rights- or interest-based approaches may have rhetorical power, although when focused on individual life forms they raise a number of problems. *Id.* at 20–24. Ultimately, she locates sources for the notions she advocates in property law. *See* Rose, *infra* note 116, at 742–46.

107. WEISS, *supra* note 78; *see also* Edwin R. McCullough, *Through the Eye of the Needle: The Earth's Hard Passage Back to Health*, 10 J. ENVTL. L. & LITIG. 389 (1995).

108. Delgado, *supra* note 8, at 1218–23.

109. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

110. *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 711–12 (1986). Richard Delgado criticized the dominance of public trust theory based on its normative force that may have precluded the development of a more profound ethical foundation for environmental law. *See* Delgado, *supra* note 8.

111. *Supra* note 97. The article considers political rhetoric about the Endangered Species Act as a form of narrative that may reflect the intuitive elements of our ethic. *Id.* at 42.

debate about it, which she sees as inadequate to express the values of biodiversity.[112]

Daniel Farber, in his book *Eco-Pragmatism*, sets out to address how we ought to reconcile our "environmental values" with other values.[113] Farber's work approaches theory-building. His central proposals could be said to represent an effort to define an ethic of sustainability or an ecological utilitarian ethic. Although Farber's ideas are framed more as an analysis of existing legal tools and a way to resolve conflict, his recommendations[114] can be viewed as recommendations for operationalizing a sustainability ethic.[115] As such, the recommendations can be viewed as a path for infusing a new set of values into the interpretation of law.[116]

D. Norm Theorists

Carol Rose is the leading norm theorist. In *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*,[117] she draws on the history of common resources in various cultures to show how customary norms can function as a management

112. *Id.* at 54–61.

113. *See* DANIEL A. FARBER, ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD 1 (1999). Farber suggests that there may be a need for society to develop a different approach to environmental problems than is currently embedded in our laws: one that incorporates cost-benefit analysis tempered by a presumption in favor of protection. *Id.* at 11–13, 199–202. His work assumes the existence of some set of "environmental values" and what he terms an environmentalist baseline. *See, e.g., id.* at 3–4, 11, 43, 94, 107–10.

114. These include "leaning into the wind," employing a low discount rate, using an environmentalist baseline tempered by reasonableness and a green canon of statutory construction. *Id.* at 11, 114–16, 138–44, 201–02.

115. *See id.* at 35–36. Farber's proposals to decentralize and provide for regulatory flexibility could be argued to cut against an ecological ethic, as the critique of Farber by Lisa Heinzerling suggests. *See* Lisa Heinzerling, *Pragmatists and Environmentalists*, 113 HARV. L. REV. 1421 (2000).

116. Farber presents his ideas more as a solution to a conflict among different world views and does not suggest that he is advocating or developing a particular ethic, except to the extent that he is seeking a mediating principle between extreme positions. FARBER, *supra* note 113, at 35. He does suggest that a goal of his recommendations is to promote better understanding of the values underlying environmental conflicts. *Id.* at 11. But his primary focus is on whether economics can accurately capture some cluster of environmental values he does not seek to define. *See, e.g., id.* at 3–4, 11, 39–44. The values at stake in the principle examples Farber draws on are largely, though not exclusively, human life and health. This easy equation of human health and environmental values shows how relatively crude our discourse about environmental values still is.

117. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 742–46 (1986).

strategy.[118] This theme is also developed in *Rethinking Environmental Controls: Management Strategies for Common Resources*[119] and elsewhere in her work.[120] Jeff Rachlinski's empirical and theoretical work on the role of social norms contributes to a better understanding of the limits of social norms as an alternative to regulation in the context of environmental law.[121] Victor Flatt's work also enters the realm of norm theorizing in the course of discussing the need for an open discourse on the values underlying environmental law,[122] as does Holly Doremus's emphasis on this point in *Rhetoric and Reality.*[123]

E. Close Analysis of Law's Meaning: Legal Scholarship with a Non-Ethics Focus

As the illustration in Part IV will show, the work to uncover the ethics embedded in our laws relies not just on attention to the content of values and plausible justifications for them but also on a careful study of how our laws operate in practice. To identify what values predominate under our laws demands that we look closely at the statutes, as well as regulations, informal guidance, agency practices, budget priorities and enforcement. Oliver Houck's work provides the best example of this type of systematic analysis. Houck studies how agencies and courts have implemented statutes like the Endangered Species Act[124] and section 404 of the Clean Water

118. *See id.* Eric Freyfogle has also written about this:

> The law of land ownership is one of the cultural elements that expresses our sense of place in the natural order of life. It reflects our communal understandings of value and of right and wrong—what land uses we consider harmful; what interactions with nature we view as appropriate; whether we understand nature as a whole or as a collection of parts; whether we see humans as part of the natural order or whether nature is merely backdrop and resources; and whether the future does or does not weigh heavily in our accounting schemes. As new members become part of a culture, they absorb many of its values. The law of ownership therefore does more than reflect a set of values: it helps instill them, and carries them on.

Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 109 (1995).

119. Rose, *supra* note 87, *Rethinking Environmental Controls.*

120. Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1990) (storytelling can promote the trust necessary to create norms that will be followed).

121. Jeffrey J. Rachlinski, *Protectiong Endangered Species Without Regulating Private Landowners: The Case of Endangered Plants*, 8 CORNELL J.L. & PUB. POL'Y 1 (1998); Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1537 (2000).

122. Flatt, *supra* note 8, at 16.

123. Doremus, *supra* note 97.

124. Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S.*

Act.[125] Although presented without explicit reference to any discourse on environmental ethics, Houck's work provides a factual context for interpreting the values embedded *in practice* in our environmental statutes.[126] Houck's writing reveals the values at stake, the values considered and those excluded from consideration.

The encyclopedic work of treatise writers like William Rodgers provides this detail on a larger scale.[127] Other examples of legal scholarship that provide detailed information about the implementation of environmental law include Ann Carlson's empirical work on the impact of social norms on recycling[128] and Jeffrey Rachlinski's empirical study of the impact of state endangered-plant regulation on landowner behavior.[129] This type of scholarship will be instrumental in evaluating the values undergirding environmental law in operation.

F. Ethics Analysis

Ethics analysts focus on the ethical underpinnings of law and legal development. Their work comes closest to the undertaking I advocate. However, much of the work of this type to date has focused on "land law," the common law of property or land use. Carol Rose,[130] Eric Freyfogle,[131] Fred Bosselman,[132] and John

Departments of Interior and Commerce, 64 U. COLO. L. REV. 277 (1993) (reviewing of the implementation of the ESA and demonstrating that through implementation, "the agencies... have converted an act of specific stages and clear commands into an act of discretion"). Houck's work also highlights the disjuncture between public perceptions of the ethic or strength of the ESA and its practical force.

125. Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. COLO. L. REV. 773 (1989).

126. In the lecture, Oliver A. Houck, *Are Humans Part of Ecosystems?*, 28 ENVTL. L. 1 (1998), Houck addresses a question of values directly: the critical question of how to incorporate human values without overwhelming the possibility of ecological integrity as we implement the concept of ecosystem management.

127. *See, e.g.*, WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 4.12 A (1986) (describing the basic message of 404 as "no discharge" but providing examples of "utilitarian holdings" that "take the sharp edge off" section 404 and highlighting effect of multiple loci of decisionmaking and incrementalism that characterize 404).

128. Ann E. Carlson, *Recycling Norms*, 89 CAL. L. REV. 1231 (2001)

129. Rachlinski, *Protectiong Endangered Species*, *supra* note 121.

130. Rose, *supra* note 117, at 742–46; Rose, *supra* note 106, at 7–11.

131. *See, e.g.*, Eric Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77 (1995) (demonstrating the way in which property law reflects society's environmental ethic and tracing the evolution of the American frontier ethic into a market ethic, and the relationship of this ethic to the development of property and takings law, separated from the

Sprankling[133] have all made significant contributions, building on earlier work by James Karp[134] and John Humbach.[135]

One could reasonably argue that the clearest lens on society's environmental ethic is the common law of property. But while this work may be a logical starting point, it cannot substitute for a focus on the ethics embedded in statutes. The limitations of the common law have made statutory law a significant part of the landscape, a circumstance likely to remain unchanged for the foreseeable future. There is no assurance that the ethics embedded in our statutes are identical to those found in the common law, so the inquiries are not redundant. And it seems that the contentious realm of environmental law and policy could benefit enormously, even disproportionately, from the effort to obtain greater clarity about its ethical dimensions.[136]

There are a few ethics analysts who have focused specifically on environmental statutes and who have undertaken partial analysis of the ethics that underlie our environmental statutes and the statutes' implementation. Holly Doremus has focused on uncovering the conservation values that were motivating forces for the passage of some of our core environmental statutes. Her work advocates restoring these values. Doremus focuses on the vision that guided the legislators and advocates who shaped our major conservation statutes.[137] She looks to the roots of the law and

realm of federal statutory environmental law).

132. Bosselman, *supra* note 80.

133. Sprankling, *supra* note 80.

134. James P. Karp, *Aldo Leopold's Land Ethic: Is an Ecological Conscience Evolving in Land Development Law?*, 19 ENVTL. L. 737 (1989).

135. John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339 (1989).

136. Some may argue the opposite point: that at least in the realm of environmental policy, unlike in property, the connection to environmental ethics is apparent and thus the work is not as imperative. However, as noted *supra* Part I, I believe that a close look at the law as it exists today reveals scant attention, beyond lip service, to an ethic that is truly environmental.

137. In *Nature, Knowledge and Profit: The Yellowstone Bioprospecting Controversy and the Core Purposes of America's National Parks*, Doremus documents the values that may explain our commitment to certain resource protection statutes and programs. 26 ECOLOGY L.Q. 401 (1999). In particular, Doremus highlights the statutory commitment to the inspirational value of the national parks. *Id.* at 444. In *Restoring Endangered Species: The Importance of Being Wild*, Doremus searched for values at the core of the ESA. 23 HARV. ENVTL. L. REV. 1 (1999). She identifies the value of wildness and the ethical impulses potentially represented in the statute from legislative history, and the statement of goals in the introductory sections of the statute. *Id.* at 10–15. In the course of measuring the Department of Interior's relevant incidental take rules against this value, Doremus discusses the balance of various values—

argues for preserving the values embedded there.[138] This approach contributes to identifying the ethics embedded in the law, but it doesn't consider in detail what values emerge in the implementation of the statute. Eric Freyfogle addresses the challenge of assessing the ethics of our laws in *The Ethical Strands of Environmental Law*, focusing on the general approach taken by Congress in select statutes and the values identified in their aspirational statements of goals.[139] This work opens the dialogue about the ethics embedded in our existing laws, but does not take as its focus detailed development of this understanding and its potential to alter the fabric of the discourse about law. There are many other scholars whose work integrates an exploration of questions of underlying values, although the attention to the questions of ethics or values is less central. For example, James Huffman's work, advocating greater recognition of the autonomy values embedded in our commitment to private property, engages in a critique of broad reliance on environmental regulation based in his reading of the values that motivate and underlie these laws.[140] Huffman has also catalogued the various ethical theories that can be advanced as the "ethic" underlying the Endangered Species Act and concluded that none fit particularly well.[141] Douglas Williams's work on natural resource damage assessment provides a critical

including protection of human life, landowners' autonomy and control over their property, and local community voice—found in the regulations. *Id.* at 44–49.

138. Doremus, *Nature, Knowledge and Profit*, *supra* note 137, at 438–42; *Restoring Endangered Species*, *supra* note 137, at 48. In *Nature, Knowledge and Profit*, Doremus presents legislative history and other materials from the late nineteenth century that reveal a commitment to a vision of parks as places of spiritual renewal. The early advocates of the national parks system believed that this spiritual renewal would inculcate environmental ethics among the visitors to the parks. From the early period, they also show how cheap theatrical manipulation compromised these loftier values espoused by park advocates. In *Restoring Endangered Species*, *supra*, Doremus critiques Interior Department endangered species reintroduction policies and practices for their biological risk and because they conflict with what Doremus sees as the overriding goal of the ESA: wildness.

139. Freyfogle, *supra* note 8, at 833–40. Freyfogle notes the naïveté of the early efforts to protect non-human nature in statutes like NEPA and the Multiple Use and Sustained Yield Act. He notes Congress' perception of the environmental challenge as an information problem and the lack of any real understanding even of the goals articulated in the statutes. He also focuses on the failure to change land law to incorporate our understanding of ecology and interdependence as a critical failing. *Id.*

140. *See* James L. Huffman, *The Public Interest in Private Property Rights*, 50 OKLA. L. REV. 377 (1997) (analyzing the turn to regulation as partly motivated by an objective of wealth redistribution).

141. James L. Huffman, *Do Species and Nature Have Rights?*, 13 PUB. LAND L. REV. 51 (1992).

reading of the rhetoric and values that support natural resource damage valuation techniques employed under the Oil Pollution Act and CERCLA.[142] Eileen Gauna, in the course of a critique of existing models of regulatory decisionmaking, describes the ethical approach embedded in each.[143] Another example can be found in Christopher Schroeder's *Cool Analysis versus Moral Outrage in the Development of Federal Criminal Environmental Law.*[144] Schroeder obliquely addresses environmental ethics in applying the dichotomy between the cool analysis approach to environmental law and the moral outrage approach.[145] Victor Flatt addresses the extent to which environmental values are inevitably excluded when EPA employs cost-benefit analysis and proposes that a new paradigm for decisionmaking must identify all values that underlie our laws and provide agencies an analytical method for incorporating all these values into decisions with transparency.[146] Dan Farber's work can also be cited as providing ethics analysis, in that it uncovers instances where decisionmaking tools such as cost-benefit analysis may advance a set of values or a particular ethical impulse.[147] Much of Farber's work focuses on the proper way to

142. *See* Douglas R. Williams, *Valuing Natural Environments: Compensation, Market Norms, And the Idea of Public Goods*, 27 CONN. L. REV. 365 (1995). The article also includes a thoughtful discussion of the difficulty of expressing environmental values through the norms and currency of the market. *Id.* at 366–71.

143. *See* Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 17–28 (1998). Gauna argues for the need for a new model that can more successfully incorporate the value of fairness that is brought into focus by environmental justice. *Id.* at 37–53.

144. Christopher Schroeder, *Cool Analysis versus Moral Outrage in the Development of Federal Criminal Environmental Law*, 35 WM. & MARY L. REV. 251 (1993).

145. *Id.* at 253–56. In the language of ethics, these could be characterized as a human-centered utilitarian ethic versus a rights-based or intrinsic value environmental ethic. He describes the apparent embodiment of the latter type of environmental ethic in many early environmental statutes and yet the utilitarian thread often reflected in their implementation through rules, permitting and then enforcement decisions. *Id.* at 258–60. The increased attention to criminal enforcement can be explained as a return to a moral outrage perspective. *Id.* at 266–68.

146. Flatt, *supra* note 8, at 15. Flatt suggests a decisionmaking paradigm for agencies that would make the value identification and weighing process more transparent in individual implementation decisions. *See id.* at 20–21.

147. For example, Farber surveys and acknowledges the shortcomings of cost-benefit analysis as a tool to capture some kinds of values. *Supra* note 113, at 47–58. Viewed in this light, Farber's work is closely related to the work of Cass Sunstein, Lisa Heinzerling and economists such as Kip Viscusi. That work focuses on the appropriate analytic methods to employ in setting environmental standards and goals. *See, e.g.*, SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE (1997); Lisa Heinzerling & Frank Ackerman, *Pricing the Priceless: Cost-Benefit*

deploy standard decisionmaking techniques when we are deciding the appropriate level of risk to human life or health to tolerate and not explicitly on questions of ethics.[148] Errol Meidinger's work on private certification as an increasingly significant complement to regulation analyzes the values embedded in certification programs, focusing on their implications for the environment, human rights and community.[149] All of this work contributes something to the broader discourse about the ethics underlying our law, but it rarely locates itself in relation to any broader debate, perhaps because a broad conversation is only now emerging.

Ultimately, the language of values and reasons for caring may not yet be sufficiently developed to enable a robust discourse about the ethics embedded in environmental law. Whether or not legal scholars are the best suited to develop this language, contributions are already being made in the literature. Further depth in the analysis of the competing values and reasons for valuing embedded in environmental law is an important element of the work ahead.

IV. THE SEARCH FOR ENVIRONMENTAL ETHICS

A. Method and Goals

Before describing a method for identifying the ethics embedded in environmental law, it may help to describe in more detail the goal of this project and its scope. Following this explanation, I offer an abbreviated illustration of the type of analysis I envision, focusing on the federal law of wetlands regulation.

Analysis of Environmental Protection, 150 U. PA. L. REV. 1553 (2002).

148. Farber argues that the same factors that make identification of our environmental *values* challenging—uncertainty, long time horizons, and rapidly changing knowledge—also justify adjustments to standard decisionmaking tools, like cost-benefit analysis and burdens of proof. *Compare infra* Part IV *with* FARBER, *supra* note 113, at 5–6.

149. Errol E. Meidinger, *"Private" Environmental Regulation, Human Rights, and Community*, 7 BUFF. ENVTL. L.J. 123 (1999–2000). His work suggests that lack of transparency limits our ability to determine the values embedded in certification programs. He also notes the impact that certification regimes can have in shaping laws. *See also* Errol E. Meidinger, *Environmental Certification Programs and U.S. Environmental Law: Closer Than You May Think*, 31 ENVTL. L. REP. 10,162 (2001). Meidinger also makes an interesting observation on the competitive evolution of certification programs "to define master social metaphors, such as ecosystem health, sustainability, and corporate responsibility." *Id.* at 10,164. This process directly affects the dialogue about environmental ethics, by providing meaning to some of the dominant words and phrases widely used in the discussion.

As is stated above, the narrow goal is to explore how we might gain a better sense of the values embedded in our statutory-based environmental law and to identify ethics or ethical impulses that these statutes seem to reflect. The goal is not, however, to produce a single clear dispositive statement of "an ethic" that is reflected in the law. Rather, the picture that emerges over time will itself be dynamic. The precise contour of the ethics embedded in the law will never be clear and perhaps never free from some dispute, but many possible ethical underpinnings will be ruled out by a careful analysis. Patterns of values that consistently appear can shed considerable light on the ethics we currently embrace in our laws.[150]

As to the scope of the project, the work I envision requires an analysis of not only the values that are reflected in statutory language but also those that emerge when we study the law in action—that is, in the law as implemented, interpreted and enforced. Analysis directed to the statute alone, or to the statute only as implemented by regulations, is useful and contributes to the overall project, but the goal should be to look at the broader context in which the law operates. While in theory every provision of every environmental law could be analyzed, I do not believe the effort to cast the net so broadly is warranted. But at the least, an analysis of key provisions of significant statutes seems valuable. Even with that limitation, what I propose is a project of tremendous scope. It is not something that one scholar accomplishes, nor even one generation of scholars. But it is a framework project to which many scholars—some intentionally, some coincidentally—can contribute.[151]

150. Even with this explicitly limited goal, one might dismiss the project as impossible, given that even a single provision of law will not clearly embrace a single ethic, but rather may be consistent with a number of different ethics, and that its implementation may lead to still other understandings of the values and their relative priority. But this reality does not negate the value of the work. Indeed, a single law may be consistent with two different and competing ethics or it may appear to reflect several different ethics. Even narrowing the possibilities to two or three plausible ethics and a limited array of relevant values can have great value. Moreover, as the illustration below shows, the layers of analysis required may reveal a pattern of certain dominant values that are emphasized at every stage of implementation. Other values that appear as aspirations in the law may, in practice, have no impact on the law's implementation. Thus a weighted assessment of the importance accorded different values and the plausible explanations for why they are valued may enable us to describe with some confidence the balance of values promoted by a statute, which in turn may suggest a certain dominant ethic.

151. Part III describes the contributions of existing work by legal scholars and its relevance to this broader project.

What follows is a very abbreviated outline of what this work looks like. It describes how one might try to identify the ethic embedded in section 404 of the Clean Water Act, as implemented. The illustration highlights how the vocabulary introduced above could be deployed and how work already done by scholars contributes to the analysis.

B. An Illustration

The federal law governing human alteration of wetlands, centered in section 404 of the Clean Water Act, presents a particularly difficult challenge for the scholar trying to unravel its ethical roots because of the extensive sources that comprise it. However, for the same reason, it provides a good illustration of the different levels of work involved. As a first step, the statutory command must be analyzed.[152] In addition, one must look at the regulations promulgated by both the Corps of Engineers and EPA pursuant to section 404,[153] as well as the Interagency Memoranda of Agreement regarding such important issues as sequencing.[154] Likewise, significant judicial decisions interpreting these agency policies may also reveal the values that predominate in practice and

152. Section 404 operates as an exception to the general prohibition on discharges of pollutants into navigable waters under section 301(a) of the Clean Water Act. Section 301(a) provides, "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (2001). Section 404(a), which deals specifically with discharge of dredged or fill material, provides:

> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

33 U.S.C. § 1344(a) (2001). This section, by virtue of the broad definition afforded navigable waters under the statute and by regulation, reaches the discharge of dredged or fill material into wetlands as well as open water. Hence the most common application of section 404 is to permit the filling of wetlands. Dispute about the jurisdictional reach of 404 was heightened by the Supreme Court's decision in Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001).

153. These regulations are found, respectively, in 33 C.F.R. Pts. 320–329 (2001) and 40 C.F.R. Pts. 230–233 (2001).

154. Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (February 6, 1990) *at* http://www.usace.army.mil/inet/functions/cw/cecwo/reg/mitigate.htm (last visited Oct. 17, 2002).

shed light on why we care about these values. There may also be related statutes, such as the Swampbuster incentive programs for agricultural interests to preserve wetlands, that should be addressed. Finally, one would look at the implementation of section 404 in practice, an exercise Professor Oliver Houck undertook in part in his detailed study of the implementation of alternatives analysis under the regulations.[155] This information would bring into focus not just the ethics that are compatible with the commands of the statute as drafted, but the ethics of the law as implemented by the relevant agencies exercising the discretion granted them. The importance is not in any one segment of such a detailed analysis, but in the picture that emerges from the whole.

When one first looks at section 404(a) in isolation, it simply modifies the general prohibition on discharges of pollutants into navigable waters under section 301(a).[156] However, 404(a) has little meaning in isolation, since the remaining sections of the statute, the regulations, etc., guide and constrain the Secretary's discretion in granting permits. One would therefore analyze each of the subsections of 404 to try to evaluate the values they serve and plausible ethical justifications for advancing these values. The goal would be a cumulative analysis of the values advanced by all steps and elements of the decisionmaking process. One would look at the guidance on specification of disposal sites under 404(b), the restriction of disposal sites authorized by 404(c), the provision of general permits under 404(e), and the exemptions carved out in 404(f), with an eye to elaborating the values promoted by each section and to deriving the plausible justifications for protecting each bundle of values.

The 404(b) guidelines of the Corps and the EPA provide extensive material for analysis.[157] For example, 33 C.F.R. § 320.4(a)(1)[158] incorporates cumulative analysis of impacts and a

155. Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. COLO. L. REV. 773 (1989).

156. 33 U.S.C. § 1311(a) (2001).

157. I skip analysis of the text of 404(b) for purposes of simplifying this example and concentrate instead on the regulatory guidelines implementing 404(b), since these regulations flesh out in greater detail the values hinted at in the statute.

158. The regulation states:

> The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become

broad inclusive balancing that includes many different values, some of which are consistent with a number of different possible justifications for caring. Many are clearly human-centered values: economics, aesthetics, historic properties, flood hazards, land use, navigation, recreation, water supply and conservation, energy needs, safety, food and fiber production, mineral needs, consideration of property ownership and the needs and welfare of the people. Others may reflect either an anthropocentric *or* a biocentric concern: conservation, general environmental concerns, wetlands, fish and wildlife values, floodplain values, shore erosion and accretion, and water quality.

Some of these values could arguably indicate a reason for caring consistent with a Sustainability Impulse, but concern for future generations is at best implicit and is not necessarily promoted at all. The values considered also arguably go beyond the range that would be considered under a Nuisance Impulse. The regulation's list of values combines some that might be protected by a nuisance action with valuing of fish and wildlife, general environmental concerns and wetlands. However, looking at the limits of the analysis demanded, including the limited extent to which the values mentioned even arguably reflect a concern for the ecological values represented by wetlands and their interdependence with upland areas, as well as the absence of explicit direction to analyze the impacts at a variety of scales and consider resilience and surprise, it appears that the impulse is not consistent with what I

> relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered, including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. For activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines. Subject to the preceding sentence and any other applicable guidelines and criteria (see §§ 320.2 and 320.3), a permit will be granted unless the district engineer determines that it would be contrary to the public interest.
>
> 33 C.F.R. § 320.4(a)(1) (2001).

have termed the Ecological Utilitarian Impulse. Taken as a whole, this seems to fit better under the broader, traditional utilitarian ethic. Current use and current protection are given equal weight to the extent the values identified are served. Moreover, the explicit mention of property ownership shows the consideration of a broad range of human interests in the land, not merely those related to particular economic activities, but also the more abstract interest in the exercise of control and limitation of governmental action. Therefore, a general human-centered utilitarian ethic seems to better describe the cost-benefit balance mandated by this section.[159]

One would also consider the rarely used section 404(c) veto authority that permits EPA to restrict or deny any disposal site when it determines that the discharge of such materials into the area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

The values embedded in this authority to prohibit disposal tend largely toward a human-centered ethic. The privileging of municipal water supplies, shellfish beds, fishery areas and recreational areas bespeaks a clear anthropocentrism. It appears to reflect a part of a pure utilitarian calculus within the broader utilitarian assessment of permissible disposal sites. It would appear that Congress identified here a small number of values that so affect human welfare that threats to them justify authorizing a complete bar on disposal in a given location. However, the consideration given to "wildlife" is potentially compatible with a slightly broader ethic, even a modified biocentric utilitarian[160] or a rights-based ethic that privileges the interests of life forms encompassed by the term wildlife. But, given that "wildlife" often refers to those species which humans hunt, observe recreationally and consume, the term seems again to embody a human-centered

159. "The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably forseeable detriments." *Id.* The ultimate standard applied, requiring the granting of a permit unless contrary to the public interest or in violation of EPA's regulations, reinforces the social utility calculus. *Id.*

160. There is debate among philosophers on the coherence of an ethic that seeks to account for the greatest good of non-human species, in light of our inability to know from the non-human species member's perspective what constitutes "the good." Some respond to this challenge by identifying a series of core goods such as survival, the avoidance of pain, and the ability to reproduce.

ethic, and unacceptable interference with these activities again points to the contours associated with a human-centered utilitarian ethic. Thus the section could be argued to be consistent with a predominantly human-centered utilitarian ethic.

But when 404(c) is contrasted with a truly comprehensive anthropocentric utilitarian analysis, particularly one informed by ecology, this section appears more in line with what I have termed a Nuisance Impulse. It singles out interference with certain economic activities in private or public areas as warranting prohibition. The standard prohibiting disposal where it would cause "unreasonable adverse effects" on these activities (fishing, hunting, recreation, provision of drinking water) would seem to replicate a nuisance standard. The rarity with which 404(c) has been invoked would have to be evaluated, however, and a close look at the instances where it has been applied may suggest a strong ecological ethic that conflicts with this more superficial statutory reading. This highlights the importance of analysis of the law's implementation, not merely its text.

After undertaking a complete analysis of the relevant regulations one would also look at the practices of the agencies that implement and enforce 404, to see if these practices reflect any new or different values, or reasons for caring about identified values. In the case of section 404, one could draw on the work done by Professor Houck and others that reveals how certain mandatory and discretionary elements of the analysis under the statute and rules (and the values embedded therein) are ignored.[161] From all of this analysis, one could derive a statement of the dominant values that the statutes promote and how these relate to identifiable environmental ethics.

Without continuing here, this illustration shows one approach, though not necessarily the only one, that one could take to try to advance our understanding of and promote discourse about the ethical content of our environmental statutes, tying together the traditional legal analysis with a new attention to embedded values. Since the provisions seem to be animated by a human-centered utilitarian ethic, much of the debate over environmental laws today may be misfocused. If our environmental statutes merely reflect this utilitarian ethic (or what I have called a Nuisance Impulse), it

161. *See, e.g.*, Houck, *supra* note 125.

would appear that a vast gulf separates many people's self-image as people committed to the environment from the reality of their commitment to their own self-interest and self-preservation.[162] Furthermore, discourse that suggests that current environmental law entails a radical privileging of non-human life would appear clearly wrong and misleading. The increasing calls to embrace a Sustainability Ethic would appear not as a small step, but as one that might require a significant shift in our laws and the values we pursue through them. Insights of this sort do not resolve the question of where our values as individuals and a society lie and how we can achieve them, nor are they prescriptive. But description of the ethics we currently advance through our laws could provide some landmarks from which to navigate as we move ahead.

V. WHY STUDY THE ETHICS EMBEDDED IN ENVIRONMENTAL LAWS?

The study of ethics and law is not novel. Topics and situations that challenge our ethical impulses, requiring us to apply laws and ethics to new situations, frequently provoke lively debate. So, with the publicity surrounding Dr. Kevorkian's assisted suicides, the ethics of euthanasia and our laws governing suicide and assisted suicide came under close scrutiny, provoking much commentary on our laws and policies, and their ethical content and justification.[163] Similarly, the phenomenon of Baby M generated much public and expert debate over the ethical issues spawned by reproductive technology as we deliberated as a society over the appropriate legal responses.[164] The decision in *Bowers v. Hardwick*[165] prompted renewed thought and deliberation on our law and ethics as they relate to autonomy and human sexuality. And the advances of DNA testing stimulated renewed debate over the ethics and legal

162. In Gallup polls taken in 1989, 76% of Americans polled considered themselves "environmentalists." In 1999, this number had dropped to 50%. Public Agenda Online, Environment: People's Chief Concerns, *at* http://www.publicagenda.org/issues/pcc_detail.cfm?issue_type=environment&list=5 (last visited Oct. 17, 2002).

163. *See, e.g.* Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J.L. & PUB. POL'Y 599 (2000) (discussing the legal history of physician-assisted suicide and its ethical and legal implications).

164. *See, e.g.* Todd M. Krim, *Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother*, 5 ANNALS OF HEALTH L. 193 (1996) (analyzing surrogacy and in-vitro fertilization from both a legal and ethical perspective).

165. 478 U.S. 1039 (1986).

rules related to the use of such information as evidence in jury trials.

These challenges may arise from changing social mores, new technology, or newly available information. Alternatively, a perceived divergence between society's ethical intuitions and its laws may provide the impetus for renewed discourse. In all of these situations, this dialogue on ethical questions raised in a legal context and on the ethics embedded in our laws is a valuable development.

The language of the law and the substance of public debate over environmental law both reveal scant attention to its ethical content. Our environmental laws remain politically controversial and subject to continuous debate over directions for reform.[166] Yet there is only superficial discourse about the complex mix of values at stake.[167] This limited discourse does not reflect the richness of the possibilities in this area. A number of environmental philosophers have posited that the development of something we might call an environmental ethic is a logical step to expect at this time in the history of human (and particularly American) ethical development.[168] But one need not accept that a uniquely environmental ethic is developing or will develop to agree that since the 1970's we have been facing new issues that raise the *possibility* of a uniquely environmental ethic. Support for valuing conservation may reflect a profound change in the identity of what we value and why.[169] Even a conscious rejection of a unique ethic

166. After a presidential campaign in 1988 in which both candidates sought to paint themselves as environmentalists, Vice President Quayle's Council on Competitiveness promoted controversial reform. The appropriate direction for reform became an issue, albeit only superficially debated, that distinguished the candidates in the next two presidential elections, and was an issue on which the Republican-controlled 104th Congress sought to distinguish itself by its unsuccessful bid to radically reduce environmental regulation.

167. The conflicts over the past ten years between advocates of greater protection for private property ownership and advocates of endangered species and wetland conservation represent what I believe is an exception, a major instance of fairly open discussion of unresolved value conflicts. The property rights advocates advance arguments for individual autonomy through economic activity in contrast to those promoting an array of values associated with greater conservation of biodiversity. However, because the arguments for conservation are supported by a wide variety of different ethics, the distinctions among which are not often discussed, the values in conflict with human autonomy are not as clearly defined, leading to a less productive debate.

168. RODERICK FRAZIER NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS (1989); LEOPOLD, *supra* note 20.

169. *See* NASH, *supra* note 168, at 4–7 (1989) (describing the evolution of human ethics to

regarding the environment would represent an important step. Moreover, it is clear that not only environmental philosophers, but a growing number of Americans have adopted a distinctly environmental ethic.[170]

One possible explanation for why little attention has been paid to the ethical content of environmental law is that these ethics are inchoate. Articulating an ethic in this area is relatively challenging, involving—as environmental protection decisions do—complex technical decisions, significant uncertainty, a focus on the impacts of human actions on non-humans who may or may not be valued, and issues that may have long-term effects that extend far beyond a human lifetime.[171] The complexity of environmental issues makes determining the values served by any given law or regulatory decision extremely difficult in many cases.[172] Our limited understanding of the natural processes we continually affect makes uncertainty an unavoidable aspect of environmental decisions. The fact of uncertainty complicates decisionmaking and can serve to mask value choices, enabling advocates to shift the debate away from values. The terms of the debate on many environmental issues has also become polarized, making reasoned decisionmaking more difficult for those who hear only the media debate or who lack time or first-hand access to the facts related to policy issues and must rely on others' judgment and characterizations.[173]

encompass ever-widening rights for new groups of individuals or beings, and suggesting the development of environmental ethics is the next step in this progression); LEOPOLD, *supra* note 8, at 237–39 (framing the evolution of a land ethic in similar terms as a step in the social evolution that once accepted, but now rejects, human slavery).

170. The increasing trend toward vegetarianism and the growth of the animal rights movement, as well as the existence of radical environmental groups whose actions reject dominant norms about the ordering of values, are examples that bespeak deliberate ethics.

171. Richard Lazarus's list of the salient features of environmental law in Lazarus, *supra* note 12, at 745–48, is similar though with slightly different emphasis. He focuses on the nature of the injuries involved which are (1) irreversible, catastrophic and continuing, (2) physically distant, (3) temporally distant, (4) characterized by uncertainty and risk, (5) with multiple causes, and (6) often of non-human, noneconomic character.

172. The command-and-control regulatory approach gives rise to decisons that are particularly complex technically. *See* Jerry L. Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L.J. 395, 411–16 (1995).

173. *See* Michael Spangle & David Knapp, *Ways We Talk about the Earth: An Exploration of Persuasive Tactics and Appeals in Environmental Discourse, in* EARTHTALK: COMMUNICATION EMPOWERMENT FOR ENVIRONMENTAL ACTION 3, 20 (Star A. Muir & Thomas L. Veenendall eds., 1996). Although Spangle and Knapp suggest that adopting a moral discourse in debates over environmental issues produces polarization, this refers to extreme polarizing rhetoric in support of a position, not analysis and explanation of parties' root values and

At the same time, there has been a diluting of meaning, so that the relative significance of "environment" is now on par with "apple pie" or "motherhood."[174] No one can say that they don't support protecting the environment, and it may in fact be the case that we are all in favor of it; people simply disagree on how much to do so, or at what cost to other values.[175] Nonetheless, this reality effect—the absence of meaning when we talk about environmentalism or "caring about the environment"—may truncate discourse.[176] Unearthing the values of a given person or group is more difficult and requires a subtler dialogue about values. Unlike an issue such as abortion, where a given person's position is generally fairly clear and accessible, notwithstanding rhetoric, the rhetoric available to discuss "valuing the environment" is not very enlightening. We lack a vocabulary as well as a discourse on this topic.

All of these factors—complexity, uncertainty, polarization, and the reality effect—tend to instill deep uncertainty in the general public about environmental issues, thereby encouraging them to

reasons for caring.

174. David Easter, *Activism in a Moderate World: Media Portrayals and Audience Interpretations of Environmental Activism, in* EARTHTALK, *supra* note 173, at 45–47, explains this phenomenon, building on Hall's notion of ideology as the "reality effect" :

> [Ideology involves] "the power to signify events in a particular way." To the extent that this exertion of symbolic power goes unrecognized, the reality effect is achieved, whereby meanings that are ideologically constructed become commonsensical—the natural way of the world. Faced with an image or proposition imbued with the reality effect, people's thought processes are short-circuited to elicit the response, "who could imagine it otherwise?'"
>
> We are drawn to wonder whether the notion of environmentalism has been enveloped by this reality effect. Indeed, allegiance to environmentalism has become virtually commonsensical in our culture. Acording to a 1992 Wall Street Journal/NBC News poll, eight of ten Americans call themselves 'environmentalists' (J. Miller 1993, p.6). At first blush, this seems like a heartening discovery after years of conservative hegemony. At second blush, however, *one has to wonder if the term has any meaning at all anymore.* Indeed, who could *not* consider themselves environmentalists these days?

Id. (emphasis added) (citing J. Miller, *The Wrong Shade of Green*, DOLLARS & SENSE, Apr. 1993, at 6).

175. This was effectively captured in a flyer supporting a candidate for local office I saw recently. The candidate's opponent was strongly identified with environmental protection and the candidate was identified with development interests. The brochure stated:

> Let's state the obvious: NO ONE WANTS DIRTY AIR OR WATER. To suggest any candidate is pro-pollution is ridiculous. The environment is everyone's priority, but it takes money to preserve and maintain it. . . . [I]n the long run, the healthier the economy is, the healthier the environment.

176. Professor Delgado describes this as a consequence of the triumph of normativity early in the development of environmental law. Delgado, *supra* note 8, at 1123–26.

retreat from serious debate about environmental issues. This tendency to retreat is exacerbated by the frequency with which environmental problems are treated as technical problems, not questions of value.[177] This may result in excessive deference to experts who make value choices for us all.[178] Also, when we focus excessively on a technical solution without having first correctly identified the values at stake in a given situation, it is more likely that the real "problem"—as experienced by the majority—has not even been correctly diagnosed. If the problem is misdefined we will more likely choose an inappropriate solution.[179] So the process of better value identification can serve to improve and guide technical choices by ensuring that technical experts are given the correct questions to answer.

An interesting exercise may be to compare the state of discourse about the ethical issues underlying environmental law with the discourse in an area of legal scholarship like criminal law that possesses in much smaller measure the qualities I have just described: a relatively short period of development that has produced highly complex and technical regulatory law on subjects about which there is a high degree of uncertainty and unresolved social conflict and the potential for new ethical terrain.[180] Apart from occasional novel scenarios that create the possibility for new

177. DESJARDINS, *supra* note 26, at vii–viii; *see also* Shrader-Frechette, *supra* note 58 (highlighting the value choices embedded in ostensibly technical decisions).

178. *See* DESJARDINS, *supra* note 26, at 4–5.

179. DesJardins states:

> Approaching any serious environmental issue with the hope of discovering a technical "quick fix" guarantees only a narrow and parochial understanding of what is at stake. History testifies to the dangers inherent in this approach. Too often past technological or scientific "solutions" have resulted in as many new problems as they have solved.

DESJARDINS, *supra* note 26, at 5.

180. Criminal law presents a contrast in terms of several of these attributes, including the historic depth of the basic concepts that continue to characterize our law. It also lacks the depth of regulatory and technical detail that characterizes environmental law, except on certain issues such as mental health and the insanity defense, for example. However, like environmental law, criminal law does cope with the problem of uncertainty in terms of prediction about human behavior and our limited understanding of human behavior. To some extent, of course, this is a feature of all law to the extent it seeks to influence human conduct, but this is a particular concern in the realm of criminal law where mental capacity and state of mind play such a central role. Collaborative work by social scientists, psychologists and lawyers on certain issues like mental capacity and dangerousness is common. The context in which these topics are studied reflects more of the characteristics of environmental law.

ethical terrain, debates over the ethical underpinnings of criminal law today rarely raise new ethical issues.[181]

Instead, discussion of the ethical or philosophical underpinnings of the criminal law revisits debates about utilitarian versus retributive philosophies of punishment.[182] These competing ethics and the values they advance are often discussed not just by philosophers but also by legal scholars and policymakers. In criminal law scholarship, it is not uncommon for the ethical justification for a particular rule or decision to be addressed by a scholar as part of legal analysis; it is part of the mainstream of criminal legal scholarship. Because the debate is grounded in traditional philosophies long identified as the core ethical force in this field, scholars are well versed in the subject. Either despite the fact that the paths for arguing these issues are fairly well trod—or because they are—discourse about the ethical theories that justify a given law, sentencing approach or reform proposal is quite common to mainstream criminal law scholarship.[183]

It seems unlikely that a clearer sense of our values would solve all the problems that plague debate on environmental issues—polarization, meaningless rhetoric, obfuscation and an excessive focus on the technical. But it is very possible that such a discourse

181. In those cases that do raise new ethical dilemmas, there are often new technology and emerging social practices that create perceived threats to human safety or property. See, for example, the debate surrounding assisted suicide.

182. The choice between utilitarian and retributive justifications for punishment, which remains a central focus of debate today, revisits themes and arguments that have long been associated with criminal law theory. The more basic question of what values the criminal law seeks to protect appears not to be frequently asked, perhaps because the answer is well-established and understood. Protection of the public from threats to life, autonomy and property is the common goal of almost all criminal law. And the autonomy interests of the criminal, along with concerns about fairness in the prosecution, sentencing and penal processes must be balanced against these. These values form the ethical ground underlying the criminal law under either major ethical theory: utilitarian or retributive.

However, where issues like the death penalty raise controversial questions of value, the debate about values may be more rhetorical than meaningful, just as it is in environmental law. Professor Dan Kahan suggests that arguments about deterrence and the death penalty are actually not relevant or persuasive even to the participants who frame them. Instead they argue about deterrence but avoid the fundamental moral question about the value of human life on which they actually differ. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999).

183. *But cf.* GEORGE FLETCHER, RETHINKING CRIMINAL LAW xix (1978) (suggesting that "the refinement of Anglo-American criminal law and its underlying theory" were inhibited by the prevalence of the utilitarian philosophy which dominated discourse). This does not necessarily mean that the ethical roots and impact of laws were not evaluated, but that scholars and policymakers failed to consider the value of alternative ethical approaches.

could help to lessen the dominance of these problems and promote democracy.

A. Clarity Can Counteract the View of Environmental Law As Purely Technical

A study and discussion of the ethics of environmental law can counteract the tendency to treat environmental problems as purely technical or political.[184] The issues addressed and governed by environmental law are ethical issues. Environmental law is itself an important expression of social value. The adoption of laws in this field reflects concern for values previously excluded or inadequately weighed under our laws. As Professor DesJardins has written:

> The tendency in our culture is to treat [environmental and ecological] . . . issues as simply scientific, technological, or political problems. But they are much more than this. These environmental and ecological controversies raise fundamental questions about what we as human beings value, about the kind of beings we are, about the kinds of lives we should live, about our place in nature, and about the kind of world in which we might flourish.[185]

Like the discussion of environmental issues, analysis of environmental law often focuses on the scientific, technological, political or legal dimensions rather than the ethical content of the law.[186] Environmental ethics often appears as a special topic discussed in isolation, not as a part of the understanding of the law. In the analysis of laws and regulations, we may detail how decisions are made and by whom, and what factors are taken into account. To identify the values that are embedded in the law's standards and procedures requires that we go a step farther and conceive of the problem as non-technical.

Professor DesJardins describes the dynamic through which the public and policymakers may abdicate responsibility for the value choices that environmental policymaking demands:

184. *See* Flatt, *supra* note 8, at 11–13.

185. DESJARDINS, *supra* note 26, at vii–viii.

186. The findings of Professor Kahan, *see supra* note 182, in the context of debates over another controversial issue, the death penalty, also reveal the human tendency to avoid difficult moral questions in favor of technical questions. He reports on research showing that people who argue about whether evidence supports the conclusion that the death penalty deters crime often do not find their own arguments persuasive. *Id.* at 436–39. Rather the opposing views are grounded in fundamental disagreements about the value of human life, which are less often aired. *Id.*

> For many people in our culture, and especially for many in policy-making positions, science and technology offer the only hope for solving environmental problems. Because environmental problems often involve highly technical matters, it is only reasonable to turn to experts in these technical areas for answers. Furthermore, since science offers objective and factual answers in an area where emotions run high and controversies abound, science seems an obvious candidate from which to seek help with environmental concerns.
>
> Unfortunately, turning to science with the optimistic hope for a quick fix is not very different from the pessimistic attitude. Each involves individual citizens relinquishing the authority to make decisions about their world. . . . Leaving environmental decisions to the 'experts' in science and technology does not mean that these decisions will be objective and value-neutral; it only means that the values that do decide the issue will be the values these experts themselves hold.[187]

Explicit discussion of the values our laws affect is a necessary first step to promote full public participation in resolving these questions.

B. Clarity Can Promote More Democratic Law and Policy

Clearly, environmental laws and policies reflect normative or value judgments. As a society, we are making decisions about right and wrong, about priorities and imperatives, when we adopt policies and rules. If neither the public nor the decisionmakers articulate the ethical issues involved, we cannot ultimately know whether our laws and policies are consistent with our ethics. Just as in archery one learns from seeing where the last arrow struck and adjusts one's aim, we need to know what the bulls-eye is for environmental law, or else we're simply launching arrow after arrow with only random improvement.

Further, both philosophers and some theorists of democracy emphasize the possibility that deliberation promotes sound development of values by the public. A more open process of identifying and debating the values at stake may allow a fuller development of the public's values.[188] Ethics can broaden our

187. DESJARDINS, *supra* note 26, at 4–5.

188. *See* KAGAN, *supra* note 30, at 21, for the proposition that people can change what they care about through deliberation. Rehearsing the information in a careful way can lead us to decide that some moral action is impelled even though it is not new information we have received. Whether the information or arguments are fairly presented, though,

ability to see and define the problem, by focusing us on what we care about. Also, there may be a risk that environmental values will not remain protected if they are poorly understood and articulated. Essential to long-term environmental protection is a clear understanding of the values that the laws serve. These values are and will continue to be in conflict with other values. If they are poorly articulated and understood, they can be too easily trumped.[189]

C. Clarity Can Counteract Polarization and Resulting Obfuscation

The rhetoric of the environmental debate has become polarized, making reasoned debate and decision more difficult.[190] Those who hear only the polarized debate and have no firsthand access to the facts may simply shut down and ignore the issues as impossible to resolve.[191] The result is a reduction in democratic participation. Or the participants in the debate and the public may be enveloped by the "reality effect"[192] of ideology, which can lead to an uncritical expression of support for environmental values by everyone. Human values that conflict with environmental values may simply be ignored or marginalized in the debate, preventing the development of a more nuanced statement of the ethics held by an individual or group. Another dynamic can result when poorly defined environmental values conflict with other values, such as autonomy, or strong desires, like economic well-being. Environmental values, poorly defined, can be marginalized by a characterization as "extremist."[193] And the increased attraction of quantification may lead to an effort to quantify all environmental values to stay in the game.[194]

determines whether the discourse promotes serious reflection on the values involved or is simply a cheap appeal to emotion. *See id.* at 21–23.

189. *See* Spangle & Knapp, *supra* note 173, at xiv.

190. *See* Vandenbergh, *supra* note 8, at 861–64.

191. For example, the contending views about whether the greenhouse effect and global warming were likely to occur created substantial public uncertainty. The debate over whether there was a problem led many people to dismiss the debate as impossible for a lay person to understand. While there are technical issues in the debate, many of the public statements by partisans advocating a particular view could have been better understood had the values that underlay the participants' conclusions been revealed.

192. *See supra* note 174 (on Hall's notion of the reality effect, discussed in EARTHTALK).

193. *See* Spangle & Knapp, *supra* note 173, at 3–26, for the use of extreme polarizing dialogue by radical functionalists and radical environmentalists.

194. James Salzman et al., *Protecting Ecosystem Services: Science, Economics, and Law*, 20 STAN.

Another incidental benefit of reduced polarization is its potential to minimize the rapid pendulum swings through which policy in this area seems to move. We seem to reel from extreme to extreme, but with a veneer that there is no or little disagreement about basic values.[195] Pressure on non-human resources is likely to continue to increase as population and human expectations for improved well-being continue to increase. Technological advances, the transition to the global economy and attendant economic pressures create periods of economic transition, where controversy over social values seems frequently to emerge. Strategies to promote or oppose conservation that rest on the superficial attachment the public has to charismatic megafauna and dramatic human health threats on the one hand, and to job security on the other, preclude the possibility of public expression of a more deeply rooted and nuanced ethic.

D. Clarity Can Promote Conflict Resolution

Environmental law is an area of competing values where difficult controversies and conflicts arise and will likely continue to flourish.[196] In this setting, careful attention to the values promoted by environmental law would provide us with valuable information. Current discourse often relies on crude statements that don't approach a discussion of the underlying values.[197] The public,

ENVTL. L.J. 365 (2001); James Salzman, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607 (2000); James Salzman & J.B. Ruhl, *Apples for Oranges: The Role of Currencies in Environmental Trading Markets*, 31 ENVTL. L. REP. 11,438 (2001).

195. President George W. Bush suffered from harsh public reaction to early policies that represented a favoring of other values over the environment. In 1996 and 1992, Bill Clinton was elected on a platform that promised a strong commitment to enhanced environmental protection. But the 104th Congress, elected during Clinton's presidency, was noted for its Contract with America and accompanying agenda to change policies on environmental protections and enhance protection for economic interests and property owners. Only seven years before, in 1988, George Bush and Michael Dukakis ran on platforms in which both sought to characterize themselves as environmentalists committed to an environmental ethic.

196. Absent currently unforeseen technological advances, pressure on resources for human use and for conservation will continue to grow as population and expectations increase; therefore, conflict will likely remain with us and grow. Pressure on our natural resources is unlikely to lessen measurably in coming years. Land, water and the resources they contain are increasingly important and subject to pressure in a growing global economy.

197. The coarseness of the current dialogue is not merely a consequence of the need to accommodate media and public interest in soundbytes. It would be naive to expect open discussion of environmental ethics to eliminate polarized debate in many fora, but it may

advocates, decisionmakers, and scholars will be better able to deliberate on the issues if they can identify and express what they care about and why on a given issue. Statements can go beyond pat political catch-phrases—whether a given proposal "will gut the Endangered Species Act" or "put humans back ahead of animals under the law"—by providing a broader discussion of the values currently embedded in the statute as well as those in any reform. Knowing the facts alone does not ensure that we can see how to resolve a conflict consistent with our ethics. If I am correct in my premise that many of these participants have only a poorly formed understanding of the environmental ethics reflected in the existing laws (and perhaps of their own values), this poor understanding interferes with the ability to apply ethics to any particular conflict.

VI. CONCLUSION

Statutory environmental law and its implementation reflect and embody important value choices that we make as a society. Public debate and public opinion reflect the assumption that environmental statutes represent a commitment to a new set of values—to environmentalism. Closer attention to the question of "the good" we are defining through this body of law may be an important step in the ongoing evolution of law in this area. We can no longer afford to retreat into the technical realm or maintain superficial assumptions about the values embedded in our law. This article argues that the continued maturation of a body of law appropriate to our society's needs and values depends on greater awareness of the values and ethics we currently embrace through our laws. Perhaps someday we will see legislation requiring an "Ethical Impact Statement" for all major federal environmental legislation and budgetary actions and a "Values Analysis" supplementing cost-benefit analyses for major regulations. But awareness of the importance and nature of the inquiry we are neglecting represents the first necessary step.

enrich the range of the debate. Even scholarly discussions often resort to crude characterizations of the values that a law or proposal advances.