

Pace Environmental Law Review

Volume 11
Issue 1 *Fall* 1993

Article 3

September 1993

Thoughts on Environmental Rights and Ownership

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Recommended Citation

Robert F. Kennedy Jr., *Thoughts on Environmental Rights and Ownership*, 11 Pace Env'tl. L. Rev. 11 (1993)

Available at: <http://digitalcommons.pace.edu/pelr/vol11/iss1/3>

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**10th Anniversary Celebration of the Pace
University School of Law Center for
Environmental Legal Studies
Speech*
Thoughts on Environmental Rights and
Ownership**

ROBERT F. KENNEDY, JR.**

June 15, 1993

It is a great honor for me to talk to all of you. I was the first LL.M. graduate from Pace and I am proud of this school and my association with the school. In my travels across the country I find many people who have been touched by Pace and the professors here in some positive way. Pace and the

* The following is an edited transcript of an extemporaneous speech delivered by Prof. Robert F. Kennedy, Jr., in celebration of the 10th anniversary of the inception of Pace University's Environmental Law Program.

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** Prof. Robert F. Kennedy, Jr., is Clinical Professor of Law at Pace University School of Law and Co-Director of the Pace Environmental Litigation Clinic. He is also Senior Attorney at the Natural Resources Defense Council and Chief Prosecuting Attorney for the Hudson Riverkeeper Fund, Inc. He received his LL.M. in Environmental Law from Pace University School of Law in 1987 and his J.D. from the University of Virginia Law School in 1982. He received his B.A. from Harvard University in 1977.

Environmental Litigation Clinic are well-respected¹ in the environmental community and all over the country people are becoming more familiar with the work that we are doing here.²

I. Where is the Environmental Movement?

This speech will focus on where I see the environmental movement going and why. I believe that this and the next decade may be the most important time in the history of humanity. Some say we are at the edge of perhaps one of the largest mass extinctions in the history of the planet. The environmental crises we are experiencing have never been encountered by our species in over two million years of existence. We are facing other environmental crises that have moved from direct mail to the front pages. It is crucial that we address these crises intelligently now, for us, and the next generations.

A. *Learning to Look at the Future: The Younger Generation*

From my experiences speaking at colleges, I believe environmental issues are the most important issues among the younger generation — more than jobs, more than the econ-

1. U.S. NEWS & WORLD REPORT, Mar. 22, 1993, at 63. In its annual survey of U.S. graduate schools, the Environmental Program at Pace University School of Law was ranked third in the nation.

2. The Pace Environmental Litigation Clinic (Clinic) allows nine students each term the opportunity to utilize citizen suit provisions of the Clean Water Act, the Resource Conservation and Recovery Act, and other environmental or related law, prosecuting violators and polluters in the Hudson River watershed. Since 1987, the Clinic has successfully litigated precedent-making cases, forcing over sixty corporations, individuals, or municipalities to comply with environmental regulations and remediate natural resource damages.

The Clinic represents the Hudson Riverkeeper Fund, Inc. John Cronin has been the Hudson Riverkeeper since 1983, when the Hudson River Fishermen's Association began its Riverkeeper Project. The Riverkeeper empowers the citizens of the Hudson Valley with a vehicle for enforcing environmental laws to protect the single greatest natural resource of the State of New York — The Hudson River.

For the last decade, the Riverkeeper has been a model of citizen advocacy and enforcement in protecting local waterways, especially since the inception of the Pace Environmental Litigation Clinic.

omy. Young people increasingly see the environment as the issue that will govern their future. All of the issues that interested my father's generation — housing, jobs, economic stability, racism, or justice . . . are, over the coming decades, going to be governed by environmental change. The young best understand the perils of environmental change, but because of the shortness of time the leadership on this issue is going to come from our generation. Environmental advocates, like myself, are fighting a battle to change the way that we think.

We can win this battle, but we have to change the way that we think about and plan for the future. Generally, we *are* able to do that as individuals. As a political organism, however, it is very difficult. Al Gore characterizes this dynamic in his book, *Earth in the Balance*.³ The present, he says, shouts, the future whispers. That is a governing dynamic of our political system.

Recently, I was out in Clayoquot Sound in British Columbia; one of the most aesthetically spectacular and biologically productive places on the planet and home to the last temperate maritime rainforest of its kind on earth. The Canadian government made a decision to log the last watershed in Clayoquot Sound⁴ and that is going to preserve a few hundred logging jobs for the next ten years, but the cost is the ruination of a tourist industry and a fishing industry that are sustainable,⁵ and that could bring prosperity to Vancouver Island for generations to come.

Many of the decisions we are making today transcend history. They go beyond it. Extinction of species is an example. Our decisions will affect life on this planet for periods of

3. SENATOR AL GORE, *EARTH IN THE BALANCE — ECOLOGY AND THE HUMAN SPIRIT* (1992).

4. Robert Mason Lee, *Worldwide Campaign Against Logging Hits Forest Firm*, *THE VANCOUVER SUN*, Nov. 12, 1993, at A1.

5. Sustainable development has been defined as "development that meets the needs of the present without endangering the ability of future generations to meet the same or other needs. It requires maintaining the carrying capacity of the resource base, and, at the same time, developing the knowledge and technology to increase the carrying capacity." CHARLES F. WILKINSON, *THE EAGLE BIRD — MAPPING A NEW WEST* 119 (1992).

time that in some cases are a thousand times the length of recorded human history.

I was out in Hanford, Washington last summer and went to the nuclear weapons facility out there. They have thousands of acres that are contaminated with a substance called Plutonium 239 that is one of the more toxic elements in the universe. It has a half-life of 24,000 years.⁶ Modern humans have only been on this planet for 25,000 years — the oldest written history is five thousand years old.⁷ Yet, as this case illustrates, we are creating and casually disposing of substances that are going to continue to poison life on this planet for periods of time that exceed our own occupation. This contamination is going to affect life on this planet for countless generations.

We don't plan very well for the future. We plan for today and the world we create tends to reflect our *immediate* objectives. That is why we have a budget deficit; because it is a problem that we can pass on to future generations. We don't have to deal with it today. The world we create tends to reflect these immediate concerns rather than the long term good of humanity.

When I was in third and fourth grade I went to Our Lady of Victory School in Washington, D.C., and every week we had to do a drill called the "atom bomb drill." This was during the time of the Cuban missile crisis. The nuns told us that if we heard the air raid sirens or if we saw the flash of a nuclear weapon, we should avert our eyes and look at the interior wall of the building or the flash would blind us. After the reflected light began to dim we could turn back and place the sharp instruments, the compasses, and the pencils inside the desk. And then we would "duck and cover" — putting our heads under the desk, and our heads between our legs. In that position we'd wait for the blast that would blow the win-

6. Matthew L. Wald, *Wider Peril Found in Nuclear Waste from Bomb Making*, N.Y. TIMES, Mar. 28, 1991, at A1.

7. Marion Steinmann, "Chicken Scratches" *Written in Clay Yield Their Secrets*, SMITHSONIAN, Dec. 1988, at 130 (describing Sumerian, the oldest written language, which dates back more than 5,000 years to the earliest recorded history of our species).

dows out of the school. Afterward, there would be a momentary calm and we would stand and file in an orderly fashion into the basement where we would stay for the next weeks.

I can look back, thirty years later, with humor and sadness. From this perspective, I can also see that as a result of that justifiable fear of nuclear annihilation from Soviet aggression, we constructed a planet where today in June of 1993, a significant proportion of the scientists in the world are employed in military and weapons technology.⁸ Fifty cents out of every tax dollar spent goes to servicing our national debt largely derived from military spending; we spend a total of about a trillion dollars a year on the military globally.⁹ That is \$200 for every man, woman and child on the face of the earth.

Thirty years later, my eight year old boy is today the same age I was during the Cuban missile crisis. If I waited thirty years and asked him and his little sister, "If we continue to allocate these kind of resources for destructive technology, will we still have something left that is worth preserving?" Their answer is going to be immediate and instinctive and it is going to be "No!" Young people are growing up with a whole different set of priorities and a whole different set of assumptions that are mainly driven by this recognition that environmental change will be the primary predictor of quality of life; erosion of the topsoil, contamination of drinking water, accelerating cancer rates, acid rain, air pollution, depletion of the ozone layer, global warming, overpopulation, extinction of species — Soviet aggression is way down on the list.

In Our Lady of Victory, my elementary school of thirty years ago, the walls were festooned with children's pictures of

8. Louis Uchitelle, *The Mothball Era in Arms Industry*, N.Y. TIMES, Sept. 22, 1992, at D2 (stating that by most estimates, at least twenty percent of the nation's scientists and engineers are employed in military work).

9. Peter Norman, *The Benefits as Swords Turn Into Ploughshares*, FIN. TIMES, Sept. 27, 1993, at 19. For example, in 1993 alone, over four billion dollars or approximately 60 percent of all research and development expenditures by the federal government were focused on defense programs. Research and development has traditionally been viewed as the source of future trends and innovations. *Random Sample*, 263 SCIENCE 27 (Jan. 7, 1994).

moon shots and mushroom clouds. And it was still OK to throw garbage out of the window of the car. It is not any more. Today the school kids are drawing rainforests and baby seals and elephants and garbage barges. I talked to a friend of mine the other day about this phenomena with the kids and she said that her kids were like eco-cops. She was grateful when they went away to camp and she could start putting glass in the garbage can again. My daughter is four years old, and one of her first words was "compost." That is a word that I didn't know until I was probably thirty. My son gets furious at me for leaving the car running. He says, "Dad, you are wasting gas!" It is an *ethical* change. My kids are not getting this from me, they are getting this from their peers; they are getting it from their public elementary school teachers; they are getting it from watching Nickelodeon and television in general. It is coming to them from everywhere and they know. They know!

Environmental issues are the deepest concern of the elementary school generation and if we wait thirty years, that generation is going to make decisions about the environment and sustainability correctly. The problem is we don't have those thirty years. The decisions that we make during the next ten and twenty years are either going to narrowly constrain or preserve the capacity of coming generations to choose their own destiny.

II. Environmental Rights as Civil Rights

A. *Protecting the Right*

In addition to changing the way we plan for the future, we need to inculcate the concept that every citizen has a right to a safe and healthy environment.¹⁰ Our failure to persuade

10. See, e.g., Kerry Kennedy Cuomo, *Human Rights and the Environment: Common Ground*, 18 YALE J. INT'L L. 227 (1993). In an address at a Yale Law School conference, Ms. Cuomo stated,

Our world has changed drastically since the Declaration and Covenants were written, and certainly the drafters did not anticipate all of today's problems. Clearly they did not foresee the enormity of our ecological degradation and the consequent necessity for human rights norms to encompass environmental considerations. Promot-

people on this has been the principal failure of the environmental movement. This can be seen by comparing the environmental movement with the labor and civil rights movements in this country. Those movements fought battle by battle, lunch counter by lunch counter, bus by bus — to secure rights.¹¹ Once those rights were generally recognized, nobody has been able to take them away. Anyone who tries gets a negative story on the front page of the paper. Once a right is generally recognized, everyone in the country, including institutions like the judiciary and the press, has a stake in assuring that it is not eroded.

The environmental movement was somewhat different. We made our principal gains after Earth Day in 1970 when all the environmental statutes with citizen suit provisions were passed. Today, we sometimes find ourselves almost em-

ing the right to a healthy environment is the most obvious mechanism to fulfill this need. That right is just now being fleshed out. We are only beginning to explore the questions it raises: What entitlements does it anticipate? What constitutes a violation? Who will monitor nations? What form will relief take? And so many other queries. Meanwhile, people are being tortured and rainforests are disappearing. We can't afford to wait until all the answers are sorted out. The need for human rights activists and environmentalists to work together is urgent.

Id. at 227-28.

11. As described by Prof. Charles F. Wilkinson,

Over the course of this century there have been four domestic social movements that have fundamentally reshaped law and life in America. Each is based on a central idea. Those ideas are that women ought to have free and equal access to the political arena and the economic system; that workers ought to have a safe place of employment and ought to be compensated fairly; that [people of color] ought to be accorded equality of treatment and that our natural environment, including its animal species, ought to be healthy and sustaining and that significant parts of it ought to be preserved in a pristine condition.

WILKINSON, *supra* note 5, at 111. See also Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619 (1992); John H. Cushman, Jr., *U.S. to Weigh Blacks' Complaints About Pollution*, *N.Y. TIMES*, Nov. 19, 1993, at A16 (noting that the Clinton Administration has ordered the E.P.A. Office of Civil Rights to initiate investigations concerning the disproportionate exposure of African Americans in Louisiana and Mississippi to toxic discharges from hazardous waste treatment plants, pursuant to untested, innovative legal theories under the 1964 Civil Rights Act).

barrassed about our success. Instead of forcefully moving to exploit our gains, to mobilize public support and indignation and fighting aggressively to expand recognition of environmental rights, we are more often on the defensive and reactive to disinformation campaigns by the likes of Rush Limbaugh or Dixie Lee Ray, or to increasing attacks on our rights by a hostile judiciary. Over the last couple of years we have seen some erosion in the citizen enforcement provisions in the environmental statutes and a narrowing of standing by the Supreme Court and by the Reagan-Bush appointees to the federal courts.¹² I recently saw first hand another example of the tendency to retreat. Congress is currently considering the reauthorization of the Clean Water Act. John Cronin and I called a member of the Clean Water Act reauthorization group to urge the group to submit an amendment which would redress the judicially imposed limitations on the citizen suit provision. The response was "No, we have decided not to do that because we do not think we can afford a public debate on those issues." It was explained that in a public debate, industry might prevail and further erode recognition of our rights and take away some more of our rights. That kind of response and fear would be unheard of in the labor or civil rights law arenas.

We should *seek out* a public debate. We want people to understand that they own the environment, that they have a right to a clean environment. First, our side can only profit from the truth. Second, the debate and environmental advocacy are advanced as more and more people come to understand that they have a God-given right to a clean environment. Each one of us is empowered by this knowl-

12. See, e.g., *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) (The Supreme Court's decision in *Lujan* severely restricted the definition and scope of the "injury in fact" requirement of the standing analysis. The Court denied standing to Defenders based upon the affidavits of two of their members who had, in their professional capacities, studied and observed certain species they alleged were endangered by federally-funded projects overseas. The Court determined that Defenders did not allege a sufficiently imminent and particularized injury because these members could not provide a description of any concrete plans to return to these locations to study the animals in the future, and could not specify the date on which they intended to return).

edge. We are all empowered by the fact that you are not allowed to sexually harass women. It does not mean that every woman on a job site is going to bring a lawsuit, but every woman is empowered by the fact that she *can*. And it is the same with African-Americans or any other group that has been the beneficiary of these successful movements to assert rights. We all should understand that we have rights in the environment; that we have the ability to enforce them. It should not be something that we are embarrassed about.

Partially because we do not believe thoroughly in our own cause, that sense of environmental rights has not permeated into the rest of society. We had a case recently in the Clinic where we found a local government had deliberately and knowingly filled wetlands to construct a landfill without compliance with § 404 of the Clean Water Act.¹³ We contacted the FBI and the U.S. Attorney after we won the case and we showed them evidence we collected in discovery proving that the county officials had “knowingly” destroyed the wetlands. We had a series of internal county memoranda that unambiguously made this case. Before filling the wetlands, the county had known that it was a wetland; they knew it was a violation of the law. They conceded this fact for the environmental enforcement agencies and they went ahead and filled it anyway. The FBI agents and the U.S. Attorney sat in the Clinic with us and a pile of law books. We showed them the Clean Water Act provision that says you cannot knowingly fill a wetland or you go to jail.¹⁴ They ignored it. They said, “Well, was there any paper fraud? Did they use the mails to lie? Did they use the telephones?” It became clear that they were uncomfortable outside the traditional types of criminal enforcement strategies. We said, “You don’t need that stuff, this is an environmental law

13. *Orange Env't, Inc. v. County of Orange*, 811 F. Supp. 926 (S.D.N.Y. 1993) (granting plaintiff's motion for summary judgment, the Court held that an EPA Consent Order did not obviate the County's obligation to obtain an Army Corps of Engineers permit); *Orange Env't, Inc. v. County of Orange*, 817 F. Supp. 1051 (S.D.N.Y. 1993) (denial of County legislature's motion to intervene), *aff'd*, 2 F.3d 1235 (2d Cir. 1993).

14. 33 U.S.C. § 1344 (1988).

which says, "This is a criminal act. Jail is the penalty." But neither the FBI nor the U.S. Attorney could grasp the concept that you can actually send somebody to jail "just" for injuring the environment. This must change.

A watershed policeman came to Pace the other day to talk to me about an investigation that he was working on. He has a polluter in Westchester County who was deliberately dumping toxic waste into the New York City reservoir system. He was lamenting the fact that the Westchester D.A. would not prosecute the polluter because the Westchester D.A. had stopped prosecuting environmental crimes — as a policy decision.¹⁵ Without the D.A., he couldn't prosecute the case as a criminal violation. Instead, he had to do it under civil code and he could only get a \$2,000 fine imposed. He noted with irony that if you steal somebody's car in New York City, throw a rock through a window, or you hit somebody with a baseball bat — you can go to jail. But you have only hurt one person. When you dump poison into the water supply, you are potentially hurting nine million people. Why shouldn't you go to jail for that? It is just as damaging. We do not have that sense yet. That is the sense we have got to develop.

B. *Exercising the Right on the Hudson River*

The notion of a right to a clean environment derives in part from the concept of ownership in public trust. Today, the Hudson River is the last fully functioning estuarine system in the entire North Atlantic — and I'll throw in the Mediterranean, the Baltic Sea and the Black Sea. In fact, the Hudson may be the most productive water body on the face of the Earth gallon per gallon. Some scientists believe that there is more life in a gallon of Hudson River water than per-

15. Deborah Pines, *Westchester D.A. Candidates Get Down and Dirty*, N.Y.L.J., Oct. 25, 1993, at 1. Westchester County District Attorney Jeanine Pirro has promised to create an environmental crimes unit within the District Attorney's office patterned after the Domestic Violence unit she created while serving under her predecessor Carl Vergari, who refused to vigorously prosecute environmental criminals.

haps there is in any water body on the face of the globe.¹⁶ One of the reasons is that the Hudson has been blessed since the early 1960s with an extremely sophisticated, vigorous, vigilant and aggressively litigious environmental community that has been willing to go to war to save that river. They have been blessed with a sense of ownership, and have secured their environmental right to a healthy river.

Hudson Valley environmentalists understand that *we* own the Hudson River. If you live in New York or you live in New Jersey — you own the Hudson River. The river was once the possession of the King of England. After the Revolution ownership descended to the people of the states. For most New Yorkers, it is probably the biggest thing we will ever own. It is therefore worth the investment we need to make to protect it. A critical mass of people believe that when somebody damages the Hudson . . . when General Electric puts something in the river that is killing fish¹⁷ — that is an act of theft and it ought to be treated the way larceny is treated, as a very serious crime. Likewise, if somebody harms the drinking water supply by dumping lead or alum,¹⁸ or something that is going to injure children in New York — that should be treated as child abuse. Ownership of the river

16. See, e.g., Robert H. Boyle, *Haven of Havens; A Harbor Like No Other*, SPORTS ILLUSTRATED, June 30, 1986, at 28. See also ROBERT H. BOYLE, *THE HUDSON RIVER — A NATURAL AND UNNATURAL HISTORY* 15 (1979).

17. For a series of editorial articles in *The Poughkeepsie Journal*, Mary Beth Pfeiffer researched and reported on the effects of polychlorinated biphenyls (PCBs) contamination to the Hudson River by the General Electric Company's capacitor plants at Fort Edward and Hudson Falls, New York, north of Albany. *PCBs: The Damage Done*, POUGHKEEPSIE J., Oct. 4, 1992, at 12A; *The Hudson can't heal itself*, POUGHKEEPSIE J., Oct. 11, 1992, at 18A; *Begin the cleanup*, POUGHKEEPSIE J., Oct. 18, 1992, at 12A; *PCBs do hurt people*, POUGHKEEPSIE J., Oct. 25, 1992, at 16A.

The EPA banned PCBs as a carcinogenic and neurotoxic compound. 44 Fed. Reg. 31514 (1979). See generally 57 Fed. Reg. 7349 (1992).

18. See *Hudson River Fishermen's Ass'n v. City of New York*, 751 F. Supp. 1088 (S.D.N.Y. 1990). Chief Judge Brieant of the Southern District of New York, discussing alum and chlorine residual discharged into the West Branch Reservoir, stated, "It is indisputable that a pollutant is a pollutant no matter how useful it may earlier have been." *Id.* at 1101.

is in a public trust.¹⁹ Nobody should be able to damage it with impunity. Everyone should know that they are going to go to jail because they are injuring us all.

C. *The Public Trust*

We are all injured when somebody damages the environment. That is why we protect the environment. The environmental movement has to be clear about that. Some environmentalists are uncomfortable with this notion. But like all rights movements, honesty to ourselves and others serves us best in the long run. We have to be honest. We are *not* protecting nature for its own merit. We are protecting it because of what it does *for us*. We are not protecting the spotted owls for their own merit. We are struggling to preserve those ancient forests in the Northwest because we believe they are more valuable to humanity standing than they are cut down.²⁰ Not for an owl, but for the sake of human beings. If you ask any other species they'd tell you the same. If you interviewed a beaver and asked, "Why did you build the dam?" he would not say, "Well, I did it to create a nice place for the fishes and the frogs." He would say "I did it because it is my home." That is the way we have got to view the planet. This is our home, we depend on it; the environment is the economic base of everything we do and if we try to deny that — as a species we are going to perish. The green plants do not need us. We need them and we need to acknowledge that!

What happens when we destroy a river like the Hudson or any of the other ones up and down the east coast of North America that are dying? All the major estuaries are in deep trouble. The Carolina estuaries — the Roanoke, the Tar and the New — are dying. The Chesapeake, which used to supply eighty percent of the fish on the east coast is dying. In Long

19. See John A. Humbach, *Public Rights in the Navigable Streams of New York*, 6 PACE ENVTL. L. REV. 461 (1989).

20. See, e.g., Jeb Boyd, Comment, *Struggling to Protect Ecosystems and Biodiversity Under NEPA and NFMA: The Ancient Forests of the Pacific Northwest and the Northern Spotted Owl*, 10 PACE ENVTL. L. REV. 1009 (1993) (analyzing the economic, social and legal implications of preserving spotted owl habitat).

Island Sound during the summer, half the water is dead water. In 1987, there was almost zero dissolved oxygen, the lowest levels ever recorded in that water body.²¹ The fin fish had to leave the area or perish. The barnacles and crustaceans simply died. The Delaware River still has a dead zone at Camden and Philadelphia. The St. Lawrence River, Narragansett Bay, Boston Harbor — all of them are dying. The Hudson is the only one left in the entire North Atlantic with strong spawning stocks of all its historical fisheries. It is our Noah's ark. It is a species warehouse and it is because people cared about the river. They felt a sense of ownership and were able to see the link between that river and their own economic, spiritual and cultural well being. They came to believe they had a "right" to a clean river.

We have been experiencing an economic downturn since the 1980s. It is the first economic downturn in the history of this country when somebody who lost their job in New York City was not able to pick up a fishing pole and go to Long Island Sound or the Hudson River and catch a big striped bass for his family for dinner.²² While the Hudson River is filled with fish, most of the fish are contaminated with PCBs and are inedible.²³ In Long Island Sound the fisheries are gone because of oxygen debt from our sewage treatment plants.

We are in danger of losing the commercial fisheries of Long Island Sound. This industry contributes at least one hundred and fifty million dollars a year to the region.²⁴ My

21. John Rather, *L.I. Sound: Perplexing Woes*, N.Y. TIMES, Aug. 9, 1987, § 11 (Connecticut Weekly) at 4.

22. Allan R. Gold, *New York's Waters Cleaner, But Pollution Is Still Daunting*, N.Y. TIMES, Apr. 19, 1990, at A1 (noting that a New York State ban on commercial fishing of striped bass due to PCB toxicity has increased the populations enough to make shad fishing, the only edible commercial fish left in the Hudson, much more difficult due to the overloading of fishermen's nets by large striped bass).

23. DIV. OF ENVTL. HEALTH ASSESSMENT, NEW YORK STATE DEP'T OF HEALTH, PUB. NO. 31180638, HEALTH ADVISORIES: CHEMICALS IN SPORTFISH AND GAME 1993 - 1994 5 (Revised Apr. 1993).

24. DR. MARILYN A. ALTABELLO, ENVTL. PROTECTION AGENCY, THE ECONOMIC IMPORTANCE OF LONG ISLAND SOUND'S WATER QUALITY DEPENDENT ACTIVITIES 8 (1992) (noting that the calculation represents only a fraction of the

children are going to grow up in Westchester County at a time when, for the first time in this nation's history, there are only a handful of commercial fishermen there. Less than fifty commercial fishermen are left on the entire River.²⁵ They are dying out. Ten years ago there were 150. This fishing heritage goes back fifteen generations to the original Dutch settlers.²⁶ Some families have been fishing the Hudson River continuously since colonial times, but their kids are not doing it. Now they are hanging sheetrock or paving roads or collecting welfare; but because of the PCBs and other contaminants, they are not going back to the river. There is something wrong with that. It is not only economic injury that they are suffering; it is cultural and it is spiritual.

D. *Our Capacity to Solve Environmental Problems*

I remain confident that we *can* solve the most critical environmental problems in this country. If you look back in history and look at the momentous problems this nation and other nations have faced in our history, it is clear that we can solve even these problems. Anybody who saw the Gulf War on television took notice of our missiles which, when fired from a ship twelve hundred miles away from their target, can negotiate through the dunes and then fly down somebody's chimney or front door — and film the whole thing. You have to believe that a nation that can design, build, deploy and use those kind of miracles of industrial sophistication can also build a sewage treatment plant that works or a car that gets forty miles per gallon. We can do those things. But first, we need to wrench the vast human and financial resources away

total value for the industry in 1990, due to data limitations and exclusion of multiplier effects).

25. See, e.g., Suzanne DeChillo, *Fishermen on the Hudson Develop a Small Caviar Industry*, N.Y. TIMES, July 14, 1991, § 12 (Westchester Weekly), at 1 (stating that roughly one dozen Atlantic sturgeon fishermen on the Hudson); Suzanne DeChillo, *A Banner Year for Blue Crabs from the Hudson River*, N.Y. TIMES, Sept. 29, 1991, § 12 (Westchester Weekly), at 1 (noting only 6 fishermen crab commercially along the Hudson); Suzanne DeChillo, *Shad Nets Yield Small Harvest*, N.Y. TIMES, May 3, 1992, § 13 (Westchester Weekly), at 1 (only 40 active commercial fishermen set up shad nets on the Hudson in 1992).

26. See Boyle, *The Hudson River*, *supra* note 16 at 37.

from the areas in which they are traditionally spent and put them into places that are going to create a sustainable planet.

The Earth Summit held last summer was an extraordinary accomplishment. For the first time, one hundred and seventy-eight nations and one hundred and eighteen heads of state from around the world gathered in Rio de Janeiro to talk about the future of the global environment.²⁷ That convocation told us that the world has changed. The cold war is over. We are in a new era. These nations are no longer looking towards the Soviet Union and the United States for their direction. They are still looking to the U.S. for leadership, but they have now reduced their issues to three: first, economic sustainability; second, the environment; and third, human rights. That is what they are thinking about.

Within the last two decades almost all of the emerging democracies in Latin America and Eastern Europe have implemented statutory provisions or amended their constitutions to include provisions that in some way give their citizens the right to a clean environment.²⁸ How are the polluters, industries and utilities going to comply with those constitutional provisions? They are going to have to buy environmental technologies from the nations that have the strictest environmental laws.

III. Environmental Marketing Opportunities

Rush Limbaugh's portrayal of environmental protection and economic prosperity is false.²⁹ If we want to create a sus-

27. James Brooke, *The Earth Summit; U.N. Chief Closes Summit With an Appeal for Action*, N.Y. TIMES, June 15, 1992, at A8; Julia Preston & Michael Weisskopf, *Rio Organizer Says Summit Fell Short*, WASH. POST, June 15, 1992, at A1.

28. EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS 297-327 (1989) (listing provisions from constitutions of over fifty countries recognizing the right to a safe environment).

29. Recently, debates between environmentalists, industry and governmental authorities have intensified, especially over protection under the Endangered Species Act. 16 U.S.C. §§ 1531-1544 (1988). This debate between economic protectionism and species protection has been characterized by Secretary of the Interior Bruce Babbitt as a "train wreck" waiting to occur. Richard Stone, *Babbitt Shakes Up Science at Interior*, 261 SCIENCE 976 (1993).

tainable economy, we must recognize that good environmental policy is identical to good economic policy almost one hundred percent of the time. If we want long term prosperity and sustainable jobs, it should be self evident that we must start planning rationally for the future, and as Al Gore has said, stop "treating the planet as if it were a business in liquidation."³⁰ Furthermore, if we want to continue to dominate the global economy we have to have strict environmental statutes and regulations here at home.

Let me give an example. We now have a good Clean Air Act in this country. We passed amendments to strengthen it during the early days of the Bush administration. In order to comply with those amendments, American industries and utilities are going to have to spend billions of dollars on scrubbing technologies to retrofit their stacks. Much of that technology is going to be purchased from Germany. Why? It is because the Germans have a tougher clean air act than we do and they have been enforcing it for the last twelve years.³¹ Their entrepreneurs and their businesses and their scientists bought up U.S. patents³² (because we developed much of this technology) and developed their products in Germany and are now selling the products back to us at a significant profit.

I see this phenomenon in my job and in all aspects of environmental law. We have a lawsuit today in the Clinic. It is probably going to force New York City to spend about two bil-

[W]hile the government, the timber industry, and environmentalists argued in court about what to do, the spotted owl was slipping to the brink of extinction. Babbitt argues that these [train] wrecks occur in part because the protection of natural resources rests on an inadequate scientific roadbed. By the time the potential collision over resources is apparent, it is often too late to avoid.

Id.

30. EARTH IN THE BALANCE, *supra* note 3 at 191 (quoting World Bank Environment Department Senior Economist Herman Daly).

31. *Global Players Position for U.S. Air Pollution Control Market*, ENVTL. BUSINESS J., Nov. 1991, at 2 (citing failure to manufacture to German air quality standards as the major cause of U.S. supplier's poor market penetration in that country).

32. *Id.* (noting that although the United States was the first country to develop an air pollution control industry, it was a visible and obvious target for foreign acquisition).

lion dollars for upgrading of technology at its fourteen sewage treatment plants. New York City will begin utilizing innovative nitrogen removal technologies, such as Ringlace, which was invented by an American who then sold it to a Japanese business, which today has developed and completely controls the technology.

Landfill technology is the one area in which we continue to dominate the global market. We make the best liners because we produce the most garbage and we produce the most toxic waste and then we do not recycle well. At least we have that niche. The rest of the world is going to need that technology and we are going to be marketing it to them over the next two decades. We used to dominate sewage treatment plant and energy conservation technologies ten years ago — not any more. The Japanese, the South Africans, the French and the Germans have pulled ahead of us.

The Europeans are going to spend 3.5 trillion dollars on environmental technology over the next six years. Our nation is going to spend 1.3 trillion.³³ Environmental technology has become *the single most important growth element* of the world economy.³⁴ We can't afford to be left out of that. We are losing jobs all over Westchester County, as General Motors and IBM scale down. The same is happening across the nation as giants like Boeing, McDonnell-Douglas, and the automobile industry watch their industrial dominance erode. By passing and enforcing strong environmental laws, we can insure that jobs lost in these industries will be replaced in part by the producers of environmental technology. We need to position ourselves to take advantage of this new industry. That is what our future is going to be. If you look at all the

33. See Roger H. Bezdek, *Environment and Economy: What's the Bottom Line*, ENVIRONMENT, Sept. 1993, at 6.

34. Christopher Flavin & John E. Young, *Shaping the Next Industrial Revolution*, in STATE OF THE WORLD 1993 180 (Lester R. Brown et al. eds., 1993) (citing THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE OECD ENVIRONMENT INDUSTRY: SITUATION, PROSPECTS, AND GOVERNMENT POLICIES (1992)). Flavin and Young conservatively estimate the worldwide market for environmental goods and services at \$200 billion in 1990, and note that the industry is expected to grow fifty percent by the year 2000, making environmental protection one of the world's fastest growing industries. *Id.*

areas of environmental law you will find the same story. We are still able to reposition, but we need to lay the basis with strict environmental laws and enforcement.

IV. Why Protect the Environment?

When we lose something like an estuary — when you extinguish a species or destroy a huge ecosystem like this — to me that is one of the worst sins that one generation could commit against another. And what does it say about our stewardship when half the species on the planet may become extinct during our lifetime alone? That is what we are looking at today — mainly because of habitat destruction. In particular, the most productive habitats on Earth — the tropical rain forests, the coral reefs, the boreal estuaries, and the salt water and fresh water wetlands — are all facing destruction.

What happens when we destroy those things? Clearly there are economic impacts; there are medical impacts; there are agricultural impacts. There are also cultural impacts. That is particularly true for our country because this country has a great connection to nature, greater than any of the major industrialized nations.

A. *The Roots of Our Nation*

The Europeans destroyed their wilderness a thousand years ago; we are still in the process of destroying the last of ours, yet our cultural and political institutions are still strongly rooted in nature. Frederick Jackson Turner, one of the nation's great historians, said that in America democracy came out of the forest.³⁵ Without the great wilderness and the natural areas that we have, we would not have the system of government or the American democratic ideal as it has developed in this country today. This theme has been echoed by our most visionary political leaders throughout this nation's history.

Thomas Jefferson was the architect of the American Constitution and the Declaration of Independence, and was a

35. See FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* (1920).

great naturalist. One of his first acts as President was to send Lewis and Clark out to the western regions of this nation to inventory the wildlife there; not just big commercial species like the bear, the elk, the beaver and the bison, but to collect insects and flowers and minnows because Jefferson saw that knowledge of our natural resources was a national security issue. Jefferson thought that if we were to know ourselves as a people, if we were to know what our national destiny was to be, we had to know as much as possible about the nature out of which we grew.

The Hudson has played an important part in defining these elements of the American character. Alexander Hamilton wrote the first Federalist Paper while he was on a Hudson River sloop. Jefferson and Madison founded the Democratic party, the oldest political party in the history of mankind, when the two came up the Hudson in 1789 on a botanical expedition to collect flowers and insects. Jefferson's notes about the journey are used as historical reference materials for the flora and fauna of North America. When they floated back down the river, they stopped in Manhattan, met with Aaron Burr and the Knights of Saint Tammany, and the Democratic party was formed. The modern architect of the Democratic party, Franklin Roosevelt, lived in Hyde Park on the banks of the river, and collected birds. He also was a great naturalist, and drew his inspiration from the abundance of the Hudson estuary in the same manner Washington had on the Potomac.

The Republican party is part of the same story. The modern paragon of Republican virtue is Teddy Roosevelt. Roosevelt was the quintessential naturalist. His books about the western mammals are still regarded as classics. He spent his latter days exploring the Amazon; he was the first one into Rondonia, one of the Brazilian states now burning. In fact, Roosevelt would have died there if his son Kermit had not insisted that the expedition go back to rescue him against his restless feverish request that he be left in the jungle to die. Today, the permanent inventory of the American Museum of Natural History houses Roosevelt's salamanders, pickled in formalin and alcohol, collected by him on the banks

of the Hudson River in Garrison, New York when he was a boy.

B. *The Artistic Documentation*

Our artists also saw nature as the critical defining element of American culture. We have two great schools of artists in this country: The Hudson River School — Thomas Cole, Frederick E. Church, Samuel F. B. Morris; and the Western artists — Remington and Russell. They painted portraits of nature in its wildest, of nature in the raw; their subjects were the powerful landscapes of Storm King, El Capitan, the Sierra Nevada Range, Yellowstone and the Adirondacks, Montana, Wyoming and the Black Hills. There are other historical schools of artists throughout the world that have painted nature. The British have their still lives, the French and Italians have agricultural scenes and their garden scenery, but that is “nature tamed.” The American artists painted nature in the raw because they saw that as the way to capture the American spirit and the American soul.

C. *Our Literary Legacy*

Our great writers, in their efforts to distill the American character, saw nature as a defining force of American life. Hawthorne described the dichotomy between the American wilderness and the first European settlers. The Puritans, in Hawthorne’s novels, loathed the forests and felt that they would descend into a kind of savagery if they dwelled there too long. They clung to European values, stockaded themselves along the coast and punished breaches of European morality, like the adultress in *The Scarlet Letter*, by banishment to the wilderness. Her daughter, born in the forest, is a delightful creature filled with joy, in contrast to the book’s other characters. In Hawthorne’s view, she is perhaps the melding of the European heritage and the American wilderness. A generation after the events described in that book, the great American writers, Emerson and Thoreau, having kicked off the traces of our European heritage, proclaimed that Americans who seek to hear the voice of God must go

into the forest and listen to the rustle of the leaves and the songs of the birds. The American soul, they believed, could best be seen in the mirror of Walden Pond.

Melville, who wrote what is still considered by many to be the great American novel, *Moby Dick*, describes the pursuit of the white whale by the whaling vessel *Pequot*, on which he placed a member of every race that was in America at that time. A college professor of mine taught that *Moby Dick* served as a metaphor for Jacksonian America. Andrew Jackson was our first true democratic American president. He broke with the aristocratic lineage that preceded him from Virginia and from Boston. He came from the heartland of our country, from the black hills of Tennessee with his mountain men and squirrel hunters, to transform the nation into the first "little person's" democracy.

Jackson was a very fiery character, the same as Captain Ahab in *Moby Dick*. *Moby Dick* starts off with the *Pequot* berthed in Nantucket Harbor. Something very odd is on the foredeck: an Indian tepee. Even those of you who aren't nautical types will recognize that you wouldn't normally find an Indian tepee on a boat. Inside the tepee, the owners of the ship met with Ahab and they explained to him what he should do on his journey. However, when they leave the harbor, Ahab, like Jackson, charts his own course to find the white whale, which serves as the symbol of the American soul. Melville does that — Jack London, Willa Cather, the poets Whitman and Frost — our great writers focus on nature as the critical formative element of the American character.

Even our language is drawn from nature. Emerson pointed out that if we were raised on a moonscape our language would likewise be barren because so many of the words and descriptive terms that we use are drawn from nature. If you talk to indigenous or agricultural peoples or if you could go back in time, language becomes more and more picturesque. If you go all the way back it becomes poetry. Just a series of symbols, all of them taken from nature. We do that today. We say gentle, we think of lamb; we say cunning, we think of fox. Emerson pointed out that every word that we

have in the English language that expresses a moral fact or spiritual fact is taken from nature. The word "right" is taken from a word that means straight. The word "wrong" is taken from a word that means gnarled and twisted. The word "spirit" is taken from a word that means wind.

D. *Our Spiritual Challenge*

Our connection with Nature has been recognized by great moral teachers throughout the history of mankind. The pagans, like Aesop, used allegories and parables and fables to teach us what the face of God looks like, and what the difference is between right and wrong. All over the world the experience is the same³⁶ — from Aesop's fables to C. S. Lewis, who is a great Christian theologian . . . to Buddha, Confucius, the Old Testament where the seminal events are the Garden of Eden and Noah's Ark, and the New Testament where Christ is born in a manger surrounded by animals and later finds divinity during 40 days in the wilderness communing with nature. The parables of the New Testament are almost all drawn from nature: "I am the vine — you are the branches," the mustard seed, the little swallows, the fig tree, etc. Christ maintained his connection with truth and his credibility with the people by constantly returning to nature and its universal truths.

I talked to Thomas Berry, a Catholic priest living not far from here who does a lot of thinking about the environment.³⁷ I challenged him with one of the most difficult episodes in the

36. See Joseph W. Meeker, *The Assisi Connection*, WILDERNESS, Spring 1988, at 61. The author notes that stewardship was a prominent theme at a 1986 World Wide Fund for Nature conference at the Basilica of St. Francis of Assisi in Italy. The five largest world religions—Buddhism, Christianity, Hinduism, Islam, and Judaism—were represented and "each offered its own perspective on the relationship between mankind and nature, and these have since been published as *The Assisi Declarations*." *Id.*

37. Father Thomas Berry is a renowned theologian, philosopher, cultural historian, and author. He has written extensively espousing a new theology, reconciling the human species' negative impacts on the global environment. "We must reapply for admission to the biosphere," he has said, and this time recognize that the "universe is a communion of objects, not a collection of objects." Michael McAteer, *Here God Lives in Nature*, TORONTO STAR, Aug. 10, 1991, at F9. Father Berry's most noted works are *THE DREAM OF THE EARTH*

history of environmental advocacy — the snail darter case.³⁸ Why did we allow a two-inch fish, with no economic significance and hardly any *ecological* significance, to hold up a multi-million dollar dam project that would have provided energy and jobs to a region of this country that badly needed it? His response was that if we lose a single creature we lose part of our ability to sense the divine, to understand who God is and therefore what our own potential is as human beings. That thought is the foundation of almost every religious tradition in the history of mankind and my own Christian tradition.

One of the seminal events after the birth and death of Christ was the conversion of St. Augustine, who drew the blueprint for modern thoughts about Christian theology, good and evil, how we conceive of God and how we worship. His conversion took place while he was sitting in a Milan garden with his mother, St. Monica. The two of them were drawn up in a religious revelation outside of the universe. As they rose, they said they heard all the creatures of the planet singing the song of creation: “We did not make ourselves, but we were made by God.”³⁹ He understood at that moment that these creatures were not put here simply for us to destroy or to devour or to consume for our biological needs. They were put here as companions for us to teach us something about the nature of humility and about the nature of being created beings.

Five hundred years before St. Augustine’s time, St. Paul said “We know the invisible God by looking at visible nature.” Eight hundred years afterwards St. Thomas Aquinas said “You can know something about God by looking at a single flower, but if you want to sense the Divine Majesty you have

(Sierra Club Books, 1988) and *THE UNIVERSE STORY* (Harper Collins, 1992) (co-authored with physicist Brian Swimme).

38. *TVA v. Hill*, 437 U.S. 153 (1978). The presence of the snail darter (*Percina tanasi*) halted the \$120 million dollar Tellico Dam project. Congress eventually granted an exemption and the project was completed. The species was later discovered in other habitat in the region, unaffected by the dam. See Linda Valdez, *Looking Beyond the Snail Darter*, *THE QUILL*, Apr. 1992, at 45.

39. See Michael J. Himes & Kenneth R. Himes, *The Sacrament of Creation: Toward an Environmental Theology*, *COMMONWEAL*, Jan. 26, 1990, at 44.

to look at the interwoven fabric of nature in all its complexity."⁴⁰

V. Unravelling the Web of Life

Today, as we remove threads from that fabric, and as the patchwork begins to fall apart, we begin to lose our ability to sense the divine. That is a cost that I don't think is prudent for us to impose upon ourselves. I don't think that we have the *right* to impose it upon our children.

When I go into a courtroom, or when I am sitting across the table from polluters, it is often difficult to work a lot of this into the conversation. These realities are not currencies that we are accustomed to dealing with in our legal system, in our political system, or in our business community. Our job as environmental lawyers is to make these themes part of the common currency. Because even though the value of these ideals is not always easy to measure in dollars and cents, they are critical to our survival and to our humanity.

Nature we preserve for ourselves because it enriches us. When we destroy it we are diminished not only economically, but in our ability to imagine. That is a cost that we are imposing upon our children. There is an old Lakota saying which most people at Pace have heard. It says: "We don't inherit this planet from our ancestors, we borrow it from our children."⁴¹ And I would add — if we don't return to them something that is roughly the equivalent of what we received, they'll have the right to ask us some very difficult questions. And what will our answers be?

40. See Patrick Halligan, *The Environmental Policy of St. Thomas Aquinas*, 19 ENVTL. L. 767 (1989). The author discusses the philosophy of Nature of St. Thomas Aquinas and applies Thomistic theories to modern ethical considerations and environmental jurisprudence.

41. See, e.g., Bob Sipchen, *Call of the Wilds*, L.A. TIMES, Nov. 11, 1992, at E1.