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## THE SEARCH FOR ENVIRONMENTAL RIGHTS

JOSEPH L. SAX\*

For nearly two decades, efforts have been made to formulate an environmental right. Among the most prominent examples are the Stockholm Declaration of 1972<sup>1</sup> and, more recently, the statement of principles for environmental protection and sustainable development of the United Nation's World Commission on Environment and Development.<sup>2</sup> Parallel endeavors also have been made in the domestic context. Proposals have been made periodically in the United States for amendments to the federal Constitution,<sup>3</sup> and a number of states have adopted broad-ranging environmental provisions in their constitutions.<sup>4</sup>

Putting aside the specific issue of judicial supremacy that arises with the recognition of a constitutional right,<sup>5</sup> there remains a pervasive problem that vexes every effort to state principles of environmental protection in the form of legal rights: what is the source of the

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1. U.N. Doc. A/CONF./48/14 (1972), 11 I.L.M. 1416 (1972). The Stockholm Declaration consists of 26 principles with some phrased as rights (Principle 1), and others as recommendations to national governments (Principle 26).

2. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 348 (1987). This so-called Brundtland Report offers twenty-two "Legal Principles for Environmental Protection and Sustainable Development."

3. E.g., H.R.J. Res. 1321, 90th Cong., 2d Sess. (1968); H.R.J. Res. 1205, 91st Cong., 2d Sess. (1970). A number of other countries have various sorts of environmental provisions in their constitutions. E.g., CAN. CONST. art. VI, § 50, 92A(1)(2); CHINA CONST. § 6, art. 169; POL. CONST. art. 71; PORT. CONST. § III, ch. III, art. 66; SWITZ. CONST. arts. 24, 25; USSR CONST. ch. 2, art. 18. See Treaty Establishing the European Economic Community, March 1957, Rome, Title VII, art. 130R, §§ 1-4.

4. Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193 (1972); Frye, *Environmental Provisions in State Constitutions*, 5 ENVTL. L. REP. (ENVTL. L. INST.) 50,028 (1975). A list of state constitutions follows: ALASKA CONST. art. VIII, §§ 1-7; CAL. CONST. art. X, § 2 & art. X(A), §§ 1-3; COLO. CONST. art. XVIII, § 6; FLA. CONST. art. II, § 7; HAW. CONST. art. IX, § 8 & art. XI, §§ 1, 9; ILL. CONST. art. XI, §§ 1-2; LA. CONST. art. IX, § 1; MASS. CONST. amend. XCVII; MICH. CONST. art. IV, § 52; MO. CONST. art. III, § 48; MONT. CONST. art. II, § 3 & art. IX, §§ 1, 2, 4; N.M. CONST. art. XX, § 2; N.Y. CONST. art. XIV, §§ 4, 5; N.C. CONST. art. XIV, § 5; OHIO CONST. art. II, § 36; R.I. CONST. art. I, § 1; TENN. CONST. art. XI, § 13; TEX. CONST. art. 16, § 59; UTAH CONST. art. XVIII, § 1; VA. CONST. art. XI, §§ 1-2.

5. For example, there is concern in the United States about vesting the final word on environmental issues with the judiciary, which would be the result of a constitutionally based right under the principle of judicial review of legislation. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

claim that there is a fundamental environmental right, and how is one to determine its content?<sup>6</sup> Specific rights usually grow out of some core social value. If environmental claims are to be taken as more than rhetorical flourishes or broad aspirational statements and are to be set in the context of rights, it is necessary to ask how they fit into the values underlying other basic rights.

I propose here to sketch out a preliminary framework suggesting that while asserted environmental rights at first seem alien to most accepted conceptions of fundamental rights, there is an important link between certain environmental claims of right and baseline democratic values.

### I. FINDING A BASIS FOR ASSERTING FUNDAMENTAL RIGHTS

Where do we begin? There is no legal tradition in our system that recognizes rights to nature preservation, so we cannot turn to precedent for guidance. Moreover, by contrast with the most basic human rights like freedom of speech or of conscience, there is no historical experience on which to draw to give content to an asserted ecological right. Indeed, as often observed, our experience deals more with the conquest and exploitation of nature than with its protection.

If we seek guidance from the established tradition of human rights, we find profound differences between any proposed environmental rights and other recognized fundamental rights. Most human rights are designed to protect individual integrity where the essential goal is being left alone by government. That is the root of freedoms like speech, press, religion and association, freedom from coercion for criminal defendants, the rights to move freely, to emigrate, *etc.* However difficult the determination of such rights may be in particular cases, at least the central idea is clear: individuals are to be left free of state coercion, secure in person and property, and at liberty to follow their own consciences.

Environmental issues are not at all parallel. They arise primarily out of the management of the economy, where government abstention is certainly *not* the goal. Indeed, positive government involvement is essential in dealing with externalities like pollution. There is no evident environmental principle analogous to the "hands off" principle that underlies basic human rights.

Surely there can be no precept to leave nature untouched, so that no tree should be cut down and no river dammed. Nor, unless we are

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6. For a review of the different interests that are sometimes jumbled together in discussions of environmental rights, see Anderson & Miller, *Fundamental Rights and Environmental Quality*, in SCIENCE COUNCIL OF JAPAN, SCIENCE FOR BETTER ENVIRONMENT 825 (1975).

prepared to demand completely closed-cycle industrial processes, could it be set down as principle that conduct should never increase the risk of health damage to any worker or neighbor. An urban and industrial society inevitably will disrupt pristine natural systems more than a rural and agricultural society, and such a society is, in turn, more disruptive than a hunting and gathering culture. It seems implausible that every movement away from this latter form of social organization should be branded as a transgression of fundamental human rights. If the questions of environmental regulation are matters of adjustment in the process of economic development, of more and less, they seem ill-fitted to the sort of ethical imperatives usually associated with fundamental rights.

The right to vote, notions of equality, and even such positive rights as universal free education seem to be another species of basic rights undergirded by a conception of the structural preconditions for a democratic society. Environmental issues seem not to provide a parallel to this sort of right either. Environmental claims, whether they focus on matters like health or on species diversity, seem to import certain substantive values, rather than being concerned with protection of the structure of democracy.

The closest analogy would seem to be found among the precepts of a modern welfare state. The effort to guarantee each individual a basic right to decent housing, health care, nutrition, safe working conditions, and cultural opportunity seems most closely fitted to the effort of articulating basic environmental rights. Terms like "decent environment,"<sup>7</sup> "environment adequate for their health and well-being"<sup>8</sup> or "environment of quality" suggest that a significant driving idea behind efforts to establish environmental rights is a version of welfare-state ideology. If so, the goal would not be government abstention, but rather a call for affirmative action by the state—a demand that it assure, as a right of each individual, some level of freedom from environmental hazards or some degree of access to environmental benefits.

As I shall suggest, this is precisely one of the directions that the search for fundamental environmental rights should take. However, it must be recognized that there presently is no existing standard by which to measure an appropriate welfare standard of environmental well-being nearly as clear-cut as the concepts of a right to basic education or even basic medical care. It needs to be recognized as well that

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7. "[E]very person has the inalienable right to a decent environment. . . . The United States and every State shall guarantee this right." S.J. Res. 169, 91st Cong., 2d Sess. (1970).

8. See source cited *supra* note 2.

at least in some countries, the United States for one, welfare entitlements do not,<sup>9</sup> or do not yet,<sup>10</sup> have constitutional status as human rights. In this respect, recognition of a basic right to a healthy environment would be a novel step. So the question of why such claims should be granted fundamental rights status still needs to be addressed. I try to respond to that question later in this paper.

All this is only to say that the search for a principle or analogy that would breathe life and credibility into the claim for a fundamental environmental right is not an easy one. When assertions of environmental rights are made, the assumption often seems to be that the principled basis for them is self-evident and need not be identified or explained. The result is to leave an aura of ambiguity around most such declarations. In the subsequent pages, I hope to advance the search a bit by suggesting the existence of links between some established fundamental right notions and the call for recognition of fundamental environmental rights.

## II. BASELINE DEMOCRATIC VALUES

Where shall we seek guidance? I believe a starting point for articulating environmental rights and responsibilities can be derived from three values that are already widely recognized as essential to modern societies. The first two are entirely familiar, though their application to environmental issues needs to be explicated; the third, though only episodically has it attained the status of public duty, describes a value that is quite generally, and increasingly, becoming a part of our core values and an element of public responsibility. The three value commitments to which I refer are these: (1) an open process of decision making; (2) recognition of the intrinsic value of each individual; and (3) patrimonial responsibility as a public duty.

### A. *An Open Process of Decision Making*

It is a common error to believe that an environmentally sound society is a place without significant risk or hazard. This is to miss a pri-

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9. See *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (there is no right to education explicitly or implicitly guaranteed by the Constitution).

10. There is considerable literature asserting that education, housing, certain municipal services, or food and medicine sufficient to sustain one's ability to enjoy other rights are fundamental. *E.g.*, Bendich, *Privacy, Poverty and the Constitution*, 54 CALIF. L. REV. 407 (1966) (food and medicine); Coons, Cline & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305 (1969) (education); Ratner, *Inter-Neighborhood Denials of Equal Protection in the Provision of Municipal Services*, 4 HARV. C.R.-C.L. L. REV. 1 (1968) (municipal services); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969) (housing).

mary point about the premises of a democratic society which is founded on self-government. In a self-governing society, risk is acceptable so long as it is knowingly assumed. Willingness to sacrifice in a cause thought worthwhile, even to sacrifice one's life, is neither wrong nor unworthy. However, this is only true if the risk is knowingly and willingly borne. The most tragic images of environmental harm are those involving hapless victims, those who without sufficient knowledge or involvement and without choice have had risk and damage imposed upon them.

As self-government is at the core of democratic government, and genuine choice is a key to self government, assuring that risks taken are the product of such genuine choice is fundamental to the legitimacy of environmental decisions. What, then, does it take to make a choice legitimate? It is not necessary that each individual personally consent to every risk, nor that risks taken be equally imposed on every individual. No society could undertake any sort of activity if it awaited unanimity, or if it had to promise that the benefits and detriments of every program would be entirely equal across the population. Representative government and majoritarian processes are no less applicable to environmental issues than to any others.

We cannot demand unanimity, but we can insist that decisions be made under conditions of sufficient knowledge and consideration so as to reflect a true choice fully appreciative of the consequences. The first environmental right, then, is the right to choose, and that is a right that has often been denied. The repeated efforts to portray environmentally risky activity as entirely benevolent has not only been a tactical error on the part of both government and private enterprise, but also has denied to the public a primary right in a democratic society—the right to determine its own destiny.

The issue here is, in some respects, a profoundly difficult one. Observation suggests that a considerable part of the strong negative public reaction to environmental hazards arises from a sense that risk has been thrust upon unwilling and unknowing victims. Sponsors of activities like nuclear power plants and oil transportation terminals seem to be torn by competing impulses: minimizing risk, emphasizing safety records, and relying on the "fail-safe" nature of technical fixes. Unless the sponsors give strong assurances of safety, they are unlikely to obtain needed public consent, or at least acquiescence.

On the other hand, since accidents do happen and complex industrial activities are often inescapably risky, the sponsors of such activities are tempted to charge the public with hypocrisy, with wanting the benefits of modern industrialism but being unwilling to tolerate its

necessary costs. In this respect, the sponsors implicitly suggest that their activities require a "Faustian bargain."

Because of this tension, in most instances, there is less genuine knowledge-based consent than a fully informed "bargain" with the public demands. At its core the issue is how to confront and deal with unpleasant truths, what one writer ominously called "Normal Accidents."<sup>11</sup>

The first step is information, because without detailed knowledge of effects there is no way to make an informed decision. The specific mechanism for such information is the environmental assessment. Impact assessment is not just desirable; it is a crucial element in legitimating risky environmental decisions. But the assessment is not the only element in the informational category. Funds must be available to assure that assessments are adequate in scope and content, and a mechanism must be available to assure its fulfillment. An initial assessment does not suffice either. Knowledge of environmental impacts requires baseline data, which translates into extensive and ongoing monitoring.

A second step is the public release of information. The public will be the consumers of whatever environmental harm comes from permitted activity, and the public is entitled to know, inquire, and respond to the fullest information which can be provided. Whatever is withheld for fear of public reaction undermines the legitimacy of decisions made thereafter because self-determination by those affected is the central principle.

Finally, there is the question of public participation. How will the information gathered and then publicly disseminated be utilized so as to set the stage for an informed decision? Unless there is some effective means for the affected public to convey its responses to decision makers, and for those responses to be conscientiously considered, the requirement that the process of consent be adequately representative—so it can legitimately serve as the consent of the public—cannot be met.

There has been much debate and controversy over so-called NEPA litigation.<sup>12</sup> But this process is one of the very few means by which the obligation to gather adequate information and then to subject it to careful and detailed consideration can be enforced. There are other institutions besides courts that can be organized to serve similar goals. One example is the jeopardy opinion process under the Endangered

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11. C. PERROW, *NORMAL ACCIDENTS* (1984).

12. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a (1988).

Species Act.<sup>13</sup> The specific device can vary, but it is essential that some “triggering mechanism” foment a search for necessary information followed by a careful analysis done by a disinterested party.

Assume that procedures are instituted which assure full information and an adequate process for consideration and decision. Is that sufficient? Is “process” enough?<sup>14</sup> Where an adequately informed public is genuinely willing to submit itself to a known risk for a known benefit, the first requirement of a fundamental right—the right to take charge of one’s own destiny—is fulfilled. But there are at least two additional hurdles that must be overcome. The first arises from situations where risk, though democratically chosen as described above, is thrust upon some small segment of the population. The second is where the decision forecloses future opportunities. The following two sections of my paper take up these questions respectively.

### *B. Recognition of the Intrinsic Value of Each Individual*

What of risks that fall particularly heavily on certain groups or individuals: the workers in a uranium mine, neighbors of a nuclear power plant, or fishermen in a bay plied by oil tankers? Where there is an element of discrimination or invidiousness in the selection of those who are to bear special burdens, ordinary precepts of equal protection of the law can be invoked. A more common and more difficult problem is presented where no element of discrimination exists and the risks of an otherwise appropriate activity falls heavily upon relatively few individuals or groups.

The siting of potentially hazardous facilities like waste dumps or power plants presents this problem in its most familiar form. It is true that if modern industrial life is to continue, someone must be the neighbor of a hazardous waste site or power plant. The society as a whole may want the activity, but no one—understandably enough—wants to be the special target of its hazards. That is why we see such frantic maneuvering on the part of virtually every community to avoid being the chosen site for undesired facilities. Local community tactics have been widely observed, and even given an acronymic name—the NIMBY (not in my back yard) syndrome. The phenomenon is familiar enough. The question is what appropriate claims underlie the resistance of people to avoid being chosen as an area of sacrifice to the

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13. 16 U.S.C. §§ 1533-1544 (1988).

14. I have urged elsewhere that process is certainly not enough as a matter of good environmental policy. Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973). But the issue here is not what constitutes good legislative policy but, rather, what claims should attain standing as fundamental entitlements.



irreducible, or at least unreduced, minimum of hazard of the desired facility.

The question is whether the majority can be said to owe to each individual a basic right not to be left to fall below some minimal level of substantive protection against hazard. The question is not free from doubt, but I believe a fundamental right to a substantive entitlement which designates minimum norms should be recognized.

This is only a problem that affects some individuals more than others. Where the norm itself is lowered for everyone, *i.e.*, acceptance of a pervasive risk, it can hardly be said that any *individual's* right has been violated. And, as indicated above, assuming genuinely free choice, the public can, in democratic theory, accept even substantial risk if it does so with full knowledge and consent.

The source of such a claimed right may be found in the growing commitment of modern societies to provide to each individual, as an entitlement, basic means essential to make it possible to flourish as a human being. It is in response to recognition of the importance of such means, as opportunity, that states commit themselves to provide the basics of food, shelter and medical care as a public welfare responsibility, if not yet as an individual right.<sup>15</sup>

It is in this setting that a claimed right of protection from environmental hazard may be considered. It seems a small step from the proposition that each individual should be entitled to needed medical care to the proposition that each individual should be entitled to living and working conditions free from unwarranted health hazards. What is the appropriate level of protection that measures whether a hazard is "unwarranted"? There is no objectively correct answer. But just as a standard is set in various countries for other affirmative elements of opportunity, *i.e.*, basic education or a decent minimum standard of housing, a standard of maximum permissible exposure to environmental hazards could be articulated in terms of a minimal standard of permissible exposure to mortal hazard. This would be no easy task; indeed it would be formidable.<sup>16</sup> But, as with the problem of genuine consent, discussed above, the issue of exposure invokes fundamental value questions. Just how much can individuals be required to submit to risk as a "conscript" in the struggle to achieve the benefits of a

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15. See, *e.g.*, KAISER COMM., PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME, (1969); J. WEICHER, HOUSING: FEDERAL POLICIES AND PROGRAMS (1980). See also 42 U.S.C. § 1395 (1988) (Health Insurance for the Aged and Disabled). Education is usually provided as a state constitutional right. *E.g.*, CAL. CONST. art. IX, § 5.

16. Setting a standard may be more elaborate than at first thought. Some hazards appear to be more fearsome than others to the public, such as the risk of cancer. Risks of mass disasters may be more hazardous than the same number of harms spread widely over space or time.

modern society? The cognate issue of how much sacrifice of our natural resources can be hazarded is taken up in section C, below.

Two additional matters should be noted at this point. First, nothing said here suggests that there is, or should be, a particular standard that each society or nation should adopt. Affirmative rights to a level of freedom from risk would be designed to create a basic norm of opportunity so that the least advantaged individual is insulated against imposition of risk below some minimal threshold within his or her own society. Second, nothing said here suggests that an individual on a genuinely voluntary basis may not opt for a lower standard than the social norm. The determination of true voluntarism is itself a profoundly difficult subject that will not be sounded here, and one can assume that the most desperate persons are not likely to make genuinely voluntary choices, *i.e.*, toxic contamination versus unemployment and hunger. But it is, nonetheless, important to emphasize that true voluntarism deserves respect in a democratic society. The test pilot who is prepared to take extraordinary risks, or the skilled worker who is willing to trade extra hazard for extra pay, are legitimate exceptions to the rule. One could imagine a rule of thumb that treated choices made by those already at the society's median or above, and opting for greater risk at higher pay, as setting a minimal standard of voluntarism.

So far I have spoken only of an individual's opportunity to flourish, but individuals are also members of communities that are central to their well-being. Where those communities are fully integrated in the dominant culture, no special problems are presented. But where one is a member of a distinctive community that has its own distinctive values, such as the native peoples in North America, a respect for the right of the individual to thrive must, of necessity, command respect for the opportunity to maintain the essential elements of that culture.<sup>17</sup> This is a claim that previously only had sporadic and inconsistent recognition as a matter of right in the United States, yet has garnered important recognition in our statutory law. Perhaps the most significant example is the legislative recognition of the right of native peoples in Alaska to maintain subsistence activities.<sup>18</sup>

One important aspect of respect for distinctive communities is a demand to insulate them, at least in the absence of some compelling

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17. See Sax, *Do Communities Have Rights? The National Parks as a Laboratory of New Ideas*, 45 U. PITT. L. REV. 499 (1984).

18. Alaska National Interest Lands Conservation Act of 1980, 16 U.S.C. § 3101(c) (1988) ("It is . . . the intent and purpose of this Act . . . to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.").

conflicting need, from imposed pressures of modernization and development that foment destruction of their cultural life.<sup>19</sup> This is *not* to say that modernization should be prevented if it is desired, for self-determination is itself a central value. Rather, the goal is to assure that modernization is not imposed in ways that inevitably eradicate ways of life that such communities seek to preserve. In offering such protection, we are likely to enhance a variety of other important values: established sustaining economies may be protected from developmental forces that would uproot them; the pace of transformation of the remaining relatively pristine areas of the earth, such as tropical forests and the Alaskan tundra, may be moderated; and human and cultural diversity will be promoted, thus enriching our heritage.

### C. *Patrimonial Responsibility as a Public Duty*

Choice is central to any idea of control over one's own destiny. Choice can be constrained by reducing the objective possibilities for choosing. By burning books considered bad, future generations are deprived the possibility of deciding for themselves what is good and bad. One of the most powerful intuitions about rights in the environmental realm appropriately grows from this sort of concern. The sense that the world is being impoverished permeates a wide range of environmental concerns, most notably in the effort to halt the decline of species. Other concerns include loss of wetlands, monocultural agricultural practices, and destruction of wilderness and ancient forests.

The notion that the deprivation of choice impairs a fundamental interest has been elegantly put forward by C.S. Lewis:

Each generation exercises power over its successors: and each, in so far as it modifies the environment bequeathed to it and rebels against tradition, resists and limits the power of its predecessors. This modifies the picture which is sometimes painted of a progressive emancipation from tradition and a progressive control of natural processes resulting in a continual increase of human power. In reality, of course, if any one age really attains, by eugenics and scientific education, the power to make its descendants what it

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19. William Brown has described this as "controlled evolution":

Controlled evolution does not mean putting the people [in a traditional community], or asking them to don, a cultural strait jacket. . . . [It] means providing the people . . . with feasible alternatives—acceptable to them—to a headlong rush into that brand of 20th century life that destroys *all* old values and evidences, that would make of their village just another characterless highway satellite, and of their lives a disillusioned empt[i]ness.

Sax, *The Trampas File*, 84 MICH. L. REV. 1389, 1401 (1986).

pleases, all men who live after it are the patients of that power. They are weaker, not stronger: for though we may have put wonderful machines in their hands we have pre-ordained how they are to use them. . . . The last men, far from being the heirs of power, will be of all men most subject to the dead hand of the great planners and conditioners and will themselves exercise least power upon the future.<sup>20</sup>

As the Lewis quotation should make clear, the issue is not simply leaving the earth as it is—for if that were the case, only remaining as cave dwellers would have been acceptable—but refraining from those acts that impoverish by leaving less opportunity for freedom of action and thought by those who follow us. Though all change necessarily modifies primordial nature, some changes enhance choice and opportunity. The increase of knowledge, the creation of great urban centers, and the proliferation of art also contribute to the enrichment of the world. At the same time, those practices that are heedless of biological and cultural diversity, whether in agriculture, forestry or urbanization, reduce choice through impoverishment and thereby make those who follow the “patients of our power.”

To be sure, there is no ordinary legal precept that speaks of a duty not to impoverish the world, nor is there formal recognition of social capital or patrimonial property. I suppose that in a purely technical sense we could leave an empty world to those who follow us, destroying all evidence of the accumulated knowledge of the ages, a sterile earth, with all our cities reduced to rubble. One of the more bizarre notions of Anglo-American property law is the asserted right of an owner to destroy what he owns, even if in doing so he deprives the world of something valuable and unique, such as a great work of art. One can even point to perverse temptations of this sort, such as the old proverb “après nous le déluge.” A more recent and, if possible, even more disagreeable sentiment has appeared on the bumper stickers of conspicuously lavish automobiles: “I am spending my children’s inheritance.”

There are longstanding traditions of preserving and maintaining a collective inheritance. From the ancient oral traditions passing myths and legends from one generation to the next to modern libraries and museums, canons of science, and botanical and zoological parks, the notion of safeguarding and passing on cultural capital reveals itself in many forms. Increasingly in modern times that intuition has been in-

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20. C. LEWIS, *THE ABOLITION OF MAN* 36-37 (1947). I am indebted to Peter C.P. Behie who called this book to my attention.

stitutionalized and reflected in the positive law.<sup>21</sup> Statutes requiring designation and preservation of historic monuments<sup>22</sup> and laws safeguarding national art treasures are familiar examples,<sup>23</sup> as are laws setting aside nature reserves, preserving green areas within cities, and protecting wildlife and its habitat.<sup>24</sup> The public trust doctrine in American law imposes a duty upon the state to protect navigable waters and the lands beneath them for the permanent use of the public, not only for navigation and fishery but, according to more recent developments, for ecosystem protection as well.<sup>25</sup>

What is all this but a recognition of a patrimonial duty—a commitment to enrich choice and opportunity not only by maintaining the variety we have received, but by also adding value to it. Perhaps the point is clearest with knowledge. It would be unthinkable to destroy that which is learned in each generation and leave our children to start anew. What is true of knowledge is no less true of the products of human labor—the pioneer farmer who aspires to leave a cultivated estate to his children or the builders of cities who aim to leave to those who follow a great metropolis. After all, the United States Constitution, it is said, was made to endure for the ages.

A general sense of a duty to maintain our capital endowment without diminution or impoverishment suggests a number of prescriptions appropriate to the endowment of the earth, the natural world. Most of these propositions are by now familiar enough, for they have been often stated, but it may be useful to restate them, this time not as a newly discovered earth ethic, but as the logical extension of a precept grounded in the preconditions of a world of genuine opportunity and choice.

The programmatic implications of a commitment not to impoverish the world might look something like the following:

The genetic stock should be maintained essentially undiminished.  
The practical application is to make habitat and species preservation

21. For a discussion of the rise of the modern sense of a public duty of cultural preservation, see Sax, *Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea*, 88 MICH. L. REV. 1142 (1990).

22. NATIONAL TRUST FOR HISTORIC PRESERVATION, A GUIDE TO STATE HISTORIC PRESERVATION PROGRAMS (1976).

23. P. BATOR, *THE INTERNATIONAL TRADE IN ART* (1981).

24. Federal laws dealing with these issues are collected in title sixteen of the United States Code.

25. *National Audubon Soc'y v. Superior Ct.*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, cert. denied, 464 U.S. 977, (1983); *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). For a background study of the doctrine, see Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

a primary programmatic obligation of environmental law.

Biological diversity, with adequate representatives of various ecosystem types, should be protected. The application is establishment and maintenance of nature reserves, whether in the form of parks or refuges or biosphere reserves, as primary embodiments of our heritage.

The stock of resources that constitutes our primary natural endowment should be conserved. The application here is a policy of sustaining yield in the management of resources, whether privately or publicly held, with the goal of undiminished productive capacity. For non-renewable resources, the now well-established notion of a heritage trust fund, consisting of income earned from mining the resource, and committed to programs for sustaining development, provides a practical means to implement our obligation to the future.

Private rights in the natural endowment of water, soil and air can never be more than usufructuary. No one may acquire a property right to destroy or to impair the productivity of our endowment, and any rights acquired should be considered subordinate to the public trust obligation to commit these resources to the foregoing purposes.

An obligation to sustained productivity mandates that irreversible contamination of soil, water and air be avoided and where damage has occurred, a concerted effort to repair the damage inflicted in the past should be undertaken so as to restore diminished capital.

Lest the foregoing precepts be unintentionally violated, institutionalized caution is the appropriate response to perceived risk where there is incomplete knowledge.

### III. CONCLUSION

Three basic precepts may thus be elicited from the central values of the modern world and adapted as the source of basic environmental rights: (1) fully informed open decision making based upon free choice, (2) protection of all at a baseline reflecting respect for every member of the society, and (3) a commitment not to impoverish the earth and narrow the possibilities of the future.

