

Building an Environmental Ethic from the Ground Up

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INTRODUCTION

Over the last twenty years there has been a remarkable theoretical flourishing in the field of environmental philosophy, with the development of biocentric ethics, animal rights theories, deep ecology, ecofeminism, modified utilitarianism, moral pluralism and theories drawing on numerous religious and cultural traditions.¹ These theories explore the intellectual and moral causes for the environmentally destructive practices of the dominant western industrial and economic culture, and propose alternatives that might avoid these consequences. This symposium raises a worthy question: to what extent have these theories had practical impact on environmental law and policy. I come to this question as a lawyer and not a philosopher. My interest in environmental philosophy has grown out of the belief that environmental law cannot and will not succeed unless there is strong public commitment to conserving nonhuman nature. Therefore, I am convinced that environmental law will not endure or have lasting effect unless environmental philosophy does indeed come down to earth successfully to affect how people view the world. Several of the participants in this symposium have contributed over the years to the important work of trying to ensure that this happens.² I will argue that this work is vitally important for the future of environmental law as well

¹ The literature in the field cannot be adequately summarized in a footnote. Some of the early leading works articulating these various theories are: J. BAIRD CALLICOTT, IN DEFENSE OF THE LAND ETHIC: ESSAYS IN ENVIRONMENTAL PHILOSOPHY (1989); BILL DEVALL & GEORGE SESSIONS, DEEP ECOLOGY: LIVING AS IF NATURE MATTERED (1985); DHARMA GAIA: A HARVEST OF ESSAYS IN BUDDHISM AND ECOLOGY (Allan Hunt Badiner ed., 1990); BRYAN G. NORTON, TOWARD UNITY AMONG ENVIRONMENTALISTS (1991); JOHN PASSMORE, MAN'S RESPONSIBILITY FOR NATURE: ECOLOGICAL PROBLEMS AND WESTERN TRADITIONS (1974); TOM REGAN, THE CASE FOR ANIMAL RIGHTS (1983); REWEAVING THE WORLD: THE EMERGENCE OF ECOFEMINISM (Irene Diamond & Gloria Feman Orenstein eds., 1990); HOLMES ROLSTON III, ENVIRONMENTAL ETHICS: DUTIES TO AND VALUES IN THE NATURAL WORLD (1988); PETER SINGER, ANIMAL LIBERATION (2d ed. 1990); CHRISTOPHER D. STONE, EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM (1987); Arne Naess, *The Deep Ecology Movement: Some Philosophical Aspects*, 8 PHIL. INQUIRY 10 (1986). See Clare Palmer, *An Overview of Environmental Ethics*, in ENVIRONMENTAL ETHICS: AN ANTHOLOGY 15 (Andrew Light and Holmes Rolston III eds., 2002). The quarterly *International Society for Environmental Ethics Newsletter* contains a comprehensive ongoing bibliography. Several journals, including *Environmental Ethics*, are major sites of ongoing academic dialogue about environmental ethics.

² See STONE, *supra* note 1; NORTON, *supra* note 1; DANIEL A. FARBER, ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD (1999); BRYAN G. NORTON, SEARCHING FOR SUSTAINABILITY: INTERDISCIPLINARY ESSAYS IN THE PHILOSOPHY OF CONSERVATION BIOLOGY; LAURA WESTRA, AN ENVIRONMENTAL PROPOSAL FOR ETHICS (1994).

as for the success of environmental philosophy itself.

In Part I, I contend that the American public lacks a coherent account of the values we pursue under our current environmental laws. In place of analysis, the public tends simply to equate environmental law with environmental values. The assumption that our laws are environmental in the sense that they reflect environmental values is dangerous and incorrect.³ This incoherent popular assumption about our environmental laws both undermines efforts to reform environmental law and impedes the ongoing development of environmental ethics among the public. In response, I suggest some ways in which the conceptual work done by philosophers can and should be deployed to advance public thinking about environmental values and ethics, and ultimately, environmental law. An important first step is to employ concepts drawn from environmental philosophy to analyze our current laws and policies.

Part II suggests that philosophers and legal scholars can also help to bring philosophy down to earth by developing "stepping stones" for those who seek to modify the ethics embedded in our current laws and policies. I use the term "stepping stones" to invoke concepts that represent marginal or gradual change from the dominant human-centered utilitarian ethical framework, as opposed to radically divergent theories of environmental ethics, such as a biocentric intrinsic value theory. I posit that work to develop enlightened variants of human-centered utilitarian ethics may bridge the realms of philosophy and law. Such concepts can transform the ethics of the American public. One essential precondition, if environmental philosophy is to take root, is that people understand why environmental ethics matter on the ground. The creation of stepping stones will help people to see the significance and relevance of ethical issues to environmental law and policy.

To illustrate, I explore how sustainability, while not a coherent environmental ethic, shows promise as a stepping stone. I describe six attributes of sustainability and explore how sustainability serves to highlight key ethical issues and to provide a logical "next step" for those dissatisfied with the ethics embedded in current law and policy. Involvement by philosophers and legal scholars in shaping concepts like sustainability can help ensure that these concepts do not become

³ An important function of law is to codify widely shared values. "Like any other system of laws, environmental legislation importantly articulates and enforces norms that society holds in high value..." Sheila Jasanoff, *Law, in A COMPANION TO ENVIRONMENTAL PHILOSOPHY* 344 (Dale Jamieson ed., 2001). The problem I highlight is the misperception or lack of clarity about the values articulated and enforced in practice under our laws.

meaningless slogans. Work at the intersection of environmental law and philosophy may fill an important gap, ensuring that law and philosophy both fulfill their promise.

I. UNEARTHING THE ETHICS EMBEDDED IN ENVIRONMENTAL LAW

A. *Where Are We Headed?*

As the new millennium dawned, we found ourselves awash in environmental law.⁴ In the three decades since the first Earth Day, we have moved from outrage over unacceptable environmental impacts of otherwise legal activity to acceptance that a distinct body of law addressing these impacts is necessary. This consensus and body of law reflect apparent agreement to change the way we were doing business in order to better account for impacts on the environment and human health.

This overwhelming consensus calls to mind an image from one of my favorite websites: www.despair.com. What this site sells is the antithesis of the motivational posters one sees on the walls of some businesses and gyms: glossy photos of mountain climbers scaling a peak or of teams of people accomplishing some impressive feat. The Demotivators™, as they are called, show the usual photos, but have titles like "Get to Work" (with the motto "You aren't being paid to believe in the power of your dreams").⁵ One of these posters captures well why I believe that environmental philosophy has an important role to play in the long-term success of environmental law. This Demotivator™ features a crew team of four rowers in a quad, gliding across flat, gleaming water, their backs to their destination, their oars in perfect unison. Instead of an inspirational heading such as "Teamwork" or "Balance," the title is "Ignorance." The motto beneath reads, "It's amazing how much easier it is for a team to work together when no one has any idea where they're going."⁶

How does this relate to environmental philosophy and law? I start with the premise that in many ways, our society has been working effectively to support environmental protection. We have been rowing

⁴ I use the term environmental law to describe the vast realm of law, largely statutory in basis, that addresses human actions affecting the rest of the natural world. Thus it includes both natural resources law and pollution control law.

⁵ <http://www.despair.com/gettowork.html> (last visited Sept. 16, 2003).

⁶ <http://www.despair.com/ignorance.html> (last visited Sept. 16, 2003).

in unison, a majority consistently supporting environmental laws to protect human health and the environment.⁷ And we now have an amazing architecture of environmental law and policy, of state and federal law, of agencies and programs. But like this crew team, I think that underneath our successful veneer of broad unified support for environmental laws and policies, few among us really know where we are going.

B. How Have We Come So Far Without Knowing Where We Are Headed?

One reason for our ignorance about what values our laws advance is the assumption that we all know what values environmental laws protect and the justification for doing so. Environmental law was developed in response to the public perception that human health and the environment were inadequately protected. Because environmentalism was and is so widely viewed as a good,⁸ we lack a nuanced discourse about what it means. Most people assume that our laws are “environmental” because they embody environmentalism or some set of environmental values, not just because they deal with the environment as a topic. Too often we assume that environmental law is a pure reflection of “environmental” values as opposed to other human values. This assumption is only partly correct. It is true that these laws likely incorporate our strongest commitment to values that have a claim to being called “environmental.” But the assumption that there is a known set of values associated with these statutes, values that are

⁷ For example, in polls taken over the period 1973-1994, a majority of those polled consistently believed that government had too little or about the right amount of involvement in environmental protection and that regulation had either struck about the right balance or not gone far enough. See EVERETT CARLL LADD & KARLYN H. BOWMAN, *ATTITUDES TOWARD THE ENVIRONMENT: TWENTY-FIVE YEARS AFTER EARTH DAY 22-23* (1995). In a 1994 survey, 76% of those polled supported government regulation to protect the environment, “even if it interferes with businesses’ right to make their own decisions.” SUSAN MITCHELL, *THE OFFICIAL GUIDE TO AMERICAN ATTITUDES* 101 (1996).

⁸ Not all may view it as positive, but few people express negative views. In Gallup polls taken in 1989, 76% of Americans polled considered themselves “environmentalists.” In 1999, this number had dropped to 50%. http://www.publicagenda.org/issues/pcc_detail.cfm?issue_type=environment&list=5 (last visited Mar. 11, 2003). A recent poll found that 12% of Americans polled identified themselves as active environmentalists and 61% identified themselves as sympathetic toward environmental concerns but not active. Twenty percent identified themselves as neutral. Only 7% were unsympathetic (5%) or didn’t know (2%). Belden, Russonello & Stewart, *Americans and Biodiversity: New Perspectives in 2002*, 11 (Feb. 2002). By a two-to-one margin, Americans who were polled stated that they believe environmental protection is more important than producing energy. William H. Meadows, Letter to the Editor, *The Environment: Fight the Tide*, N.Y. TIMES, Dec. 2, 2002, at A20, available at LEXIS.

accurately captured by the muddy adjective "environmental," may be a convenient and dangerous illusion.⁹

In reality, we may have little idea as to what values we are protecting through our laws, and our rationale for doing so.¹⁰ My concern is that unless we develop a better sense of where we are headed, we may find out too late that we do not like the destination we are headed for.¹¹ Ignorance of the course we are following may permit environmental law to evolve in a direction inconsistent with our values, whatever those values may be, as individuals and as a society. Environmental ethics has a key role to play in helping us to better understand just where we are headed.¹²

⁹ This lack of clarity about what values are "environmental" is related to the conceptual void that the term "environmentalism" currently masks. See JOSEPH M. PETULLA, *AMERICAN ENVIRONMENTALISM: VALUES, TACTICS, PRIORITIES* 97-118 (1980) for a discussion of the various views and values expressed through the environmental movement. Robert C. Paehlke, in *ENVIRONMENTALISM AND THE FUTURE OF PROGRESSIVE POLITICS* 144-45 (1989), outlined thirteen central value assertions of environmentalism, but acknowledged that not all environmentalists share all the values he identifies. His list, derived from actions and writings of active environmentalists, would be a useful starting point for discussion but is not a widely accepted understanding of what values are "environmental." Paehlke's list reflects a strong version of environmentalism.

¹⁰ One might contest the need for clarity and conceive of environmental law as a stage upon which a dynamic struggle occurs among a broad array of values. I reject this as an adequate model for environmental law because such a struggle would necessarily be undemocratic — one conducted by experts who can master the technical details, with major shifts in embedded values subject to only superficial public scrutiny. One might characterize the debate over tax policy in such a way. It produces a massive rambling record of battles over social values won and lost, impenetrable to the ordinary individual. However, tax law may be conceived of as a body of law focused on one set of tools that can be deployed to advance many different social values, rather than a body of law developed to focus on a particular set of values. I believe that a similarly limited conception of environmental law sacrifices its promise and potential as a body of law developed to incorporate important values previously excluded from our law and policy.

¹¹ By describing it as a destination, I do not mean to suggest that we have or should have a single ethic that animates environmental law. Environmental law may function well and be congruent with the majority's will without having a single identifiable ethic. My concern is that whatever mix of ethics and values is embedded in the laws be known and articulated so that the public and decisionmakers can better determine their views on reform of existing law. I advocate more work to identify that mix of values and the relative priority accorded these values, whether by design or merely in practice. The goal is to identify the dominant ethics that emerge as compatible with our laws.

¹² My focus in this paper is on the values our society advances by the adoption and implementation of environmental laws (the values embedded in laws) which should be distinguished from two other related but distinct topics: the values and ethics held by individuals (individual ethics), and the values and ethics held by the public taken in the aggregate (societal values). I argue that a focus on the former — the values embedded in laws — is lacking and advocate work on this topic by scholars of environmental law and philosophy. Study of the latter two topics — individual and societal ethics — is the

To illustrate the challenge, consider the protection of wetlands under Section 404 of the Clean Water Act.¹³ What are the values that this important law advances? One of the key regulations that implements Section 404 includes a long list of factors that must be considered in deciding whether to fill a wetland.¹⁴ It is an impressive and varied list. One might dismiss the need for further inquiry, concluding that this list tells us all we need to know about the values embedded in Section 404 as implemented. But to identify accurately the values that Section 404 advances would require that we study how the law and regulations are applied, not just how they appear on paper.¹⁵ In practice, not all of the

province of sociologists, pollsters, environmental psychologists and environmental philosophers, who have done significant work already to shed light on these subjects. Such work is distinct from the project I describe, but can serve as an important complement for the work I propose. Although my goal is not to undertake or advocate work on these latter topics, a more rigorous discourse on the values embedded in law may ultimately lead to greater clarity in the discourse about individual and societal ethics. Thus, the quest to identify the values embedded in laws may contribute indirectly to the evolution of individual and societal ethics.

¹³ 33 U.S.C. § 1344 (2003).

¹⁴ The regulation setting forth the Army Corps of Engineers' public interest review test states:

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

33 C.F.R. § 320.4(a)(1) (2001).

¹⁵ Moreover, there are many other regulations, inter-agency memoranda, policies and statutory sections that operate in conjunction with this regulation that would need to be

factors mentioned in the regulations are considered equally. The data an agency would need in order to consider some of these values may be virtually impossible to obtain or cost-prohibitive. Other factors that affect the law's implementation, such as budget or enforcement policy, may in practice be dispositive. Moreover, it is not always clear what values a particular factor advances. For example, what values are advanced or promoted by considering "general environmental concerns?"

Thus, it takes a concerted effort to identify what values we are pursuing under our laws. It requires that we wade through the analysis required under the relevant statutes and regulations for a start. Then, we need to look at how the regulations are applied and interpreted by agencies and courts, to determine whether some values are systematically favored, while others are protected in name only. Lawyers and legal scholars already typically engage in this type of analysis, but only up to a point. We study how the laws, regulations, and policies are interpreted and applied, and analyze whether agency and court decisions are based on sound reasoning. What I am suggesting is that this analysis needs an ethical dimension — a translation of what happens under the law into the language of values. The challenge such a task presents is that it demands work across the boundary that divides law and philosophy. Both philosophers willing to delve into environmental law and legal scholars interested in environmental ethics will need to forge the path for this work.

The missing analysis would seek to determine what values and ethics are embedded in Section 404. I have suggested that we need a detailed and systematic analysis.¹⁶ Some may challenge the notion that detailed work is really necessary. For example, those familiar with Section 404 or with environmental philosophy might be willing to forgo a close analysis and offer as adequate the following general characterization: that Section 404 reflects predominantly a human-centered and utilitarian ethic — that, *in general*, Section 404 employs a balancing designed to maximize human good. For purposes of considering whether detailed analysis is really necessary, let us assume that this characterization is generally correct, in this sense: that the values Section 404 advances are more consistent with a human-centered utilitarianism than with any

considered.

¹⁶ See Alyson C. Flournoy, *In Search of An Environmental Ethic*, 28 COLUM. J. ENVTL. L. 63, 83-103 (2003) for a survey of the work done by legal scholars and philosophers in recent years, how it may contribute to such a systematic project, and a discussion of the work that remains.

other coherent ethic (environmental or not) that we can identify. Even if this is an accurate generalization, there is a fundamental problem with relying on this general characterization as a statement of the ethic of Section 404. By virtue of its effort to capture Section 404 in the abstract vocabulary of pure philosophy, this characterization is misleading.

If we look more closely at Section 404, it is quickly apparent, that as applied, the section incorporates a very incomplete calculation of "the good." Rather than reflecting a pure and perfect utilitarianism, it reflects what I call a bounded and imperfect utilitarianism. By these qualifiers, I mean that the analysis is demonstrably inadequate on numerous scores. If one imagines a utilitarian calculus that incorporates the insights of ecology as perfectly as is humanly possible, that is not the utilitarian calculus we are currently performing.¹⁷ Our assessment of the benefits provided by wetlands is severely constrained by data gaps as well as by the limits of our understanding of complex natural systems. This is no surprise to most who study environmental law. Critiques that highlight the flaws of available analytic techniques are core contributions of legal scholarship.¹⁸ But I submit that we lack and need analysis that does more than identify the flaws in regulatory and judicial decisions. We need to refocus our attention away from the consistency and completeness of regulatory and legal analysis, and onto the values advanced by the flawed analytic techniques as they exist. We need a language to express this, to describe the mix of values that actually emerges from the flawed utilitarian calculus that our laws so often embrace. This demands a new vocabulary, one that belongs neither to philosophy nor to law.¹⁹ Philosophers can make a significant

¹⁷ Beyond the often noted exclusion of hard-to-quantify values of the environment, the exclusion of values like fairness and justice for systematically underrepresented groups like the poor and people of color also distorts the utilitarian calculus used under our statutes. See Clifford Rechtschaffen, *Advancing Environmental Justice Norms*, 37 U.C. DAVIS L. REV. 95 (2003), simultaneously published in 27 ENVIRONS ENVTL. L. & POL'Y J. 95 (2003).

¹⁸ Specific critiques have effectively highlighted the inadequacies of utilitarian analyses under a wide array of statutes as implemented. See, e.g., Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981 (1998); Oliver A. Houck, *The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. COLO. L. REV. 773 (1989); Kristen S. Shrader-Frechette, *Environmental Justice and Procedural Safeguards: The Ethics of Environmental Restoration*, 42 ARIZ. L. REV. 525 (2000); Kristen S. Shrader-Frechette, *Academy Recommendations on the Proposed Yucca Mountain Waste Repository: Overview and Criticisms*, 8 RISK: HEALTH, SAFETY & ENV'T 25 (1997). Here I argue for the value of moving beyond a technical critique to identify the ethical implications of the bounded and imperfect utilitarian approach.

¹⁹ In his 1991 book, *TOWARD UNITY AMONG ENVIRONMENTALISTS*, Bryan Norton commented on the absence of an accepted vocabulary for discussing environmental values and focused on developing a common vocabulary that captured the shared elements of

contribution by helping to develop this vocabulary, and lawyers and legal scholars can contribute by using it.²⁰ The work to uncover and articulate the values embedded in our laws represents a significant challenge that will require thinking that transcends disciplinary boundaries — work and discussion fostered by symposia like this one.

C. *What Can We Gain from Unearthing the Ethics in Environmental Law?*

Having described the type of work I advocate, let me turn to the question of its worth. Why do we need a better understanding of the values embedded in our laws? Why do we need to be able to accurately describe the mix of values that Section 404 tends to protect? I contend that the public and decisionmakers need a better sense of our current bearings in order to validate or invalidate popular assumptions. Consider the portrait of Section 404 offered above: let us assume for a moment that the most accurate description of the ethic embedded in it is a bounded and imperfect human-centered utilitarianism — in other words, a utilitarianism that does not fully account even for the total value to humans of wetlands. Contrast this with the public narrative we tell about Section 404. Section 404 is widely viewed as one of the brightest stars of the environmental law constellation. And rightly so. Wetlands have what we might call “most-favored-ecosystem” status under our legal regime, while many uplands ecosystems are left relatively unprotected. But the fact that Section 404 is one of our stronger environmental laws does not mean that it reflects any uniquely environmental values or a unique way of valuing the environment. Yet, the public narrative may reinforce the assumption that environmental law is a pure reflection of some indistinct but noble set of environmental values. This may contrast with the reality that our laws, like Section 404,

environmentalists’ worldviews. NORTON, *supra* note 1, at 6, 92. Norton’s goal was to study how despite differing worldviews, environmentalists often were in fact in agreement about their objectives on major policy issues. *Id.* at 90. Although my goal here is slightly different — to find a language that accurately captures not individuals’ worldviews, but the values embedded in our law and policy — a common vocabulary might serve both purposes. Like the worldviews Norton sought to capture, the mix of values embedded in our laws and their justifications are somewhat messy and not necessarily coherent. *See id.* at 93.

²⁰ Some of the challenges this work will entail and the need for this work is described in Flournoy, *supra* note 16, at 83-88. One interesting problem about creating such a vocabulary is that it needs to be a shared vocabulary used systematically in law and policy discourse. While academics in law and philosophy are those most likely to develop a workable language, the culture of academia prizes individual achievement — atomistic contributions. In contrast, to be effective, this vocabulary must be agreed on and widely used. Almost by definition, it will need to result from a collaborative effort.

often protect a wide array of very traditional human values, and uniquely environmental values or ethics are at best only partially reflected.

What if this is true broadly? What if the values protected by our environmental laws are human values that differ only slightly from the values protected by the common law of nuisance, cloaked in the appealing veil of environmentalism? It is possible that instead of an identity between the values in our laws and those held by the public, there is a significant disjuncture.²¹ At present, I contend that it is difficult for an expert, let alone a lay person, to know if this is the case.

Such ignorance can interfere with democratic participation. The easy equation of environmental laws and environmentalism, which is reinforced by our inability to describe accurately the values of our laws, discourages serious public discourse about why we care about the environment. If we do not ever consider or discuss as a society what we value and why, we are like the rowers I described at the start: backs into the wind, rowing in unison with no idea where we are headed, but convinced it is where we all mean to go. A clearer picture of the embedded values can correct any erroneous assumptions and validate accurate ones. Moreover, the discourse involved in providing a more accurate account of the values protected by our laws may promote wider attention to the ethical questions, challenging people to consider why they support environmental protection.

Thus, I propose that legal scholars and philosophers work to enhance public understanding of the values embedded in our laws. When members of the public are confronted with a clearer picture of what values are advanced by our current laws and policies, they can determine whether or not these laws comport with their ethical intuitions. If they find that the laws are consistent with their ethical intuitions, we will have a stronger public commitment to support existing laws. If not, the public can support efforts to reform the law in any direction — to enhance protection of non-environmental human values like autonomy or to enhance protection of the social or intrinsic

²¹ I do not assume that the values embedded in law are now or ever will be a perfect reflection of any one individual's ethics, nor of the values held by the majority. But in general, if our representative democracy is functioning, our laws should evolve in a direction that favors the values held by the majority, with concessions to prevent oppression of the minority and erosions of fundamental liberties. Therefore, an understanding of the values that our laws advance seems a valuable tool to aid the public and lawmakers to determine how well our democracy is functioning in the realm of environmental law and policy.

value of the environment, as they see fit.

Beyond the democratic benefits of better public understanding of the values advanced under our laws, this work is important to the long-term efficacy of environmental law and policy. Engagement with environmental issues by the public and changes in individual and civic behavior will only result if we care about something at stake. If, as I suggest, the American public lacks clarity about what it values about the environment, then the public is less likely to be engaged and responsive on issues of environmental policy. As philosopher James Rachels explains, in describing where ethical argument leads us:

As Hume observed, when we come to the last reason, we mention something we *care* about. Nothing can count as an ultimate reason for or against a course of conduct unless we care about that thing in some way. In the absence of any emotional involvement, there are no reasons for action. The fact that the building is on fire is a reason for me to leave only if I care about not being burned; the fact that children are starving is a reason for me to do something only if I care about their plight.²²

In short, unless we have a sufficient grasp both of our own values and of how a law or decision or action affects something we care about, we will not respond. The process of gaining clarity, of discussing the values at stake, may itself promote more reasoned thinking.²³ Deliberation may promote ethical development.²⁴ One does not need to know how

²² James Rachels, *Can Ethics Provide Answers?*, in APPLIED ETHICS AND ETHICAL THEORY 3, 20 (David M. Rosenthal & Fadlou Shehadi eds., 1988); see also Holly Doremus, *Shaping the Future: The Dialectic of Law and Environmental Values*, 37 U.C. DAVIS L. REV. 233 (2003), simultaneously published in 27 ENVIRONS ENVTL. L. & POLY'Y J. 233 (2003).

²³ "What people care about is itself sensitive to pressure from the deliberative process and can change as a result of thought Someone might not care very much about something before he thinks it through, but come to feel differently once he has thought it over Aristotle, Butler, and others emphasized that responsible moral judgment must be based on a full understanding of the facts; but, they added, after the facts are established a separate cognitive process is required for the agent to understand fully the import of what he or she knows. It is necessary not merely to know the facts, but to rehearse them carefully in one's mind, in an impartial, nonevasive way. Then one will have the kind of knowledge on which moral judgment may be based." Rachels, *supra* note 22, at 21.

²⁴ Rachels points out that we may "know" the facts about a problem, but be like Aristotle's "drunkard reciting the verses of Empedocles," but without understanding their meaning," *id.* at 21, in contrast to a person who has thought carefully about what one knows. Rachels gives the example that all of us know there are starving children in the world. Yet we will spend money on trivial things for ourselves rather than to help ensure there is food for them. But when something shows us vividly what it must be like to be a starving orphan, such as a picture or story in the paper, many people are suddenly moved to action. It is not just new information that they have received — surely they knew that

deliberation might affect Americans' views on environmental values, to believe that greater thought and attention to these issues is a desirable end in itself.

Because there is ultimately no reason for any action, nor for law that regulates action, unless we care, environmental philosophy matters for environmental law. The steady support for increased regulation to limit our impact on the environment over the past thirty years suggests that American society does care about some values associated with the environment. If we are to change our current pattern of conduct with regard to the environment — including our action through government — we need both information and motivation to deliberate. Several characteristics of environmental problems — their technical complexity, the scientific uncertainty and extremely long time horizons attending them, and the wide array of values they engage — discourage clear thinking about the relevant values. The possibility that a majority may wish to change our current patterns makes the effort to clarify our thinking about why we care worthwhile.

A last point about the importance of identifying our laws' underlying values relates to the greatest long-term challenge for environmental law and environmental ethics: reconciling our valuing of the environment with other values that may be incompatible in a given case. This is a challenge many environmental philosophers recognize and wrestle with, and one brought home to environmental lawyers by the rise of the property rights movement beginning in the 1980s.

As I suggested with reference to Section 404, it appears that we generally do embrace a wide range of human values in our environmental laws,²⁵ but our narrative about environmental laws does not reveal that. At present, environmental laws are perceived as a blunt counterweight to other human values. Although it is true that some legislation recognizes values beyond traditional human values, the narrative that environmental laws *exclude* other human values is a powerful and misleading claim that facilitates attacks on environmental laws.²⁶

there were people in such situations. *But they were moved to think about the implications and then to act.* Rachels, *supra* note 22, at 21-22; *see also* Doremus, *supra* note 22.

²⁵ See Flournoy, *supra* note 16, at 104-07 for a further elaboration of the many traditional human-centered values weighed under the Corps of Engineers and EPA regulations under Section 404 of the Clean Water Act.

²⁶ This is true in the field of natural resources law, but less so in the realm of pollution control law, where protection of human health is often clearly a paramount value of regulation. Thus, in pollution control regulation, the values advanced by the laws and why we care about them are more commonly understood. The ethical conflict is typically

Restoration of the Everglades, an eight billion dollar project most would identify as serving purely “environmental” values, provides a good example of the inaccuracy of this story. In reality, the bipartisan support for federal funding of the largest and most ambitious restoration project ever reflected a broad coalition that sought to advance a wide range of values. The restoration of the natural system — of the sheet flow that is the lifeblood of this wetland ecosystem — was spotlighted. But other values — specifically an adequate supply of drinking water to support expanded population and development in South Florida — were also prominent in the restoration plan.²⁷ This conflict of values at the core of the project has caused and will cause serious tension.

For example, the pressure to experiment on a large scale with controversial technology for storing water, such as Aquifer Storage and Recovery, was driven partly by development needs, which vastly expanded the quantities of water that had to be restored.²⁸ Similarly, the failure to explore some alternatives that would be ecologically preferable reflects a valuing of existing and potential human uses of the historic Everglades for agriculture and development. Acknowledging more openly that humans are part of the equation — without pretending that every equation that includes humans and the environment is a win/win situation — is an important step.²⁹ I am not suggesting that it is bad to consider human needs alongside other values. To the contrary, I am suggesting it is unavoidable. Concealing these more mundane and, to some, less palatable values under the appealing guise of environmentalism may not promote the best decisions or ethical engagement with the real issues by the public.

The task of uncovering the ethics embedded in our laws may represent a significant challenge that no one person or discipline can hope to remove from the path of environmental law and philosophy. Work across disciplinary boundaries, fostered by symposia like this one, will be crucial. But a first step is to identify the challenge, and to address the problem by developing a better account of what values we are pursuing through implementation of our environmental laws. Given the public’s

framed as one that pits human well being (represented by health) against autonomy and human well being (represented by economic opportunity or jobs.)

²⁷ The political success of the effort to secure federal funding to support restoration reflected the strength of this unusual coalition. See Mary Doyle, *Implementing Everglades Restoration*, 17 J. LAND USE & ENVTL. L. 59, 61-62 (2001).

²⁸ Michael Grunwald, *A Rescue Plan, Bold and Uncertain: Scientists, Federal Officials Question Project’s Benefit for Ailing Ecosystem*, WASH. POST, June 23, 2002, at A1.

²⁹ On the dangerous allure of win-win, see William H. Rodgers, Jr., *The Myth of Win-Win: Misdiagnosis in the Business of Reassembling Nature*, 42 ARIZ. L. REV. 297 (2000).

significant interest in environmental issues and identification with environmental values,³⁰ detailed accounts showing the values that our laws actually protect may usefully refocus the debate. A clearer picture of the ethics we currently advance through our laws can provide landmarks from which to navigate as we move forward.³¹

II. BUILDING AN ETHIC FROM THE GROUND UP

Having suggested a first necessary step towards bringing environmental philosophy down to earth, let me turn to a second step: what I call building an ethic from the ground up. It may help to think of this in contrast to Professor Stone's study.³² His very interesting and useful investigation looked to see if environmental ethics had influenced or motivated key decisionmakers — legislators and judges — in shaping our laws. In other words, he was looking to see if environmental ethics had entered the legal system from the top down. As he reported, there was very little sign that it had. In contrast, my inquiry focuses on how ideas from environmental philosophy may start to inform thinking about environmental issues from the ground up, among the public. This is a slow process at best, but one that is important to a fully informed debate about our future.

To describe this process, I will rely on a generalization about the dominant ethics embedded in our environmental laws: I will assume that most of our environmental laws, as implemented, reflect predominantly an ethical impulse that is both anthropocentric and utilitarian.³³ Not all our laws are entirely consistent with a purely utilitarian ethic.³⁴ There are standards and provisions of our laws that incorporate values in ways that may be compatible with recognizing nonhuman nature's intrinsic value. But I will assume that the ethical core of our environmental laws, as implemented, emphasizes human

³⁰ See *supra* note 8.

³¹ In the hopes of provoking discussion about how this work might proceed, I have described one way to achieve these goals through application of concepts drawn from philosophy in the context of legal analysis. Flournoy, *supra* note 16, at 103-08. That description also highlights the significant challenge of building a common vocabulary to capture the diverse reasons for caring about the environment. *Id.* at 83-88.

³² Christopher D. Stone, *Do Morals Matter? The Influence of Ethics on Courts and Congress in Shaping U.S. Environmental Policies*, 37 U.C. DAVIS L. REV. 13 (2003), simultaneously published in 27 ENVIRONS ENVTL. L. & POL'Y J. 13 (2003).

³³ As previously discussed, this generalization is inadequate. See *supra* text accompanying notes 16-20.

³⁴ The Endangered Species Act is perhaps the best example of a statute that reflects an ethic that appears not to be utilitarian, though it too has strong measures of that ethic.

values, and that the justification that best fits with our legal standards is a very bounded and imperfect utilitarianism rather than, for example, a biocentric theory of intrinsic value.

Given this assumption, what is the relevance of environmental philosophy? Environmental philosophers are making contributions on many fronts, but the most visible is work that develops coherent theories promoting less destructive relationships with the nonhuman world. When one surveys the literature on environmental philosophy, the most prevalent focus is the challenge to identify a coherent alternative to a human-centered utilitarian theory.³⁵ Thus the first step most philosophers take is to reject the dominant human-centered utilitarian ethic.

This is essential work that may provide alternative ethical frameworks for people who are dissatisfied with the ethics reflected in traditional Western philosophy and our current practices. In other words, people who already know that they reject the dominant ethic may immediately benefit by the insight into alternative ethics. But the vast majority of citizens who may consider themselves sympathetic to environmentalism may not identify easily with these radically different ethics. So mainstream philosophical discourse on environmental ethics may not engage the American public on relevant ethical questions. Philosophical environmental ethics may be so far removed from lay values and worldviews as to be irrelevant and inaccessible. Engaging a broader swath of the public on the question of what matters is what I call building an ethic from the ground up. This paper suggests that a key step towards such engagement may be the development of a new discourse about environmental values.

Initially, the term environmentalism may have served as an adequate focus for our discourse. It captured and expressed the public desire to embrace a new ethic, new values, and prompted deep thought about our relationship with the environment. But the meaning of the term has been so diluted over time that commentators have noted that it is now on a par with apple pie and motherhood,³⁶ something most people embrace and only a few view unsympathetically.³⁷ Today, environmentalism seems to suggest a posture supportive of environmental laws as they exist or with moderate reforms. It may be that environmentalism today

³⁵ See *supra* note 1.

³⁶ David Easter, *Activism in a Moderate World: Media Portrayals and Audience Interpretation of Environmental Activism*, in *EARTHTALK: COMMUNICATION EMPOWERMENT FOR ENVIRONMENTAL ACTION* 45-47 (Star A. Muir & Thomas L. Veenendall eds., 1996).

³⁷ See *supra* note 8.

lacks a core meaning distinct from the dominant human-centered utilitarian ethic.³⁸ Use of the word "environmentalism" does not lead to thoughtful engagement with the ethical and practical problems that arise under the current dominant ethic. It is a question mark too often used as a period.

One might argue that to cure this void, coherent alternative theories are needed and that the theory-building work being done by philosophers is the most urgent need. However, it seems possible that the leap required of people if they are to understand and embrace a coherent environmental ethic is too difficult for most, given current attitudes and the limited public discourse about underlying values. Coherent environmental ethics are compartmentalized as "radical" and rejected, leaving a vast undefined realm of "mainstream" environmentalism. Most people believe themselves concerned about the environment, even though that commitment may be one without well-defined content. To challenge the public's comfortable self image as "environmentally friendly," we may need concepts that are not so radically removed from utilitarianism but which frame the ethical and practical shortcomings of our current ethics as applied to environmental problems.³⁹ In other words, concepts that show the possibility and value

³⁸ This is not to say that there cannot be a critique of a particular law, policy or decision that would be generally accepted to be "environmentalist." For example a critique of President Bush's Clear Skies Initiative because it allows industry to avoid retrofitting air pollution equipment might be widely accepted to represent an environmentalist perspective. But such a critique can be made based entirely on values that are consistent with the dominant human-centered utilitarian ethic. The term environmentalist lacks coherent content to distinguish it from the dominant ethics. There is no widely accepted sense of what values an environmentalist commits to or what reasons motivate an environmentalist to care about these values. Environmentalism encompasses all possible values associated with the nonhuman environment and all possible reasons for caring.

³⁹ Most environmental philosophers who explore alternative ethics have rejected the notion of an ecologically and ethically enlightened human-centered utilitarianism. See, e.g., CALLICOTT, *supra* note 1. They see the flaws with the dominant ethic as fundamental. From their view, no solution short of an entirely new ethical grounding will produce a sound relationship with the nonhuman world. I do not seek to convince them otherwise. My point is to suggest that in addition to their contributions through theory-building, other philosophers may usefully apply their skill to the challenge of framing concepts that will not solve the fundamental philosophical dilemma but may help the public to understand and confront the ethical issues that motivate environmental philosophers. Bryan Norton and Andrew Light are among the philosophers who share the view that the focus on non-anthropocentric ethics has limited environmental philosophy's impact. See, e.g., Andrew Light, *Contemporary Environmental Ethics From Metaethics to Public Policy*, 33 *METAPHILOSOPHY* 426, 427, 435-36, 444 (2002); Bryan Norton, *Which Morals Matter: Freeing Moral Reasoning from Ideology*, 37 *U.C. DAVIS L. REV.* 81 (2003), *simultaneously published in* 27 *ENVIRONS ENVTL. L. & POL'Y J.* 81 (2003).

of more ecologically enlightened ethics, but which do not require wholesale acceptance of a radically altered worldview, may have value.⁴⁰

A. Towards a New Ethical Discourse: Stepping Stones

This paper emphasizes the value of an environmental ethics discourse that can reach a wide segment of the public. Concepts that can frame the ethical issues in a more accessible form may help those who are not completely satisfied with the dominant bounded and imperfect, anthropocentric utilitarian ethics embedded in our policies and laws. Therefore, I advocate developing concepts that can serve as points of departure from where the majority is today — concepts that frame the ethical issues in an accessible form and offer a new direction for those whose ethical impulses diverge from current dominant norms.⁴¹

Such concepts may fill a gap that exists between legal scholars' work that is directed at improving decisionmakers' analytic techniques and philosophers' work to develop coherent ethical theories. Concepts and vocabulary that draw on both philosophy and law may be useful tools that will help members of the public to understand the full implications of current laws in ethical terms, and to identify or envision practices and policies consistent with their evolving individual ethical intuitions. Developing these concepts will require that we broaden the definition of appropriate work for lawyers and philosophers. Philosophers' contribution cannot be limited to developing and justifying a coherent alternative completely apart from human-centered utilitarianism. And lawyers' contribution cannot be limited to critiquing current legal standards or decisionmaking techniques. Philosophers must help us to create a discourse that describes ways of valuing the environment that builds on people's current values, and lawyers must analyze the extent to which existing and proposed laws are compatible with these values. Ultimately, such concepts may prove more radical in practice than ecocentric ethical theories, in that they may enable ethical transformation that would otherwise not occur.

Metaphorically, we can think of such concepts as stepping stones — ideas that help people to find their way past some of the constraints of

⁴⁰ This parallels Holly Doremus' observation on the need for "gateway" behaviors — small, relatively easily accomplished steps — as a key step in turning people's values into behaviors. Doremus, *supra* note 22. What I call stepping stones could be called "gateway" environmental ethics.

⁴¹ Such concepts may serve the function Eugene Hargrove ascribes to ethics: helping people to perceive issues rather than providing neat answers that resolve questions in every situation. EUGENE HARGROVE, FOUNDATIONS OF ENVIRONMENTAL ETHICS 5-8 (1989).

traditional ethics. Such concepts should focus public attention on the constraints imposed by traditional utilitarian ethics and bring into view the possibility of an ethic that addresses these constraints. These constraints include inadequate capacity to deal with long time horizons, uncertainty, integrated decisionmaking, social equity, and values that are not easily monetized. Stepping stones, unlike a true environmental ethic, may not provide coherent and complete responses to these constraints, but by making the issues salient for the public, they may represent a necessary step in any widespread ethical evolution.

Where an environmental ethic might be described as requiring a leap from current dominant ethics, stepping stones require only a small step. They invite contemplation of change by highlighting the constraints of current ethics, but they do not demand a complete ethical transformation. To be effective, a stepping stone must have broad resonance with the public and provide a context for confronting some of the challenges that any environmental ethic will have to overcome, including long time horizons, scientific uncertainty and the limitations of the dominant economic framework.⁴²

One objection to the work of developing stepping stones may be that this is not the work of either philosophy or law. Under this view, environmental philosophy should properly focus on developing coherent alternatives to traditional ethics. Enlightened human-centered ethics will never transcend the ethical inadequacies of human-centered ethics and thus are compromised from the start. But if environmental philosophy is to take root, if it is to reach its potential as both an intellectual and moral tool for people interested in it, some accessible groundwork must be laid.⁴³ Further, the work to identify such concepts

⁴² These challenges are distinct from the central philosophical challenge of expanding our moral focus to include nonhuman nature. Several of the speakers in this symposium have identified these well known challenges. In his book *EARTH AND OTHER ETHICS*, Christopher Stone identified the long time horizons over which the consequences of human action may be revealed, the broad geographic horizons across which localized actions may affect the environment, and the challenges of extending moral concepts to nonhuman entities, both real and artificial, such as nonhuman elements of nature and corporations. STONE, *supra* note 1, at 30. As Stone shows, not all of these inhere uniquely in applying morals to environmental problems; some result from modern technological development. But the challenges must be addressed if environmental ethics are to effect meaningful change in human relationships with the nonhuman world. In *ECO-PRACTICISM*, Daniel Farber focused on incommensurability of economic and physical harms, long timelines and scientific uncertainty. FARBER, *supra* note 2, at 1. Laura Westra draws on Hans Jonas' statement of the problems of traditional western ethics which include the assumption of temporal and geographic proximity. WESTRA, *supra* note 2, at 6.

⁴³ Andrew Light asserts the importance of building on the prevailing anthropocentric view. Light, *supra* note 39, at 444.

is not entirely removed from philosophical concerns, but often lies at the boundary between philosophy and law. Some environmental philosophers and legal scholars are already working in this vein.⁴⁴ My goal here is to suggest that more common effort on this endeavor is essential.

To illustrate the potential value of this approach, I explore one concept — sustainability — which holds promise as a stepping stone. If systematically integrated into debates on law and policy — not as a legal standard, but as a concept that frames the ethical questions that law and policy raise — it may enable environmental philosophy to grow from the ground up. Sustainability is not the only such concept, but it is one that warrants attention for reasons that I explore below.⁴⁵

B. Sustainability as a Stepping Stone

A first question is how to define sustainability. The most widely accepted definition of sustainability is providing for the needs of the present without compromising the ability of future generations to meet their needs.⁴⁶ Decisions or policies are deemed sustainable only if they

⁴⁴ Bryan Norton, Laura Westra, Kristen Shrader-Frechette, and Andrew Light have all explicitly defined and followed approaches that begin with practices in the world and then look to see what philosophy can bring to bear on that reality. See Light, *supra* note 39; NORTON, SEARCHING FOR SUSTAINABILITY, *supra* note 2, at 1-37; NORTON, TOWARDS UNITY, *supra* note 1, at 12; Kristen A. Shrader-Frechette, *Ecology*, in A COMPANION TO ENVIRONMENTAL PHILOSOPHY 304, 312-14 (Dale Jamieson ed., 2001); WESTRA, *supra* note 2, at xv.

⁴⁵ Daniel Farber's eco-pragmatism is another. FARBER, *supra* note 2. While eco-pragmatism is distinct from sustainability, it shares some attributes with sustainability, drawing on a low discount rate to enable considering future generations and applying the precautionary principle to shift the burden of proof. *Id.* at 154-55, 170-74. In his conclusions, Farber explicitly describes his work in terms of "sustainable environmental law." *Id.* at 199. Another example of work developing an alternative ethical framework is Carol Rose's exploration of the concepts of nature as "a given" versus as "a gift." Rose draws on ideas from the realm of property that may help shift how we value nonhuman nature by changing the story we tell about our relationship to it. Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENVTL. L. 1 (1994). Edith Brown Weiss's exploration of the property law concept of the trust is another example, and one which has close links to the future-generational focus of sustainability. EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989). Joseph Sax's work on the public trust doctrine laid the foundations on which much understanding and interpretation of our current natural resources law rests. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970). Its limited ethical focus on the relationship between the government and the public may explain our need to search for additional concepts to address challenges such as uncertainty and long time horizons.

⁴⁶ WORLD COMM'N ON ENV'T AND DEV., OUR COMMON FUTURE 8 (1987).

incorporate consideration of three co-equal factors: ecology, economics and social equity.⁴⁷ Because of the explicit focus on human needs, the concept is compatible with anthropocentrism.⁴⁸ On its face, sustainability values the environment and economic activity, not intrinsically but for their utility to humans. The explicit valuing of equity among humans in the allocation of environmental and economic benefits seems to introduce a complementary rights-based approach.

So what is potentially useful about this concept? First, let me be clear about what sustainability does not accomplish. It does not address the problem that motivates so much of the work in environmental philosophy; that is, it does not expand the community of morally valued entities beyond humans.⁴⁹ To that extent, it is consistent with a calculus of utility like that employed under many laws today. It does not appeal to any inchoate non-anthropocentric intuitions that members of the public may possess. However, sustainability has six attributes that endow it with the potential to expand public discourse and to help us confront problems that must be addressed if any environmental philosophy is to take root. By framing and focusing public debate on these important issues, sustainability may facilitate future ethical development.

First, the concept of sustainability provides an elegant way to address the critical problem of long time horizons.⁵⁰ Legal scholars have done much that shows the failures of current cost-benefit methodology in dealing with long time horizons. Scholars have revealed both the controversial value choices about time horizons made in current policies and the flawed technical analysis sometimes performed under our

⁴⁷ *Id.* at 9-11. I use the term sustainability in place of sustainable development because of its greater flexibility in application to any decision whether or not a development decision. Bryan Norton has analyzed sustainability in detail in his recent work and highlights the dangers of a weak definition. See NORTON, *supra* note 2, at 168-79, 225-39.

⁴⁸ There are efforts by some commentators to infuse it with an explicitly biocentric meaning. See, e.g., Cesar Cuello Nieto, *Toward a Holistic Approach to the Ideal of Sustainability*, 2 PHIL. & TECH. 41, 44 (Winter 1997); Paul B. Thompson, *Sustainability as a Norm*, 2 PHIL. & TECH. 75, 80, 91 (Winter 1997). This potential for compatibility with biocentric impulses is another positive feature. Sustainability may not only provide a stepping stone to a new ethic but may itself be transformed.

⁴⁹ See Stan Godlovitch, *Things Change: So Whither Sustainability?* 20 ENVTL. ETHICS 291, 300 (1998).

⁵⁰ As Professor Norton's recent work suggests, experts in economics and ecology ultimately disagree on the key question of the appropriate time horizon when discussing sustainability, in part because there are value choices embedded in the decision. NORTON, *SEARCHING FOR SUSTAINABILITY*, *supra* note 2, at 225-28.

current laws, which tends to undervalue future harms.⁵¹ But much of the work is necessarily very technical and abstract, removed from the concrete conflicts that shape public debate. It may be critically important that the public be engaged directly with this central moral issue in environmental policy.

Sustainability can provide an anchor for debate about the appropriate time horizon to consider in law and policy. The challenge of extending our ethical horizon to include a longer timeframe is an enormously important one for anyone who cares about the environment, under almost any justification for caring. Sustainability is a concept that can perform this heavy lifting. Future generations of humans are front and center and must be considered. The questions of how far into the future we want to consider and how we weigh our interest in the future against current needs are not easy. But as Bryan Norton's work shows, sustainability frames the issue and focuses attention on this key value choice that we must make.⁵²

Second, by virtue of its explicit focus on environmental impacts over a long time horizon, sustainability demands that we employ the tools and knowledge of ecology to understand these consequences. Of course, the same claim could be made of a utilitarian philosophy: accurately determining the greatest good for the greatest number demands that we employ our best methodologies to determine the human consequences of our actions. However, sustainability suggests the need for an antidote to current practices in two ways. First, the emphasis on the environment as an equal factor of consideration alongside economics and equity elevates the importance of ecological impacts and our analysis of them. Further, sustainability envisions integrated decisionmaking, a key prerequisite to incorporating ecology effectively into decisions.⁵³ Again, this is not a panacea, but a spotlight that can illuminate the issues, bringing them into the public's field of vision.

Third, sustainability focuses attention on the role of uncertainty and the ethical implications of our choices related to burdens of proof. Engaging people on the subject of scientific uncertainty and burdens of proof is likely to induce glazed eyes; sustainability provides a concrete entry point for initiating public debate on the relevant moral questions. Inadequate data and limited understanding about the consequences of

⁵¹ See, e.g. Lisa Heinzerling, *Discounting Our Future*, 34 LAND & WATER L. REV. 39 (1999); Lisa Heinzerling, *Discounting Life*, 108 YALE L.J. 1911 (1999).

⁵² NORTON, *SEARCHING FOR SUSTAINABILITY*, *supra* note 2, at 421-46.

⁵³ See John C. Dernbach, *National Governance*, in *STUMBLING TOWARDS SUSTAINABILITY* 725 (John C. Dernbach ed., 2002).

human activity on the environment have long been recognized by scholars as serious challenges to developing effective environmental policy and law. No matter what our ethical stance, we must all confront the central question of how we ought to deal with uncertainty. This is not purely a philosophical problem. But as a practical matter, if an approach to uncertainty is not embedded in the ethical framework we apply, then questions about coping with uncertainty may be wrongly relegated, as they often are today, to the realm of technical questions, removed from public debate and concern.

Sustainability has promise for bringing the question of uncertainty back into the public eye because it embodies the premise that all decisions must preserve options for future generations. Sustainability reframes the debate, thus introducing the possibility for a different approach to uncertainty than that embedded in current law, policy, and ethics. In place of legal standards that demand proof of harm in the face of uncertainty, sustainability raises the possibility that we should assess human decisions to see if they are sustainable. As such, the concept of sustainability can expose the significant issue of how to assess technological optimism in light of what is unknown.⁵⁴

Because sustainability provides a positive standard against which to measure human activity, it facilitates placing the burden of proof of sustainability on those whose actions deplete resources rather than on those who advocate protective regulation. Asking whether a given activity is sustainable redirects the focus from whether human activity causes harm. In the harm prevention context, the relative concreteness of the term "harm" serves to focus our attention on the issue of harm as the operative inquiry. This focus on whether harm has occurred gives force to the argument for placing the burden of proof (and thus of uncertainty) on those who would prove harm. Because sustainability is a positive attribute of a decision, a focus on sustainability may lend at least rhetorical strength to the argument for shifting the burden of coping with uncertainty to those who seek to justify their activities as sustainable.⁵⁵ Further, the international discourse on sustainability,

⁵⁴ The debate over the appropriate assumptions regarding resource substitution and technological optimism is highlighted in Thompson, *supra* note 48, at 79. Adopting sustainability as a stepping stone makes the outcome of this debate of great importance, but it does not resolve it. Its value is largely in framing the issue and confronting the public with the question.

⁵⁵ The Republican Party's careful attention to its "message" on environmental issues in recent months, described in Jennifer Lee, *A Call for Softer, Greener Language: G.O.P. Adviser Offers Linguistic Tactics for Environmental Edge*, N.Y. TIMES, Mar. 2, 2003, at 1, 24, suggests the practical power of language and rhetoric in shaping public debate.

which has made the precautionary principle one of its operational elements, also supports this shift.

Of course, just as the argument is made under current law that it is unreasonable to ask economic actors to prove a negative (that there will be no harm to health or the environment), there will undoubtedly still be claims that it is unreasonable to ask economic actors to prove such a broad positive (that a decision is sustainable). In other words, sustainability will not eliminate controversy over policies on the burden of proof and how to cope with uncertainty. But broader adoption of the concept of sustainability would remind us that this is a value question and not a technical issue. It may, therefore, renew public interest in, and attention to, the question of the burden of proof in light of uncertainty.

Fourth, sustainability embraces the reality that a broad array of human values must inevitably be weighed along with values associated with the environment, whether in a traditional or a non-traditional ethical framework. Other human values do not simply disappear when values related to interactions with the nonhuman environment appear.⁵⁶ Resolving conflicts that exist among values is perhaps the most important context in which environmental values are invoked.⁵⁷ Advocates on all sides of environmental debates may not always want to highlight the fact that environmental protection measures that make us feel virtuous often serve our self-interest as well. But the prevailing polarized discourse and false dichotomies impede mature debate about environmental ethics and may undermine long-term support for environmental law. Sustainability may provide an antidote for extreme polarization by recasting the debate to emphasize that decisions affecting the environment inevitably affect other human values. Sustainability makes a virtue of this necessary tension by acknowledging the need to consider other values. Recognizing that environmental statutes and an environmental worldview already incorporate rather than exclude these other values is an important step. Incorporation of a broad array of values, linked with a long time horizon, ecological principles, and social equity, may have tremendous power to enrich public debate.

There is an obvious risk that comes with the inclusion of non-environmental human values alongside environmental values. The risk is that despite the nominal embracing of the environment, other more

⁵⁶ Oliver Houck expressed this humorously as the "Nothing in Environmental Law is More Than Fifty Percent" rule: that a wide array of human values and concerns creep into every equation under every law, however absolute and exclusive of those concerns the statute appears. Oliver A. Houck, *Are Humans Part of Ecosystems?* 28 ENVTL. L. 1, 12 (1998).

⁵⁷ See *supra* text accompanying notes 25-31.

easily quantifiable values will outweigh non-economic environmental values. Many commentators have pointed out this failing under current laws that mandate cost-benefit analysis. If this critique of sustainability proves correct, sustainability will produce decisions no different than those we have today or worse. For this reason, embracing the broad range of values associated with sustainability may justifiably be rejected by many advocates in the polarized debate on environmental law and policy. But the work of philosophers, scientists, and legal scholars can help us avoid this peril by giving the concept of sustainability meaning and preventing its dilution.⁵⁸

The fifth promising aspect of sustainability is its inclusion of social equity as a third factor to be considered along with the environment and economics. By including social equity, sustainability introduces a human value that, although not necessarily in tension with valuing of the environment, is often excluded from consideration and ignored in environmental law and policy. The breadth and depth of the environmental justice movement has demonstrated the importance of social equity in the allocation of environmental benefits and burdens.⁵⁹ Sustainability incorporates concern about environmental justice rather than relegating it to a separate domain.

Finally, there is one practical advantage sustainability has: accessibility. Sustainability may be a particularly strong starting point from which to reach people who are interested in the environment because it comports with people's current ethical intuitions. Results of a recent survey showed that the top justification people gave for caring about environmental protection was the current generation's responsibility to future generations.⁶⁰ The reason selected most

⁵⁸ For example, Bryan Norton has proposed an approach to defining sustainability based in what he calls scientific contextualism — an approach that evaluates impacts of decisions on future generations not only in terms of severity of effects, but also in terms of reversibility, which leads to the notion that some obligations are “non-negotiable” because they “perpetuate the conditions necessary for the continuation of the human species and of its culture. NORTON, *SEARCHING FOR SUSTAINABILITY*, *supra* note 2, at 174. Norton's approach also embodies a holistic approach — one that cannot be reduced to the preferences of individuals — and it accounts for the systemic nature of ecosystems. *Id.* at 174-76. *See also* Dernbach, *supra* note 53. Oliver Houck's reflections on the concept of ecosystem management offer interesting insights on how to avoid having humans dominate an equation of which they are part. Houck, *supra* note 56.

⁵⁹ *See, e.g.*, KENNETH MANASTER, *ENVIRONMENTAL PROTECTION AND JUSTICE* (1995); CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, *ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION* (2002); *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS*, (Michael B. Gerrard ed., 1999).

⁶⁰ Belden, Russonello & Stewart, *supra* note 8, at 6. Individuals were asked to choose

frequently as being a "very important reason" to protect biodiversity was biodiversity's value in providing natural services to humans.⁶¹ Thus sustainability shows promise as a stepping stone from current ethics and values held by the public. It builds both on the utilitarian justification most people identify as foremost among their reasons for caring about the environment, and on their concern for future generations. In addition, sustainability seems compatible with views that are grounded in a sense of religious duty. If the public is broadly committed to protecting the environment for future generations and for spiritual reasons, as surveys suggest,⁶² the concept of sustainability will help citizens to evaluate whether certain policies and decisions are consistent or inconsistent with widely shared values.

There are several objections that may be raised to the value of sustainability. First, introducing the concept of sustainability does not make the answers to these questions easy.⁶³ How to reconcile the needs of current and future generations, how to reconcile economic and non-economic values, and how to deal with the problems of limited information and understanding will remain thorny problems. But no ethic will resolve these questions or make them easy. The value of the concept of sustainability is in framing these issues for the public as important value questions that our laws and policies must address. The important question is whether we will face them and if so, how careful our thinking will be.⁶⁴ Sustainability can promote better thinking by

only one among six reasons for caring about protecting the environment. The justifications selected by the surveyed individuals were: responsibility to future generations to protect the earth — 39%; nature is God's work — 23%; protect the balance of nature for you and your family to enjoy health — 17%; respect nature — 10%; appreciation for beauty — 6%; to protect America's natural history — 4%; don't know — 1%. *Id.*

⁶¹ *Id.* at 5-6. Seventy-four percent ranked as very important protecting habitats for their values cleaning the air and water we humans rely on; 72% ranked as very important protecting forests because they clean our drinking water; 72% ranked as a very important reason for protecting biodiversity the fact that new medicines are mostly derived from plants and animals. *Id.* at 7.

⁶² See *supra* note 60.

⁶³ See, e.g., Christopher D. Stone, *Deciphering "Sustainable Development,"* 69 CHI.-KENT L. REV. 977, 978 (1994), who points out that sustainable development embodies the inherent conflict of interests between developing and developed countries. The developing countries have natural resources and want development. The developed countries have economic development and want the developing countries to preserve their resources. When raised in the United States' domestic policy context, the term sustainability raises slightly different issues, although Stone's point still holds — sustainability embodies value conflicts. However, I don't suggest resorting to sustainability as a policy or legal standard to resolve conflicting values, but only as a concept that highlights and frames the ethical issues.

⁶⁴ Laura Westra highlights the possibility that law may operate as an interim

making the questions clearer and more concrete.

Many holistic approaches emphasize transforming our sense of our humanity. Sustainability may be a small step, but it is potentially one that enables both modest and radical transformation. By confronting the challenge of enlarging our spatial and temporal horizons directly, we are forced to step outside the comfort of traditional ethics. By focusing attention on a model of preservation of capital as an alternative to the spend-down model of capitalism, sustainability can promote transformative deliberation. And by incorporating social equity, sustainability brings environmental values and other human values into the same picture.

Still, the risk that this or any other concept will be co-opted to serve as an apology for current practices without encouraging reflection upon underlying value questions is real.⁶⁵ A fair criticism is that the term lacks a common meaning, even after twenty years of currency.⁶⁶ However, a concerted effort to use the term to promote engagement with ethical issues could help to offset these risks.

CONCLUSION

An important challenge for those working at the intersection of environmental law and philosophy is to identify the values we embrace today through our laws. Knowing the values we are advancing as a society through our laws is essential to any serious debate about reforming our law or our ethics. A clearer sense of the values that dominate our laws and policies today may foster more serious thought about the values we want to protect and why.

If environmental philosophy is to take root, it must help people to move from the dominant ethics of human-centered utilitarianism or it

paternalistic measure until education occurs. WESTRA, *supra* note 2, at xviii. In a similar vein, I suggest that exposure to, and adoption of, new concepts can promote further thought, understanding, and transformation of people's ideas and ethics.

⁶⁵ See Michael Wenig, *Book Review: Making Sense of Growth and Sustainable Development*, 28 ENVTL. L. 235, 237-38 (1998).

⁶⁶ Even those who see the value of sustainability, like Bryan Norton, have commented on the "deep conceptual ambiguities." SEARCHING FOR SUSTAINABILITY, *supra* note 2, at 225. Stone points out that this can be an asset in the context of international treaty negotiations. Stone, *supra* note 63, at 978. I do not claim a similar virtue to its ambiguity in the debate about values and advocate continued work by philosophers and lawyers to develop the term's meaning. Norton's effort to develop an ecological definition of sustainability, as opposed to a social scientific one, is a good example of how the term can address shortcomings of economic approaches by considering reversibility and employing a holistic approach. See NORTON, SEARCHING FOR SUSTAINABILITY, *supra* note 2, at 171-76.

must help to transform that ethic from within. Work to develop concepts short of coherent environmental ethics may be an important step to promote deeper thought about the ethical challenges environmental problems present. Sustainability is one concept that can frame and focus attention on key ethical questions.