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# NINTH ANNUAL LLOYD K. GARRISON LECTURE ON ENVIRONMENTAL LAW

## The Transition to Sustainable Development Law

J. WILLIAM FUTRELL\*

The August 2002 World Summit on Sustainable Development convened heads of state, officials from international agencies, and leaders of civil society to assess progress toward sustainable development since the Rio Earth Summit of 1992 and to chart a course for the future. The Conference produced two official documents: a political statement from the heads of state reaffirming their commitment to achieving sustainable development, and a plan of action addressing specific sectors—such as agriculture, fisheries, forestry, mining, and energy.<sup>1</sup> In addition, side events engaging leaders of environmental organizations, business, and governments resulted in Type II outcomes—partnerships aimed at achieving concrete results in the near term. Unfortunately, the summit did not advance the transition to Sustainable Development Law, statutes, regulations, and cases that prevent, mitigate or remedy unsustainable conduct.

The summit was the first major meeting of governments, international agencies, and civil society since the terrorist attacks of September 11, 2001 and the enlarged commitment of the United States to increased foreign aid. The U.S. delegation went to Johannesburg determined to mesh its goals there with the results of World Trade Organization talks and the Monterrey Funding Sum-

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\* J. William Futrell, president of Sustainable Development Law Associates, delivered the Ninth Annual Lloyd K. Garrison Lecture on Environmental Law on March 31, 2003. The author acknowledges the inspiration and help of the staff of the Environmental Law Institute, where he served as President from 1980-2003.

1. *U.N. Report of the World Summit on Sustainable Development* at 1, 6, U.N. Doc. A/CONF.199/20\*, U.N. Sales No. E.03.11.A.1 (2002), available at [http://www.johannesburgsummit.org/html/document/summit\\_docs/131302\\_wssd\\_report\\_reissued.pdf](http://www.johannesburgsummit.org/html/document/summit_docs/131302_wssd_report_reissued.pdf).

mit.<sup>2</sup> The U.S. mantra was action through public/private partnerships. Secretary of State Colin Powell announced an initiative to achieve sustainable forestry in the Congo Basin with public funds from the United States Agency for International Development and private funds from the World Wildlife Fund, Conservation International, the American Forest and Paper Association, World Resources Institute, and others. The summit saw the announcement of more than 250 such partnerships.<sup>3</sup>

These are important results, and disappointment over the failure to achieve larger objectives should not lead to disparaging of the summit. Press accounts glossed over the broad areas of agreement and focused on the conflicts between the European Union and an informal alliance of the United States and oil rich states on controversies surrounding energy and climate change. The discontent of many of the Nongovernmental Organization (NGO) participants, dismayed by the stark contrast with the spirit of the Rio Earth Summit of 1992 (Rio), which resulted in global treaties and Agenda 21, fed the press condemnation of the United States. Rio followed the fall of the Berlin Wall. The Johannesburg meetings convened under the clouds of war and a sense of world-weariness that focused on the achievable. In sharp contrast to Rio's openness and inclusiveness, Johannesburg denied citizens groups access to meetings and information. Much of the green anger at the United States grew out of its perception that the free trade agenda was overwhelming the sustainable development agenda, and that an effort was underway to erode the international environmental agreements, which had been such a significant achievement at Rio.<sup>4</sup>

In some ways, Johannesburg was the World Summit of Sustained Denial. Because the summit operated on a consensus basis, it handled the most pressing issues obliquely, if at all. Issues such as population, regulation of genetically modified organisms,

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2. Alan Hecht, *Building Blocks*, THE ENVIRONMENTAL FORUM, Sept.-Oct. 2003, at 18. Hecht, a senior career official in the United States Environmental Protection Agency, played a key role in staff planning for both the 1992 Rio and the 2002 Johannesburg summits. *Id.* at 19.

3. The invitation to form partnerships remains open, and each month adds new partnerships. Information about the WSSD partnerships is most easily found on the United Nations website. See <http://www.un.org/esa/sustdev/partnerships/htm> (last modified Oct. 15, 2003).

4. See *Disappointment at the Summit*, INT'L HERALD TRIBUNE, Sept. 3, 2002, at 1; *Environmentalists See Losses at the Summit*, WASHINGTON POST, Sept. 4, 2002, at 1; *U.S. Wrecks Green Deal at the Summit*, GUARDIAN WEEKLY, Aug. 30, 2002, at 1.

and the failure of the United Nations Environment Program and the Commission on Sustainable Development to function as effective agencies for environmental governance were beyond an easy consensus and went unaddressed. Business groups and the NGOs were left to address the agenda of the future. In the halls and seminar rooms, official delegates and observers talked about the need for a World Environment Organization to balance the World Trade Organization.<sup>5</sup>

However, even if international environmental institutions increase in strength and honest enforcement efforts increase compliance with the laws, states will not have addressed the fundamental failing in our environmental protection schemes. While we have made a good beginning on pollution control laws, our laws governing development activities are primitive. Our agencies, such as the Environmental Protection Agency, are reactive agencies. Most of the real environmental problems arise out of unsustainable development activities. We need to go beyond the current law of environmental protection to a new goal of law that encourages sustainable development instead of the current system, which rewards unsustainable activity. Law school curricula do not contain a course called Sustainable Development Law. We need to create one. Legal scholars need to examine how strands from different fields, property, tort, and insurance, can be woven together to facilitate sustainable development.

Legal scholars could have greatly aided this effort in the preparations for Johannesburg. The summit was a missed opportunity for those who want to use law as a means of bringing together the interrelated strands of ecological protection, a sound economy, and a just society. One of the great successes of the Rio conference in 1992 was its emphasis on placing law at the center of Agenda 21—the blue print of action for achieving sustainable development.<sup>6</sup> Agenda 21 contains 115 action items, such as programs in

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5. For example, the Environmental Law Institute and the Yale School of Forestry and Environmental Studies presented an official side event for delegates: Theory and Practice of Environmental Governance at the Global and Regional Levels on August 27, 2002. A list of the official side events can be found on the World Wide Web, at <http://www.un.org/esa/sustdev/index.html> (last modified Nov. 20, 2003). See Steve Charnovitz, *A World Environment Organization*, 27 COLUM. J. ENVTL. L. 323 (2002), for an analysis by a leading authority on trade and the environment on the imbalance of power in international institutions.

6. AGENDA 21: EARTH'S ACTION PLAN ANNOTATED (Nicholas Robinson ed., 1993). The environment and development agenda is also available at <http://www.un.org/esa/sustdev/documents/agenda21/english/index.htm> (last modified Mar. 24, 2003).

forestry, fisheries, cleanup technology, directions on institutional arrangements, and procedures designed to encourage participation. Each of these agenda items requires follow through at the national level.

Legal reform is at the center of the institution-building chapters of Agenda 21, which call for more effective environmental law enforcement, training, and a global partnership of environmental law centers. Agenda 21 could—and still may—serve as the starting point for the common law of international environmental protection or as the bridge to a new sustainable development law. It is an impressive achievement. A key section, Chapter 8B, “providing an effective legal and regulatory framework,” urges action to: (1) make laws and regulations more effective; (2) establish improved judicial and administrative procedures; (3) create legal reference and support services; (4) establish a cooperative training network for lawyers; and (5) develop effective implementation programs to decentralize Agenda 21 to the regional, national, and local levels.<sup>7</sup>

A review of the progress made in pollution control efforts flowing from the United Nations Conference on Environment and Development (UNCED) is instructive and suggests what might have been accomplished at Johannesburg if law had been a vital part of the preparations. A broad outline of widely accepted principles defines the body of environmental policies, thanks to the UNCED in 1992. We cannot overestimate the significance of the Rio Declaration on Environment and Development and Agenda 21 as consensus documents because all good law rests on a solid foundation of societal consensus.

Between Stockholm in 1972 and Rio in 1992, a compelling body of scientific data gave increasing evidence of human activity's destructive impact on the global commons. A series of United Nations conferences addressed discrete environmental problems such as desertification, safe drinking water, and population,<sup>8</sup> and

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7. AGENDA 21, *available at* <http://un.org/esa/sustdev/documents/agenda21/english/agenda21chapter8.htm> (last modified Mar. 24, 2003).

8. U.N. Conference on the Human Environment Stockholm, June 5-16, 1972; World Food Conference Rome, Nov. 5-19, 1974; World Conference of the International Women's Year Mexico City, June 19 to July 2, 1975; HABITAT: U.N. Conference on Human Settlements Vancouver, May 31 to June 11, 1976; U.N. Water Conference Mar del Plata, Mar. 14-25, 1977; U.N. Conference on Desertification Nairobi, Aug. 29 to Sept. 9, 1977; U.N. Conference on Technical Cooperation Among Developing Countries Buenos Aires, Aug. 30 to Sept. 12, 1978; Primary Health Care Conference Alma Ata, Sept. 1978; U.N. Conference on Science and Technology for Development Vienna,

laid the foundation for ambitious treaties to protect the global environment.

In each of these international undertakings, the questions concerning the law as lived turns on national practices. The national leaders at Rio and at the United Nations in the following years have been, and are, firm in holding on to national sovereignty as a bedrock principle. Despite the dynamic of globalization, the principle of sovereignty remains the primary force for determining a state's environmental laws and policies. Thus, the analysis of how law, economics, and policy work for or against sustainability must proceed nation state by nation state. However, there is a great deal of commonality among states' objectives fostered in their laws and the tools they use.

Following UNCED, Montevideo Program II,<sup>9</sup> adopted by the United Nations Environment Program (UNEP) governing council in 1993, defined the work needed to carry out the legal goals of Agenda 21. The first priority was to enhance the capacity of countries to develop their own national laws. The 1990s saw literally thousands of law-drafting missions, where teams of experts from nations with a record of accomplishment in implementing pollution control regulations conferred with colleagues from developing countries. Citizen groups such as the International Union for Conservation of Nature (IUCN), the Center for International Environmental Law (CIEL), and the Environmental Law Institute (ELI) have participated in hundreds of these missions.<sup>10</sup> Because of this joint effort, pollution control statutes share a remarkable degree of commonality around the world.

Now, UNEP's Montevideo Program III,<sup>11</sup> recognizing that good statutes and regulations are not enough, calls for the funding of a major effort to strengthen enforcement and compliance. Most of this assistance will go to developing countries—many of which

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Aug. 20-31, 1979; World Conference of the U.N. Decade for Women Copenhagen, July 14-30, 1980; U.N. Conference on New and Renewable Sources of Energy Nairobi, Aug. 10-21, 1981; U.N. Conference on the Least Developed Countries Paris, Sept. 1-14, 1981; U.N. Conference on Environment and Development Rio de Janeiro, June 3-14, 1992. See Hilikka Pietila, *Engendering the Global Agenda: The Story of Women and the United Nations*, at Annex III, at <http://www.unsystem.org/ngls/documents/publications/en/develop.dossier/dd.06/a13annex3.htm> (last visited Nov. 22, 2003).

9. UNEP Governing Council decision 17/25 adopted in May 1993.

10. The fervor of these efforts is captured in Margaret Bowman & David Hunter, *Environmental Reforms in Post-Communist Central Europe from High Hopes to Hard Reality*, 13 MICH. J. INT'L L. 921 (Summer 1992), and in CARL BRUCH, *CONSTITUTIONAL ENVIRONMENTAL LAW: GIVING FORCE TO PRINCIPLES IN AFRICA* (2000).

11. UNEP Governing Council decision 21/23 adopted in Feb. 2001.

have excellent laws on the books that are often not enforced because of lack of funding and of political will.

This progress in legal doctrine and implementing institutions owes much to the central place of law in Agenda 21 and the hard work of thousands of lawyers and officials in countries around the world to make environmental law effective. This capacity-building effort in pollution control law rests on the decades of experience from the mid-1960s on, in Europe and to the United States, in devising strong air, water, and waste pollution control laws. Developing countries have learned from our successes and failures. No such similar experience is available to suggest the shape of the needed sustainable development law. In 1992 at Rio, the United States and other Organization of Economic Cooperation and Development (OECD) countries could offer working models of advanced pollution control laws. At Johannesburg, no country could offer a domestic model of what sustainable development law should look like.

The search for a model of sustainable development law is at the heart of the Environmental Law Institute treatise, *Sustainable Environmental Law*,<sup>12</sup> which addresses the integration of natural resource laws and pollution control laws. Rather than organization according to chapters on individual media (such as air or water) or pollutants (such as toxic chemicals), the book organizes according to areas of human economic activity. Timber, agriculture, fisheries, energy, and metals are just a few of the industries that the treatise examines from "resource to recovery," that is, through their entire life cycle. The first stage is resource extraction—cutting the tree down; the second stage is resource use—turning the tree to paper; and the third is resource recovery—putting the paper into landfills. Environmental Protection Agency regulations focus on the second stage and concentrate on controlling discharges from large industrial processes. In contrast, many, if not most, of the laws in the resource extraction phase emphasize rapid development of the resource, a "use it or lose it" attitude of the nineteenth century age of western expansion. For instance, no federal law promotes unsustainable development more urgently than the 1872 mining law.<sup>13</sup> This analysis of the various laws that affect each industry throughout the cycle shows that our laws governing development and our laws gov-

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12. CELIA CAMPBELL-MOHN, BARRY BREEN, & J. WILLIAM FUTRELL, *SUSTAINABLE ENVIRONMENTAL LAW* (1993).

13. 30 U.S.C. §§ 22-54 (2000).

erning the environment often act in conflict. The authors believe better laws in the resource extraction phase would significantly lessen the institutional and political burden on government programs and on financial burdens on the private sector. This is consistent with the principles of pollution prevention and of sustainable development.

The old paradigms embodied in our law do not reflect ecological understanding and, indeed, actually compel unsustainable development. Sustainable development is impossible without transforming the legal structure within which human activities, transactions, and initiatives occur. Getting the law right is an essential precondition to success; continuing to get it wrong guarantees continued failure despite the best intentions.

Absent a change in the legal structure, there is no economic incentive for public or private enterprise to operate sustainably. Indeed, most incentives in current law discourage sustainable decision-making and encourage wasteful, short-term decisions that sacrifice economic and ecological health over the longer term.

The transition to sustainability and respect for the laws of ecology will not take place without a fundamental change in economics. While the market is an effective instrument for determining the best and most efficient route through the calculus of prices, it does not determine goals. The market system is unable to account for environmental degradation because the crucial link between the environment and the market was never forged; prices fail to reflect the full costs to the environment. Indeed, environmental goods and services are undervalued or are free for the taking.<sup>14</sup> Kenneth Boulding, the father of environmental economics, contrasted the current cowboy economy based on rapid exploitation of resources with the need for a transition to a spaceship Earth economy, conservative in its intake of materials and discharge of residuals.<sup>15</sup>

In order to forge the legal instruments for the new economy of sustainability, the law that matters is the deep bedrock of the common and civil law—the property, tort, contract, liability,

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14. Since the 1960s, environmental economists have discussed pollution as an example of market failure, in which manufacturers are permitted to dump (externalize) the costs of caring for the residuals of industrial processes on the public. See A. MYRICK FREEMAN III ET AL., *THE ECONOMICS OF ENVIRONMENTAL POLICY* 72-77 (1973).

15. Kenneth Boulding, *The Economics of the Coming Spaceship Earth*, in *ENVIRONMENTAL QUALITY IN A GROWING ECONOMY* 3, 9 (Henry Jarrett ed., 1966).



transactional, and constitutional laws that pick winners and losers.

In designing the new sustainable development law, we should avoid the delay of an effort to define the elusive concept of sustainable development. The analogy is to the law's approach to the elusive concept of justice. As Edmon Cahn points out in *The Sense of Injustice*,<sup>16</sup>

Justice is, of course, an ideal value of highest rank, but its positive embodiments are so thoroughly alloyed with other values and interests that it can never be completely refined out. . . . The lofty abstract concept lurks somewhere beyond our discernment. . . .<sup>17</sup>

So, too, with sustainable development, a concept that merges concerns of equity, environment, and economics.<sup>18</sup> But, Cahn notes there is a wide commonality of opinion across cultures and time as to what constitutes injustice. Similarly, building a consensus on the relative seriousness of environmental insults that result in unsustainable development offers a path to legal reform. To Cahn, justice means the active process of remedying or preventing what would arouse the sense of injustice. In a similar fashion, sustainable development law would prevent, mitigate, or remedy unsustainable behavior.

The effort to create sustainable development law must move on two fronts. The first addresses a negative agenda, identifying and dealing with the vast structures of cowboy economics, policies, and laws that militate for rapid exploitation and wasteful use of resources. The second calls on the creative resources of the bar and judiciary in creating new doctrines and institutions that will promote sustainability.

Existing law limits the scope and durability of sustainability initiatives to a drastic extent. The first fundamental task in the transition to sustainable development law is to identify the inconsistent and conflicting legal institutions, doctrines, and programs that cancel out ecological protection and community development.

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16. EDMOND CAHN, *THE SENSE OF INJUSTICE* 11-14 (1949). He writes at pages 13-14, "'Justice' as we shall use the term, means the active process of remedying or preventing what would arouse the sense of injustice."

17. *Id.* at 11-14.

18. Michael Decker illustrates the difficulty of defining a positive definition of sustainable development law in *THE LAW OF SUSTAINABLE DEVELOPMENT—GENERAL PRINCIPLES* (2000), which lists a dozen general principles of sustainable development law without resolving their integration.

Scholars must identify the perverse incentives in existing law that drive individuals and institutions to choose wasteful forms of economic development over sustainability creating a road map of the path to reform. Without a road map charting perverse incentives, reformers will not be able to start out on the road to sustainable development law. With a road map, citizens will be able to work together on the thousands of politically achievable, incremental changes that are necessary for transforming the system.

One of the greatest, yet often ignored, impacts of federal law on the environment is governmental promotion of projects through direct and indirect subsidies such as tariffs. Development subsidies often undermine expensive environmental protection efforts, destroying neighborhoods and natural resources. For instance, tariffs on sugar protect Florida sugar cane growers whose effluents, when dumped in the Everglades, lead to massive water pollution cleanup efforts. For years, litigation aimed at fixing liability for protecting the endangered Everglades immersed the Florida sugar cane industry, notorious for its unfair labor practices based on seasonal laborers.<sup>19</sup> Yet, the destructive activity itself would be uneconomic if not for the intervention of law in the marketplace. Similarly, subsidized timber sales by the United States Forest Service subvert wildlife protection measures under the Endangered Species Act.<sup>20</sup>

Recurring newspaper stories portray these conflicts in a “jobs versus environment” context. In fact, many of these conflicts arise in sunset industries whose activities are economically viable only because of indirect or direct government subsidies that undermine sustainability. Existing subsidies are a reflection of the political power of the past and seldom a harbinger of the technologies of the future. However, not all subsidies are bad. Indeed, environmental economists have identified the characteristics of good subsidies. They make markets work more efficiently because they ease the introduction of new technologies, promote social peace, are effective and efficient, and are the least costly means of supporting the aided effort.<sup>21</sup>

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19. Aaron Schwabach, *How Protectionism is Destroying the Everglades*, 31 ENVTL. L. REP. 11,499 (2001).

20. See Victor M. Sher, *Ancient Forests, Spotted Owls, and the Demise of Federal Environmental Law*, 20 ENVTL. L. REP. 10,469 (1990) (providing an overview of the litigation concerning endangered species in the old growth timber on the public lands of the Pacific Northwest).

21. DAVID MALIN ROODMAN, WORLDWATCH INSTITUTE, *PAYING THE PIPER: SUBSIDIES, POLITICS, AND THE ENVIRONMENT* 15 (1996).

In contrast, subsidies that undermine sustainability are often hidden in obscure provisions of an agency budget or are the beneficiaries of political muscle. Many destructive subsidies in the United States are bunched in federal programs promoting rapid exploitation of natural resources. As George Miller, Chair of the House Committee on Natural Resources, observed,

[E]ach of the major natural resources still receives a huge number of overlapping supports. Many of these supports do not meet the purposes for which they were intended. Some address needs that no longer exist. . . . Mining companies can claim and excavate hard rock minerals on public land free of charge. They can also purchase the land itself for \$2.50 or \$5.00 per acre, in some cases the federal government has had to purchase the land back at higher prices. . . . Numerous accounting devices reduce irrigators' price for Bureau of Reclamation water for below the cost of providing it. . . . Timber companies pay for much federal timber at prices below its market value, or below the Forest Services administrative costs to sell it.<sup>22</sup>

Taxpayer-supported energy projects promote air pollution, and below-cost sales of mining lands increase water pollution and the country's Superfund bill.<sup>23</sup>

States have their own versions of these perverse laws and are filled with incentives to take the short view of environmental goods. The litany is long. For example, until 1992, it was illegal in Virginia for utilities to offer any incentives to their customers for energy conservation and efficiency. The regulation, which had been aimed at discouraging kickbacks, actually meant Virginia could not take advantage of cost-effective, ecologically sustainable energy strategies.<sup>24</sup> State courts have invalidated local development ordinances requiring infrastructure or impact fees.<sup>25</sup>

The law's prejudice against sustainability continues into finance. The commercial and corporate law of fiduciary duties actually leads to the liquidation of slow-growing forests if better returns are available elsewhere. The law of secured transactions

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22. STAFF OF HOUSE COMM. ON NATURAL RESOURCES, 103D CONG., TAKING FROM THE TAXPAYER: PUBLIC SUBSIDIES FOR NATURAL RESOURCE DEVELOPMENT 21 (Comm. Print 1994).

23. Luke J. Danielson et al., *The Summitville Story: A Superfund Site is Born*, 24 ENVTL. L. REP. 10,389 (1994).

24. Environmental Law Institute, BLUEPRINT FOR SUSTAINABLE DEVELOPMENT OF VIRGINIA (1994), at 11.

25. See *Bd. of County Comm'rs v. Home Builders Ass'n*, 929 P.2d 691 (Colo. 1997).

elevates the interests of creditors above environmental values and ecological functions, making the environment an unintended third-party victim in commercial defaults. For example, secured creditors may remove pollution control or resource recovery equipment without regard to the external effects on the environment.

The law's tilt against sustainability extends even after death. Inheritance taxes are another area of law that can produce unsustainable actions, even when all parties desire a sustainable action. Indeed, such laws can compel an estate to liquidate standing timber on privately owned woodlands, even when the heirs would prefer to maintain a working forest or an unexploited wood lot for conservation and biological diversity.<sup>26</sup> An analysis of state and federal inheritance laws would identify changes that would promote sustainability without eroding the social interests involved in family law.

Reconciling these conflicts will require extraordinary acts of political skill and will. This necessary exercise will not be able to proceed without an exhaustively detailed road map that identifies the crosscutting affects that promote or restrain sustainability. Defusing the "jobs versus environment" debate needs such an analysis to show how communities can generate employment and sustain livelihoods while protecting the resource base necessary for ecological health and community stability.

Policy makers must take the lead in creating a positive agenda to foster sustainable conditions. The Supreme Court of India has exhibited the kind of judicial innovation needed to move toward sustainable development. Following a period of one party rule characterized by the revocation of constitutional guarantees ("the Emergency"), India restored multiparty competitive politics and democratic procedures. The Supreme Court of India handed down a series of decisions strengthening civil liberties and, in the process, expanding a right to a healthy environment as a basic right under the constitution.<sup>27</sup> In the years that followed, tens of thousands of environmental lawsuits created a judicial revolution

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26. William J. Siegel, *Timber and Taxes*, NATIONAL WOODLAND at 26 (Oct. 1999). The adverse effects have been ameliorated somewhat by 26 U.S.C. § 2031(c) (2000), which provides for an exclusion of a portion of the estate from taxation for donation of an eligible conservation easement by the decedent, the decedent's family, or the executor or trustee. *Id.*

27. SHYAM DIVAN & ARMIN ROSENCRAZ, ENVIRONMENTAL LAW AND POLICY IN INDIA 58-59 (2001).

in India with state Supreme Courts following the high court's example.<sup>28</sup>

On a more mundane level, government agency policies can work for sustainability; the key seems to be in creating the protective impulse into the structure of development agencies. Japan offers a striking example of how one country is leveraging financial institutions to encourage sustainability. For years, Japan suffered a terrible reputation for environmental degradation both domestically and internationally.<sup>29</sup> The genesis of Japan's new approach lay in coming to terms with its almost total reliance on imports for energy supply. The first initiative was to require energy conservation measures as a means of getting a loan under the regulations of the then Ministry of International Trade and Industry. For example, the Ministry required lending agencies to require loan recipients to hire government-certified environment monitors as a condition of the loan. In Japan, banking law regulations supplement environmental standards and play a role in promoting sustainability. Now, measures promulgated by the successor agency, the Japanese Ministry of Economy, Trade, and Industry, have broadened the scope of energy conservation measures required of investors seeking loans.<sup>30</sup>

Linking the secondary mortgage market to environmental assessment in the U.S. could produce profoundly favorable effects because prudent long-term investment decisions and design with nature go hand in hand. William Seidman, head of the Resolution Trust Corporation during the Reagan administration, was charged with cleaning up the savings and loans scandals of the 1980s, which resulted in the failure of hundreds of banks. He observed that a substantial portion of the losses could have been avoided if investors had heeded regulations barring development in wetlands and flood plains.<sup>31</sup>

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28. J. William Futrell, *Wake Up Call for India*, THE ENVIRONMENTAL FORUM, Mar.-Apr. 1997, at 48.

29. See NORIE HUDDLE & MICHAEL REICH with NAHUM STISKIN, *ISLAND OF DREAMS: ENVIRONMENTAL CRISIS IN JAPAN* (1975), for an assessment of pollution's toll domestically. See also Craig Garby, *Japan Reversing Image: Now Earth's Best Friend*, THE WOODROW WILSON CENTER REPORT, at 1 ("Eventually, Japan gained the reputation of being a global environmental scofflaw.").

30. The Ministry maintains a detailed outline of its regulations and programs in English on its website. See <http://www.meti.go.jp> (last visited Nov. 22, 2003).

31. Seidman's irreverent account of his tenure, *FULL FAITH AND CREDIT: THE GREAT S & L DEBACLE AND OTHER WASHINGTON SAGAS* 162 (1993), refutes the canard that regulation and efficient working of markets are antithetical. Blaming much of the banking system problems on a failure of regulation, he wrote,

Much of the needed legal effort is going to be on the local level where communities committed to the ideals of social justice and wise use of resources will call on a wide range of ordinances and policies to promote sustainability. The states and local governments have been the laboratories for creative land use policies.<sup>32</sup>

Advocates of sustainability need to spur thinking on new legal structures to incorporate ecological economics into law by unleashing the common law, which has deviated into the service of unsustainable concepts since the late nineteenth century.

Judges and legal scholars in the United States have not been as effective in environmental and natural resources law as earlier judges were in revising doctrines such as privity of contract that denied redress to wronged consumers. Consider how Judge Benjamin Cardozo led a revolution in consumer protection and product liability law by creating new doctrines in the law of torts.<sup>33</sup> All first year law students study the legal method embodied in *MacPherson v. Buick*,<sup>34</sup> which furthered the judicial assault on the citadel of privity with the resulting demand for an increased duty of care by manufacturers.

For those who are frustrated by the judiciary's torpor in dealing with this generation's severe environmental crisis, it is strange to read the disparaging comments of Professor Lawrence Friedman who wrote,

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When the real estate market collapsed, no state in the nation was worse off than New Hampshire, which was ideologically devoted to the free market fashions of the 1980s, under its governor, John Sununu. By 1990, half of the outstanding loans were in failing banks. . . . Overoptimism and misguided deregulation had done in the once archconservative Granite State. Its speculative real estate markets had been fueled by relatively permissive environmental zoning rules in a state that depended heavily on tourism and recreation for a living. It thus became easier for builders to build, and banks joined the rush to lend to them. By contrast, Vermont, right next door, maintained very strict zoning and environmental rules, so the same overbuilding opportunities were not as readily available. In the end, few Vermont banks failed because they were not lending in the kind of unregulated environment that helped ruin so many New Hampshire banks.

*Id.* at 162.

32. See JOHN R. NOLAN, OPEN GROUND: EFFECTIVE LOCAL STRATEGIES FOR PROTECTING NATURAL RESOURCES (2003); JOHN R. NOLAN, NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW (2003); JOHN R. NOLAN, WELL GROUNDED: USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH (2001).

33. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921). See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, 61-62, 189-92 (1992).

34. 111 N.E. 1050 (N.Y. 1916).

Cardozo's language was eloquent, his reasoning was clever. The case created a stir in legal circles; it encouraged more cases to be brought. . . . After a generation or so, most state courts accepted the innovation. . . . Whether his opinion persuaded, in itself, is another question. If it did, it was less because of its own eloquence than because it eloquently summed a state of mind *which would have made its way on any account. The 20th century was bound to accept the basic idea of products liability.* . . .<sup>35</sup>

No legal reform is bound to happen; social progress in the law occurs only with the creativity and the cooperation of many dedicated policy makers. Effective consumer protection law emerged in the twentieth century because of creative judges such as Benjamin Cardozo. Effective sustainable development law has not occurred in part because of judicial torpor.

Cardozo's work in extending the effectiveness of consumer law is an example of what sustainable development law needs. However, most judges acting alone are reluctant to effect sharp change in the common law; a creative partnership with the legislature is needed. The cooperation of the bench and legislature best serves the progress of new doctrines. The need for the law of copyright arose with the spread of mass publications and the age of invention. English lawyers struggled in the courts and in Parliament for more than a century to forge new doctrines that would protect intellectual property.<sup>36</sup> At its best, the common law is inventive and responsive to social needs. The creation of a law of patents and copyrights was a precondition of the age of invention and lawyers, parliamentarians, and judges rose to that generation's challenge.

Creative judges seeking to advance sustainable development law have avenues to explore in the common law. These include changes in the law to explore the use of expanded liability to internalize externalities.<sup>37</sup> Public nuisance remains the most effective

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35. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 684-85 (2d ed. 1985) (emphasis added).

36. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 499 (5th ed. 1956).

37. Many of the environmental reform measures of the 1970s sought to internalize externalities through a complicated administrative system managed by the Environmental Protection Agency. The 1980s Superfund Law relied on liability with more impressive results. See William H. Rodgers, Jr., *The Seven Great Wonders*, THE ENVIRONMENTAL FORUM, Nov.-Dec. 1994, at 23-24 ("In the 14 short years of its life, this statute has revolutionized commercial property management and exchange in the

tool to protect environmental quality *if* the public prosecutor has the will to enforce the law. All too often, the polluting source is so powerful in legal and political resources that it is above the law, but, if the prosecutor is dedicated, the proper tools are there. However, twentieth century courts vitiated the law of private nuisance, which had been one of the most powerful tools for abused neighbors. In *Boomer v. Atlantic Cement Co.*,<sup>38</sup> the New York Court of Appeals overruled a century of jurisprudence in which courts protected the right of numerous smaller property owners to enjoin the destructive actions of their neighbors.<sup>39</sup> A vital environmental justice movement can bring new life to private nuisance actions.<sup>40</sup>

State law needs to enable communities to plan for sustainability through changes in property law to reflect twenty-first century understandings rather than the law of the frontier. Neglected in the last century, the law of servitudes could serve as a powerful tool in land use protection.<sup>41</sup> The majority opinion in the *Boomer* decision handed down in 1970 at the dawn of modern environmental litigation conflates the law of private nuisance with servitudes, a position excoriated by the dissent.

Judges and legislators working together can look back to their golden era of cooperation in the late 1960s when Congress and the courts worked in tandem to breath life into environmental rights. They can recall the political momentum growing from the increasing public demand that new ethical and religious standards govern our use of the environment. Environmental law's greatest achievement is its codification of a change in ethics, a legal recognition that, in the last quarter of the twentieth century, individual—and government—responsibility extends to the natural world. During the next twenty-five years, the most important de-

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United States. More than any other single enactment, Section 107 has brought environmental law into the blue-ribbon firms of every major city. In no small way, this statute has transformed the practice of environmental law from fringe novelty to mainstream reality.”).

38. 257 N.E.2d 870 (N.Y. 1970).

39. See *Whalen v. Union Bag & Paper Co.*, 101 N.E. 805 (N.Y. 1913); *Campbell v. Seaman*, 63 N.Y. 568 (1876).

40. See Richard Lazarus, *Pursuing “Environmental Justice”: The Distributional Effects of Environmental Protection*, 87 Nw. U. L. REV. 787 (1993).

41. The American Law Institute completed Restatement III of the Law of Servitudes in 2003 without exploration of the servitude of conservation. See *RESTATEMENT (THIRD) OF SERVITUDES* (2003). The outline of the subject always mentions this servitude, but litigation never fleshes it out; a failing not of the Institute, which merely restates, but of scholars and litigators to breathe life into the subject.



velopment will be to spread this consciousness beyond environmental law to sustainable development law.

The intellectual roots of sustainable development law were defined in Aldo Leopold's *Sand County Almanac*: "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."<sup>42</sup> A legal framework that fosters the capacity for self-renewal will lay the foundation for sustainable development law.

The changes suggested may seem quixotic in light of the current political climate. Implementing this ethical, indeed religious, shift will be as fundamental and disturbing to established social relations as earlier changes in thought leading to the end of slavery in the 1860s.<sup>43</sup> Those heavily invested in unsustainable development will bitterly resist the transition. Indeed, the political challenge is intimidating, but no more than past great challenges. In the 1770s, a group of Quakers in Manchester, England began preaching against slavery. No nation in the world banned slavery. It was the accepted order. William Wilberforce, Thomas Clarkson, and Zachary Macauley led a campaign of preaching, writing, and persuading that became the center of the Whig party's political efforts.<sup>44</sup> All this played out against the background of the Napoleonic wars, which was the key priority of the Tories.<sup>45</sup> Wellington and Pitt, seeking national unity, pledged the abolition of slavery in the British Empire and the use of the British Navy to suppress the slave trade on the high seas.<sup>46</sup> The Congress of Vienna in 1815 ratified these actions.<sup>47</sup> Within fifty years, the dream had become international law.<sup>48</sup>

The social response to the sustainability challenge can be either planned and peaceful or chaotic and fitful as the outlaws of the cowboy economy make their last stand. In the nineteenth century, the United Kingdom ended slavery in its colonies without bloodshed and with compensation for the slaveholders. In the

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42. ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 258 (1966) (emphasis added).

43. See GEORGE M. TREVELYAN, *HISTORY OF ENGLAND* 129-31 (3d ed. 1953).

44. ELIZABETH LONGFORD, *WELLINGTON: THE YEARS OF THE SWORD* 370-72 (1969).

45. See *id.* at 371.

46. See *generally id.* at 370-72.

47. *Id.* at 396.

48. GEORGE M. TREVELYAN, *HISTORY OF ENGLAND* 129-31 (3d ed. 1953).

United States, emancipation came only as the result of a savage civil war.

With knowledge comes the responsibility to act. The combination of science and public opinion heightens the possibilities for success in building processes and institutions for protection of life systems in a new law of sustainable development that prevents, mitigates, or remedies unsustainable conduct. Decision-makers must grapple for wise decisions not only across space—balancing the interests of the developer and the environment—but also across time—balancing the interests of the present against the future—seeking an equity not only among nations, but justice between generations.