

FINDING EDEN IN A COST BENEFIT STATE

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This Article explores the role of the law in the evolution of environmental values. The Article compares and contrasts the ‘intrinsic value’ and the ‘welfarist’ approaches, the two leading methodologies for valuing nature in environmental law and policy. Proponents of intrinsic value argue that nature is morally significant and holds intrinsic value as an end in itself. In contrast, welfarists view nature not as intrinsically valuable but simply as a means to a human end. After evaluating the merits and demerits of each approach, the Article concludes that their flaws caution against using either as the sole rationale underlying environmental policies. Instead, I advocate for value pluralism in environmental law and policy.

I develop a pragmatic theory of environmental ethics that identifies human experience as the source of environmental values. Based on this theory, the Article argues that legal frameworks play an important role in the evolution of environmental values. Through the structure of human relationships, social institutions, and physical environments, the law influences the experiences which make up an individual’s worldview and ethical thinking. Therefore, to “get our morals right,” we must embrace environmental pluralism and experimentation. Using legal theory and qualitative analysis, the Article identifies communal management of resources as the only viable governance approach for promoting meaningful environmental pluralism and experimentation. Based on this understanding, the Article advocates for communitarian reform in American law and policy.

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INTRODUCTION

In the Introduction of his 2002 book on cost benefit analysis (“CBA”),¹ Cass R. Sunstein predicted that despite fierce opposition from opponents of CBA, the US would gradually become “a cost benefit state.”² Many factors underlay Sunstein’s prediction, the strongest was his observation that throughout government, the ‘first generation’ debate whether CBA is desirable as rulemaking policy is concluding with the clear victory of

¹ Cass R. Sunstein, *THE COST BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* (2002).

² *Id.* at ix.

CBA's proponents.³ After sixteen years, Sunstein's words seem almost prophetic. In less than a generation, CBA has become entrenched in our society. After taking over the executive,⁴ the legislature,⁵ and the states,⁶ CBA has now captured the courts.⁷ The U.S. Supreme Court's decision in *Michigan v. EPA* marks the conquest of the polity's summit.⁸ We have finally entered a new era, the age of the cost benefit state.⁹

To many, the rise of CBA as the dominant rulemaking policy in the US is not a reason for celebration but cause for concern. For opponents of CBA, despite its prevalence in government, the normative debate about the merits of CBA is far from settled. Moral philosophers, legal scholars, and political scientists continue to publish books and articles, warning against the dangers associated with the transition to a cost benefit state.¹⁰ Writers have attacked CBA's underlying premise – that human welfare is the *only* morally significant value – as ethically degrading,¹¹ undermining human freedom,¹² and metaphysically wrong.¹³ Others have criticized the loss of individuality imposed by CBA,¹⁴

³ *Id.* at xi.

⁴ See President Reagan's Executive Order requiring federal agencies to analyze the costs and benefits of major regulation and to issue regulations only when the analysis showed that "the potential benefits to society outweigh the potential costs to society." Exec. Order No. 12,291 § 2(b), 46 Fed. Reg. 13,193 (Feb. 17, 1981); President's Reagan's mandate has remained in place and expanded through succeeding administrations. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Exec. Order 13,258, 3 C.F.R. 204 (2003); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011). CBA is also "institutionally structured into the administrative decision-making process through Office of Management and Budget review of regulations." Richard L. Revesz, and Michael A. Livermore, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 11 (New York, 2008).

⁵ Cass R. Sunstein, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* 4 (Cambridge, 2002); Robert W. Hahn, *REVIVING REGULATORY REFORM: A GLOBAL PERSPECTIVE* 22-29 (Washington DC, 2000); Revesz & Livermore, *supra* note at 11.

⁶ Hahn, *supra* note 5 at 4.

⁷ See Revesz & Livermore, *supra* note 4 at 11 ("many influential federal judges are strong supporters of cost-benefit analysis, and important court decisions have turned on how administrative agencies apply the technique.")

⁸ *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (the Court held that the Environmental Protection Agency acted unreasonably when it deemed cost irrelevant to the decision to regulate power plants under section 112 of the Clean Air Act. *Id.* at 2712. The Court's decision was based on its observation that cost represents "a centrally relevant factor" in nearly all reasonable regulation. *Id.* at 2707).

⁹ Cass R. Sunstein, *Thanks, Justice Scalia, for the Cost-Benefit State*, BLOOMBERG (July 7, 2015). Available at <http://www.bloomberg.com/view/articles/2015-07-07/thanks-justice-scalia-for-the-cost-benefit-state> (last visited Feb. 2, 2019).

¹⁰ See Amy Sinden, *Cass Sunstein's Cost-Benefit Lite: Economics for Liberals*, 29 COLUM. J. ENVTL. L. 191, 192 (2004) and references therein.

¹¹ Laurence H. Tribe, *Ways Not to Think of Plastic Trees: New Foundations for Environmental Law*, 83(7) YALE L. J., 1315, 1330-1332 (1974)

¹² *Id.* at 1326-1327.

¹³ Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, 5(1) REG. 33 (1981).

¹⁴ Douglas Kysar, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* (2010), and see generally Bernard Williams, *A Critique of Utilitarianism*, in *Ethics: History, Theory, and Contemporary Issues*, in *ETHICS: HISTORY, THEORY, AND CONTEMPORARY ISSUES*, Steven M. Cahn and Peter Markie ed., 657 (5th ed., 2012).

its failure to facilitate moral agency,¹⁵ and the ethical limitations of a calculative rulemaking methodology.¹⁶ Proponents of CBA celebrate it as an objective, accurate rulemaking approach that allows policymakers to employ judgment while considering the trade-offs between alternative courses of action.¹⁷ To CBA supporters, the critique of the methodology is no cause for concern but rather an incentive for further development of CBA.¹⁸

This Article takes a different approach than those advanced by opponents and proponents of CBA. Acknowledging the value of CBA as a rulemaking methodology and accepting the fact that it is here to stay, I ask what are the necessary structural characteristics of a legal regime that is able to maintain ethical resiliency in a cost benefit state? To answer this question, I enter the fiercest battleground of CBA – environmental policymaking. The crux of the controversy concerning the use of CBA in environmental rulemaking revolves around the value of nature. For proponents of CBA, nature *qua* nature has no intrinsic value, but is merely a means to a human end. Accordingly, to determine the desirability of a proposed action, policymakers should account for potential environmental impacts in terms of the monetary losses and gains that will result. Non-anthropocentric considerations, like injuries to species (from the vantage point of the species) are irrelevant.¹⁹ For opponents of environmental CBA, nature is much more than an ‘instrument’ for human benefit: it is itself a morally significant entity with intrinsic value standing apart from human experience.

Ideas about the ‘value’ of nature are integral to environmental decision-making. Debates about how we understand nature, what nature means to us, and what is the correct place of nature in our society have shaped American environmentalism for more than a century.²⁰ The elaborate system of environmental laws that governs our relationship with the natural world is shaped by the answers the American people have given to these questions at different times in history.²¹ Often, questions about the value of nature determine the result of a legal controversy. For instance, if an unknown species of fish has value that transcends utilitarian calculations of cost and benefit, then any project that endangers the species should be banned, even if it is a multimillion dollar dam.²² Along

¹⁵ Kysar, *supra* note 14; Williams *supra* note 14.

¹⁶ Kelman, *supra* note 13; Mark Sagoff, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT 67-87 (1988).

¹⁷ See generally, Sunstein, *supra* note 5.

¹⁸ See e.g. Revesz & Livermore, *supra* note 4.

¹⁹ This is not necessarily the case for all utilitarian environmental approaches. See e.g., Jonathan B. Wiener, *Law and the New Ecology: Evolution, Categories, and Consequences*, 22 ECOLOGY L. Q. 325, 353 FN 140 (1995) (explaining that "at least on first principles" utilitarian environmental approaches advocate "maximizing the happiness of everything that suffers, human and otherwise").

²⁰ Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L. J. 1122, 1160-1189 (2010).

²¹ *Id.*

²² “[N]either the Endangered Species Act nor Art. III of the Constitution provides federal courts with authority to make such fine utilitarian calculations. On the contrary, the plain language of the Act,

similar lines, if natural constructs are morally significant, then it may be argued that mountains, valleys, and species should have standing to sue for human aggressions committed against them.²³

I compare and contrast the two opposing environmental stances, consider their different modes of ethical valuation, the benefits each approach provides, and the conceptual flaws that undermine them. After evaluating the merits and demerits of each approach, I conclude that their flaws caution against using either as the *sole* rationale underlying environmental policies. Instead, I advocate value pluralism in environmental law and policy. I argue that the reason we are unable to answer fundamental questions about the natural order and our place in it is that we are still in the early development of environmental ethics, when experimentation and discussion are crucial for answers about the value of nature and our relationship with it. Thus, to ‘get our morals right,’ we must strive to maintain a plurality of ethical valuation modes.

To understand how to promote value pluralism in a democratic society, I ask what is the origin of values? I engage in a theoretical analysis of the emergence of values and identify human experience as the birthplace of value. Individual perspectives, values, and ethical approaches are a sum of the individual’s life-long experiences. Hence, while law affects individual morals, it does so in a different way than the one generally contemplated. It is through the structure of human relationships, social institutions, and physical environments that the law influences the sum of experiences which make up an individual’s world view and ethical thinking.

Guided by the understanding that human experience is the origin of value, I argue that value pluralism requires legal frameworks that enrich the environmental experiences of individuals. Those frameworks present a challenge, as pluralism is not a policy but a state of existence. Legal rules are designed to achieve specific ends, they cannot achieve multiple unspecified ends. The solution, I explain, does not lie in specific rules but rather in institutions. While it is impossible to design rules without a specific end, one can imagine the structure of a pluralistic society. A society that embraces environmental pluralism is one that provides its members with a rich menu of environmental lifestyles from which to choose. In such a society, individuals are free to experiment in nascent forms of environmental relationships with nature, each striking a different balance between a set of environmental values.

Viewing humans as deeply social beings who pursue self-chosen goals within communities of interrelationships, I argue that, if given the right measure of autonomy, communities may function as pluralistic laboratories for ethical experimentation. This observation leads me to the conclusion that to promote pluralism of experiences, law must

buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as ‘incalculable.’” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 187 (1978). See also, *id.* at 174, 184.

²³ See Douglas, J., dissent in *Sierra Club v. Morton*, 405 U.S. 727, 741- 752 (1972).

respect the autonomy of local communities. Unfortunately, American law is structurally and theoretically opposed to communal autonomy. To many American jurists, communal values are not sources of ethical progress but rather parochial competitors of national values. To understand how American law may better accommodate communal autonomy, I explore a recent case study from the UK, in which the central government transferred powers for planning and development to local communities. The case study demonstrates how strengthening communal autonomy vindicates environmental pluralism and experimentation. I conclude the Article with legal and policy recommendations for regenerating pluralism in the age of the cost benefit state.

The Article proceeds as follows: Part I discusses the two prominent camps within American environmentalism: preservation, an environmental approach premised on the view that nature holds intrinsic value, and conservation, an environmental stance that embraces the utilitarian maxim of the “greatest good for the greatest number.” I discuss the merits and demerits of each approach, provide an assessment of the reasons that led to the decline of preservation as a leading driver of environmental policies and the rise of utilitarian approaches to environmental policymaking in the U.S. I explain the basic tenets of welfarism, the dominant strain of utilitarianism underlying environmental rulemaking today; provide a synthesis of Professor Laurence Tribe’s ethical critique of welfarist environmental policies, and explain the conceptual flaws in Tribe’s framework.

Part II develops a pragmatist framework for environmental valuation. I explain pragmatic thought and its focus on human experience as the origin of value. Building on pragmatic scholarship, I observe that environmental ethical progress requires pluralistic legal frameworks that enrich the environmental experiences of individuals. I survey the writings of legal scholars who have suggested such frameworks and identify the challenge to design a road with no end (or too many ends) as the major obstacle hindering progress towards pluralistic legal structures.

Part III explores human agency and regimes of collective responsibility. I explain why principles-based legal systems promote individual agency better than rule-oriented approaches. Based on this and on an analysis of communities as principles-based governance regimes, I advance an argument recognizing local communities as pluralistic social structures amenable to responsible environmental experimentation.

Part IV provides an account of a recent successful legal reform in the UK - the enactment of the Localism Act and its provisions concerning communal autonomy to plan and develop land. The case study demonstrates how legal reforms that support greater communal autonomy serve the goals of environmental pluralism and experimentation advanced in this Article. The Article concludes with a synthesis of the framework developed in the Article and a call for further exploration of its merits.

PART I: THE CONSERVATION SCHISM

Since the first decades of the 20th Century, a lasting divide has split American environmentalism into two opposing camps.²⁴ The first camp, usually referred to as the preservation movement,²⁵ has been largely driven by a wilderness ethos. According to this ethos, wild nature, as a construct of creation, must be preserved in its natural, untainted form.²⁶ For more than a century, the wilderness ethos nurtured a growing national movement of environmental preservation. A pillar of this movement was the promotion of human encounters with sublime nature, a practice intended to arouse aesthetic responses and appreciation of nature.²⁷ From Thoreau's immersion in nature at Walden Pond to John Muir's adventures in the Sierra Nevada,²⁸ being a preservationist was first and foremost about the experience of being *in* nature. Preservationists, therefore, worked to promote human encounters with nature as a means to facilitate public recognition of nature's unique value and to mobilize support for its protection.²⁹

The second camp, known as the conservation movement, emerged at the end of the 19th century out of a growing recognition that American resources, if not managed properly, would not last.³⁰ The conservation movement endorsed the utilitarian principle of the "greatest good for the greatest number."³¹ When applied to environmental policy, the utilitarian principle required that natural resources be managed in the most efficient manner

²⁴ Roderick Nash, *John Muir, William Kent, and the Conservation Schism*, 36(4) PAC. HIST. REV., 423, 427 (1967).

²⁵ See Christine Oravec, *Conservationism Vs. Preservationism: The "Public Interest" in the Hetch Hetchy Controversy*, 70 Q. J. SPEECH, 444, 444 (1984); Jessica Sheffield, *Theodore Roosevelt, "Conservation as A National Duty,"* 5 VOICES OF DEMOCRACY 89, 93-94 (2010).

²⁶ William Cronon, *In Search of Nature, in UNCOMMON GROUND: TOWARD REINVENTING NATURE*, William Cronon ed., 25 (1995).

²⁷ See John Muir, *OUR NATIONAL PARKS*, preface (1901); Robert J. Brulle, *Environmental Discourse and Social Movement Organizations: A Historical and Rhetorical Perspective on the Development of U.S. Environmental Organizations*, 66(1) SOC. INQUIRY 58, 69 (1996); James Mitchell Clarke, *THE LIFE AND ADVENTURES OF JOHN MUIR* (1980); *THE CAMBRIDGE COMPANION TO WORDSWORTH* 241 ((Stephen Gill ed., 2003).

²⁸ The writings of Thoreau were highly influential in the emergence of the preservation movement. See Robert J. Brulle, *Environmental Discourse and Social Movement Organizations: A Historical and Rhetorical Perspective on the Development of U.S. Environmental Organizations*, 66(1) SOC. INQ. 58, 69 (1996) (preservation origins can be traced "through the transcendentalism of Emerson to the writings of Thoreau"); James Mitchell Clarke, *THE LIFE AND ADVENTURES OF JOHN MUIR* (1980) (noting that Muir found Thoreau "particularly congenial").

²⁹ In 1892 Muir funded the Sierra Club, an environmental organization dedicated to wilderness enjoyment and preservation. See John Muir, *THE YOSEMITE* 249-262 (1912) (explaining that the underlying intention of nature excursions was to mobilize support for more preservation, as the increase in both size and number of gardens and national parks will eventually lead to the recognition of their value). See generally Holway R. Jones, *JOHN MUIR AND THE SIERRA CLUB: THE BATTLE FOR YOSEMITE* (1965) (on the Sierra Club's origins and initial mission).

³⁰ Theodore Roosevelt, "Conservation as a National Duty," keynote address to the 1908 Conference of Governors (May 13, 1908) referring to President Thomas Jefferson's First Inaugural Address (Washington D.C., March 4, 1801).

³¹ Oravec, *supra* note 25 at 444.

to maximize human welfare.³² The three fathers of the conservation movement in the United States are George Perkins Marsh, Theodore Roosevelt, the “conservationist President,” and Gifford Pinchot, the famous forester.³³ Two notable examples of preservation and conservation as expressed in American environmental law and policy are the conservation-based Forest Service and Preservation-based Park Service.³⁴

The two camps of environmentalism were often at odds. For the preservationists, conservationists were too materialistic, lacking any sense of reverence for nature.³⁵ In John Muir’s words, conservationists were “despoiling gainseekers and mischief-makers... eagerly trying to make everything immediately and selfishly commercial...”³⁶ they were “devotees of ravaging commercialism” who “seem to have a perfect contempt for Nature, and instead of lifting their eyes to the God of the mountains, lift them to the Almighty Dollar.”³⁷ In return, Conservationists viewed Preservationists as parochial. They could not understand the immense importance Preservationists ascribed to aesthetics and encounters with pristine nature. For Conservationists, aesthetic enjoyment was just one of many uses of nature, and prudent environmental policy required decision-makers to consider all potential uses.³⁸ As explained by Gifford Pinchot in his address to Congress on the question of damming the Hetch Hetchy Valley, “[i]f we had nothing else to consider than the delight of the few men and women who would yearly go to Hetch Hetchy Valley, then it should be left in its natural condition. But the considerations on the other side of the question, to my mind, are simply overwhelming...”³⁹

However, the preservationist ‘fixation’ on aesthetics was not myopic. Preservationists viewed nature as a manifestation of divine presence and encounters with nature as a dialogue with the sublime. To Preservationists, natural objects were intrinsically valuable, while Conservationists held that nature was a means to a human end and not an end in itself.⁴⁰ The Preservationist view of nature as a ‘window’ to divinity explains the movement’s celebration of aesthetic responses to the natural environment: if nature is a manifestation of the divine, then encounters with wild pristine nature, its purest form,

³² Roosevelt, *supra* note 30; Gifford Pinchot, *Principles of Conservation* in CONSERVATION IN THE PROGRESSIVE ERA: CLASSIC TEXTS 20 (David Stradling ed., 2004); Gifford Pinchot, BREAKING NEW GROUND 326 (1947, 1998).

³³ Pinchot, *supra* note 32 at 326; Jedediah Purdy, AFTER NATURE: A POLITICS FOR THE ANTHROPOCENE 37-38 (2015).

³⁴ See Jamison E. Colburn, *Habitat and Humanity: Public Lands Law in the Age of Ecology*, 39 ARIZ. ST. L.J. 145, 153-161 (2007).

³⁵ Muir, *supra* note 29 at 257, 261.

³⁶ *Id.* at 257.

³⁷ *Id.* at 261.

³⁸ Anne Whiston Spirn, *Constructing Nature: The Legacy of Fredrick Law Olmsted* in UNCOMMON GROUND: TOWARD REINVENTING NATURE 112 (William Cronon ed., 1995).

³⁹ Statement of Gifford Pinchot, Hearing Before the Committee on the Public Lands, House of Representatives, 63rd Congress, 1st session. H.R. 6281.

⁴⁰ See Purdy, *supra* note 20 at 1159; Mark Sagoff, *Settling America or the Concept of Place in Environmental Ethics*, 12 J. ENERGY, NAT. RESOURCES & ENVTL. L., 349, 404-405 (1992).

should bring us as close as possible to God.⁴¹ Under this view, aesthetic responses of awe, comfort, and inspiration were accepted as natural human reactions to divine presence.⁴² Keeping wild nature in its pristine state was therefore not less a matter of religious belief than of national duty.⁴³

A. *The Rise and Fall of Preservation*

The notion that going into the wild can elevate the human spirit, cultivate certain virtues, strengthen the human-nature bond, or allow for an authentic form of living preceded preservationists by at least a century.⁴⁴ Preservationists incorporated this notion into the service of an environmental movement. John Muir, the preservation prophet,⁴⁵ took Transcendentalist principles of engaging nature as a form of inner ethical discovery and repackaged them as a popular message about exalted human experiences.⁴⁶ The Transcendentalist inner wilderness, a contemplative quality that is available anywhere,⁴⁷ was reborn as a spectacular oeuvre, a sublime work of art to be enjoyed and appreciated by the well-to-do.⁴⁸ The popular reconstruction of transcendentalism became a major force in the mobilization of environmental groups and politics. The preservationist idea about the value of engaging wild nature as a way to increase respect and care for the environment spread like wildfire among middle-class urbanites across the United States, helping to embed environmental awareness in American society. In the decades to follow, preservation became one of the pillars of the American environmental movement and one of the few distinct forces through which the movement has emerged and developed.⁴⁹

The reason preservation was so successful is that the wilderness ethos thrived on loathing urban living and the rise of the city, two prevalent and coterminous developments in the U.S. and Europe during the 19th and early 20th centuries. In an era when growing cities were characterized by “filth and squalor and disease,”⁵⁰ the wilderness ethos that celebrated the purity of forests, rivers, mountains, and valleys resonated with many upper-

⁴¹ Nash *supra* note 24 at 425.

⁴² Purdy, *supra* note 33 at 118-122.

⁴³ See Holly Doremus, *Nature, Knowledge and Profit: The Yellowstone Bioprospecting Controversy and the Core Purposes of America's National Parks*, 26 *ECOLOGY L.Q.* 401, 440-42 (1999); see also Thomas Cole, *Essay on American Scenery* (1835); Paul Shepard, *MAN IN THE LANDSCAPE* 188-189 (2nd ed. 1991).

⁴⁴ Jean Jacques Rousseau, *LA NOUVELLE HELOISE*, pt. IV, letter 11; Andrew Holden & David A. Fennell, *THE ROUTLEDGE HANDBOOK OF TOURISM AND THE ENVIRONMENT*, 102 (2013); William Wordsworth, *The Tables Turned*, *THE COMPLETE POETICAL WORKS* (1888, 1999) Lord Byron, *CHILDE HAROLD'S PILGRIMAGE*, Canto iv, Verse 178; Henry David Thoreau, *WALDEN AND OTHER WRITINGS* 172-173 (3rd ed., 1982); George Perkins Marsh, *MAN AND NATURE: OR, PHYSICAL GEOGRAPHY AS MODIFIED BY HUMAN ACTION* 290 (1864).

⁴⁵ Michael B. Smith, *The value of a tree: public debates of John Muir and Gifford Pinchot*, 60(4) *THE HISTORIAN*, 757, 757-759, (1998).

⁴⁶ Doremus, *supra* note 43 at 443.

⁴⁷ Thoreau, *supra* note 44 at 172-173, 224-226, 261.

⁴⁸ Smith, *supra* note 45 at 759; Purdy, *supra* note 20 at 1163.

⁴⁹ Brulle, *supra* note 27 at 69.

⁵⁰ David Owen, *THE GREEN METROPOLIS: WHY LIVING SMALLER, LIVING CLOSER, AND DRIVING LESS ARE THE KEYS TO SUSTAINABILITY* 23 (2009).

class urbanites.⁵¹ For Preservationists, modern city life was unhealthy, morally degrading, and mentally exhausting.⁵² Going into the wild was therefore a necessity for reclaiming one's very soul, not just an exclusive privilege.⁵³ To go into the wild was to visit a mythic idea of home, to return to a state of balanced existence where the "fountains of life" could rejuvenate the "tired, nerve-shaken, over-civilized" city dwellers.⁵⁴ It is in the wild where one is awakened from "the stupefying effects of the vice of over-industry and the deadly apathy of luxury... to get rid of rust and disease."⁵⁵

1. *Loving Nature to Death*

The undeniable success of preservation was its ability to introduce a new way for people to experience and value the natural environment. As the American wilderness settled in people's hearts, it became harder and harder for non-Preservationists to exploit scenic resources for purposes contravening the ideal of preservation. Just as John Muir envisioned, the more the wilderness became aligned with people's values, the more people were willing to sacrifice to protect it.⁵⁶ While nourishing an ever-growing environmental movement, the success of the recreation-oriented Preservationist ideal had negative environmental impacts as well. As the volume of encounters with wild nature increased,⁵⁷ the myth about the non-consumptive nature of recreation started to unravel.⁵⁸ Unlike its benign image, recreation leaves a significant ecological footprint on the environment.⁵⁹ High-volume, unchecked recreation adversely impacts biodiversity,⁶⁰ pollutes bodies of water,⁶¹ contributes to soil erosion,⁶² introduces invasive species,⁶³ and increases

⁵¹ Brulle, *supra* note 27 at 69.

⁵² Robert Gottlieb, *FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT* 63 (Revised edition, 2005).

⁵³ *Id.* at 64; Owen, *supra* note 50 at 24.

⁵⁴ Muir, *supra* note 27 at 1.

⁵⁵ *Id.* see also John Muir, *Going Home to the Mountains: On way to Yosemite Valley* (Sept. 1874) in Linnie Marsh Wolfe, *JOHN OF THE MOUNTAINS: THE UNPUBLISHED JOURNALS OF JOHN MUIR* 191 (1979).

⁵⁶ See *supra* note 29 and accompanying text.

⁵⁷ See James R. Rasband, *The Rise of Urban Archipelagos in the American West: A New Reservation Policy?* 31 ENVTL. L. 1, 25 (2003).

⁵⁸ John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 870 (1994) ("preservation permits future nonconsumptive human usage of wild lands, including recreation"); Kelly Nolen, *Residents at Risk: Wildlife and The Bureau of Land Management's Planning Process*, 26 ENVTL. L. 771, 775 (1996) (recreation is "nonconsumptive use"); John W. Ragsdale, Jr., *National Forest Land Exchanges and the Growth of Vail and Other Gateway Communities*, 31 URB. LAW. 1, 5 (1999).

⁵⁹ See Rasband, *supra* note 57 at 35-39 and references therein; David N. Cole, *Environmental impacts of outdoor recreation in wildlands*, in *SOCIETY AND RESOURCE MANAGEMENT: A SUMMARY OF KNOWLEDGE* 107-116 (M. Manfredo, et al. eds., 2004).

⁶⁰ David N. Cole & Richard L. Knight, *Impacts of Recreation on Biodiversity in Wilderness* 0(6) NAT. RESOURCES AND ENVTL. ISSUES 1 (1990).

⁶¹ S. M. Turton, *Managing Environmental Impacts of Recreation and Tourism*, 43(2) GEO. RES. 140 (2005); Rasband, *supra* note 57 at 44.

⁶² Ralf Buckley & John Pannell, *Environmental Impacts of Tourism and Recreation in National Parks and Conservation Reserves* 1(1) J. TOURISM STUD. 24, 25 (1990).

⁶³ Aaron P. Potito, *Impacts of Recreation Trails on Exotic and Ruderal Species Distribution in Grassland Areas Along the Colorado Front Range*, 36(2) ENVT'L MGMT. 230 (2005).

uncontrolled fires.⁶⁴ As more and more Americans adopted the wilderness ethos, environmentalists started to wonder whether we were “loving our national parks to death.”⁶⁵

2. *The Wilderness Ethos as an Anti-Human Agenda*

Unintended environmental impacts were not the only challenge introduced by preservation. From an ethical perspective, preservation suffers from a substantial inherent flaw. The wilderness ethos that stands at the heart of preservationism embraces, nourishes, and entrenches a dualist view of nature and man as separate and opposite, with untainted nature representing the purest form of creation and man the problem with which environmentalism must deal.⁶⁶ Instead of promoting one ethical community, a wilderness-focused environmental ethic enlarges the divide. It does not advocate a new form of being with the natural world or adopting an alternative form of life in the city. It presents no solution, it requires no action.⁶⁷ As a man-nature alienating philosophy, preservation leaves us very “little hope of discovering what an ethical, sustainable, honorable human place in nature might actually look like.”⁶⁸ In fact, taken to the extreme, a wholly-Preservationist world is devoid of people.⁶⁹

3. *Contrast is a Poor Driver of Environmental Protection*

The third rub of Preservationist ideology is that a contrast between urban living and wilderness engagement is not a good driver of environmental protection. Ecosystems are intricately connected to one another.⁷⁰ One cannot simply protect wilderness and expect ‘untainted’ nature to remain as such, without extending adequate protection to other ecosystems. But Preservationists were not interested in protecting tainted lands. Only sublime manifestations of the divine were deserving of their efforts and resources. Other issues, like urban growth, sustainable development, biodiversity, or ecosystem protection were not on the preservationists’ agenda.⁷¹ As external stresses on the environment increased, and as legal reforms, technological advances, and social changes reconstructed

⁶⁴ Buckley & Pannell, *supra* note 62 at 25.

⁶⁵ Joseph Sax, MOUNTAINS WITHOUT HANDRAILS, 1 (1980).

⁶⁶ *Id.*

⁶⁷ William Cronon, *The Trouble with Wilderness; or, Getting Back to the Wrong Nature*, in UNCOMMON GROUND: TOWARD REINVENTING NATURE, 80 (William Cronon ed., 1995) (All that the wilderness ethos represents is “the false hope of an escape from responsibility, the illusion that we can somehow wipe clean the slate of our past and return to the *tabula rasa* that supposedly existed before we began to leave our marks on the world...Going out into nature is an excursion, a visit to the natural, unfallen, antithesis of an unnatural civilization that has lost its soul.”)

⁶⁸ *Id.* at 80-81.

⁶⁹ Wendell Berry, THE UNSETTLING OF AMERICA: CULTURE & AGRICULTURE 28-29 (1977).

⁷⁰ THE UNITED NATIONS WORLD WATER DEVELOPMENT REPORT 2018: NATURE-BASED SOLUTIONS FOR WATER 61 (2018).

⁷¹ Gottlieb, *supra* note 52 at 64; Edward R. Grumbine, *Using Biodiversity as a Justification for Nature Protection in the US.*, in THE GREAT NEW WILDERNESS DEBATE 595, 604 (J. Baird Callicott & Michael P. Nelson eds., 1998).

and diversified human encounters with nature, preservation became less and less relevant.⁷² The dichotomy of pristine nature vs. tainted lands cannot support a conservation ethic, when the realm of untainted nature grows narrower and narrower. On the contrary, it leaves too much out of environmental discourse.⁷³

B. *The Ascendancy of Welfarism*

Except for occasional strife, preservation and conservation largely proceeded on parallel courses, each affecting and shaping American environmental policy in its own distinct way.⁷⁴ However, in a long process that began around 1970, utilitarianism, the ideological tenet of the conservation movement, became the leading approach for environmental policymaking.⁷⁵ The version of utilitarianism which gradually came to encompass environmental policy is welfare economics, a practical methodology for welfarism, a utilitarian-oriented ethical theory.⁷⁶ Welfarism views individual human well-being as the *only* relevant value in ethical decision-making. Under a welfarist framework, the goodness of an action is judged on its tendency to increase or decrease aggregate human well-being.⁷⁷ To implement welfarism, policymakers use CBA. CBA defines benefits as increases in human well-being (utility) and costs as reductions in human well-being.⁷⁸ For a project or policy to qualify on cost-benefit grounds, its social benefits (utility) must exceed its social costs.

Viewed from a welfarist cost-benefit perspective, the question whether or not to construct a dam that will harm a wild species has nothing to do with the imperiled species. To decide the ‘goodness’ of the action, one must compare aggregate human well-being under two alternative scenarios: (1) with the dam and injury to the species; or (2) without the dam and the injury. If construction of the dam will increase social utility, welfarist analysis will support it. This is not to say that the imperiled species has no place in a welfarist analysis. When calculating well-being, one must take into account the extent of well-being derived from the species and discount it from the benefits to be created if the

⁷² Berry, *supra* note 69 at 25.

⁷³ Purdy, *supra* note 33 at 123.

⁷⁴ *Id.* at 116-188.

⁷⁵ Nicholas A. Ashford, *The Legacy of the Precautionary Principle in US Law: the Rise of Cost-Benefit Analysis and Risk Assessment as Undermining Factors in Health, Safety and Environmental Protection in IMPLEMENTING THE PRECAUTIONARY PRINCIPLE: APPROACHES FROM THE NORDIC COUNTRIES, EU, AND USA* 352 (Nicolas De Sadeleer ed., 2007).

⁷⁶ Graham Smith, DELIBERATIVE DEMOCRACY AND THE ENVIRONMENT 35 (2003); Mark Sagoff, *On Preserving the Natural Environment*, 84 YALE L. J. 205, 215 (1974); Sagoff, *supra* note 40 at 404.

⁷⁷ See e.g., Amartya Sen, *Utilitarianism and Welfarism*, 76(9) J. PHIL., 463, 468 (1979) (defining the principle of ‘welfarism’).

⁷⁸ Organisation for Economic Co-operation and Development, COST-BENEFIT ANALYSIS AND THE ENVIRONMENT: RECENT DEVELOPMENT 16 (2006).

dam is built. Thus, cheaper electricity and less greenhouse gas emissions will be weighed against the aesthetic and recreational benefits the species confer on humans.⁷⁹

The species itself, however, has no claim on the aggregator of well-being. In a welfarist society, nonhumans possess no ethical significance and have no intrinsic value of their own. In a welfarist maximization scheme, the only value of nonhumans is as a derivative of the utility they confer on humans, the dollar value of their ‘services.’⁸⁰ Hence, in a world of welfarist-based environmental policy making, the soon-to-be extinct species has no standing in the courtroom of utility maximization.⁸¹ For an environmental welfarist, the talk about wilderness or the intrinsic value of nature is superfluous: like Coca Cola, Apple iPhone, and Nike sportswear, the natural environment is a resource that contributes to human welfare and should be managed as such. To an environmental welfarist, the fact that people’s sentiments make them value the natural environment is merely an indicator that people are willing to pay more for its conservation.

1. *Understanding the Appeal of Environmental Welfarism*

Many arguments have been offered for the transition of environmental policymaking into the utilitarian realm. One explanation focuses on the rejection of the balance of nature paradigm. For centuries, the view of nature in Western Civilization was dominated by a myth of balance. According to this myth, natural systems aspire to equilibrium. This equilibrium, when achieved, is the best condition for natural systems and is attainable as long as human disturbance is avoided.⁸² However, beginning in the late 1960s, ecologists uncovered more and more evidence suggesting that nature is characterized by change, not stability.⁸³ In a series of studies, researchers were discovering that nature is not static at all. In effect, nature’s default was dynamism. Environmental disturbances, such as pollution, land development, fires, droughts, earthquakes, floods, or newly introduced invasive species, constantly challenge existing dynamics and redraw interrelationships among species in a perpetual dance of continued and gradual change.⁸⁴

The change from an equilibrium view of nature to a paradigm of dynamism had an immense impact on conservation practices: if nature is characterized by change, focusing on preservation could actually harm nature because the main idea behind preservation is

⁷⁹ Welfarist accounting may also consider non-use values of the species like bequest value (the wellbeing individuals derive from knowing that the species and the benefits it creates for humans will be available to their descendants and future generations), and existence value (the wellbeing individuals derive from simply knowing the species exist).

⁸⁰ To measure wellbeing, CBA requires commensurable units of wellbeing measurement. Units of currency are the most common (but not mandatory) form of measurement to be used in this calculation.

⁸¹ See generally Louis Kaplow & Steven Shavell, *FAIRNESS VERSUS WELFARE* (Cambridge, 2002) supporting welfarism as the only valid methodology for rulemaking.

⁸² Daniel B. Botkin, *Adjusting Law to Nature’s Discordant Harmonies*, 7 *DUKE ENV’T L. & POL’Y FORUM* 25, 26 (Fall 1996)

⁸³ *Id.* at 27.

⁸⁴ Wiener, *supra* note 19; Judy L. Meyer, *The Dance of Nature: New Concepts in Ecology*, 69 *CHI.-KENT L. REV.* 875 (1994).

maintaining constancy, keeping an ecological system *unchanged*. The dynamic view of nature could not be reconciled with an environmental movement based on an ethos of wilderness. An ethos of wilderness is premised on dualism, a view that man and nature are separate and distinct, with nature portrayed as an unwavering source of nonhuman values to reflect upon, and man as an external force unjustly harming nature with his actions.⁸⁵ This dualist view collapsed in the face of the “nature as a change” model. If nature is unstable, dynamic, and oftentimes a product of human design,⁸⁶ then nothing is left to support the ethos of untainted sacred wilderness to be shielded from human interference.⁸⁷

More importantly, if humans are part of nature and human-induced change is an integral part of the disturbances that occur in nature as part of healthy evolution, how can we distinguish between a ‘good’ disturbance and a ‘bad’ one? Under a Preservationist paradigm the answer was easy: humans should stay out of nature. However, the new paradigm complicates things considerably. The dynamic view of nature does not care about the facilitator of disturbance but rather on the rate and magnitude of the change induced.⁸⁸ In other words, the new paradigm required a regulatory platform designed for managing change, regardless of its origins (human/ nonhuman).⁸⁹ To manage change, environmental policy shifted from a normative approach that bans human interference to a consequential analysis of impacts. Environmental welfarism, as a consequential theory, and CBA, its practical tool for implementation, perfectly fit this methodology.⁹⁰

A second explanation, suggested by Jedediah Purdy,⁹¹ focuses on political economy. According to Purdy, as a response to the environmental protections introduced into law during the environmental revolution of the 1960s and 1970s,⁹² American industry and the business community mobilized to protect against additional restrictions on production activities. Declaring a political war to save markets and efficiency from the evils of

⁸⁵ William Cronon, *In Search of Nature*, in William Cronon ed., UNCOMMON GROUND: TOWARD REINVENTING NATURE, 24 (1995).

⁸⁶ Daniel B. Botkin, *Adjusting Law to Nature's Discordant Harmonies*, 7 DUKE ENV'T L. & POL'Y FORUM 25, 30-31 (1996)(discussing how many “natural” environments celebrated as unique examples of “untainted” wilderness, are actually a product of unintentional human design, that is, many of their unique characteristics are attributable to human disturbances); Calvin Martin, *The American Indian as Miscalc Ecologist* in Robert C. Shultz and J. Donald Hughes (eds.), ECOLOGICAL CONSCIOUSNESS 137-148 (1981); Anne Whiston Spirn, *Constructing Nature: The Legacy of Fredrick Law Olmsted* in William Cronon ed., UNCOMMON GROUND: TOWARD REINVENTING NATURE 91 (1995) (91) (providing examples of natural preserves reconstructed or designed by Fredrick Law Olmsted, e.g., Niagara Falls, Yosemite, and the forest that today surrounds the Biltmore Estate in Asheville NC).

⁸⁷ Wiener, *supra* note 19.

⁸⁸ *Id.* at 352.

⁸⁹ *Id.* at 354.

⁹⁰ *Id.* at 356.

⁹¹ Jedediah Purdy, *Our Place in the World: A New Relationship for Environmental Ethics and Law*, 62 DUKE L. J. 857 (2012).

⁹² See e.g., The National Environmental Policy Act (1969), the Clean Air Act (1970), the Federal Insecticide Fungicide, and Rodenticide Act (1972), the Endangered Species Act (1973), the Safe Drinking Water Act (1974), the Resource Conservation and Recovery Act (1976), and the Toxic Substance Control Act (1976).

overregulation, those mostly affected by environmental restrictions on production worked to change decision-making processes in the U.S. and to introduce a “pro-business, anti-regulation” voice into political discourse.⁹³ These efforts bore fruit, and by the late 1970s and early 1980s, the window for major environmental reforms in the U.S. had closed.⁹⁴

The political atmosphere that emerged at the beginning of the 1980s made the work of environmental decision-makers very difficult. Entrusted with environmental laws to implement, regulators had to walk a fine line; they sought a neutral methodology of implementation, a system that would advance the environmental ideals of the laws enacted during the years of the environmental revolution but without embracing a contested environmental narrative. CBA, as an 'objective' human welfare calculating contrivance, fits the requirement perfectly.⁹⁵ CBA's appeal is strongest when it is used to implement policies in a world of competing settled values. Given an ethical framework of diverse first-order values which set the boundaries for human conduct, CBA uses a second order value, utility, to compare alternative policy options by aggregating the utility functions of individuals.⁹⁶ This is exactly the state of affairs which regulators faced following the environmental revolution of the 1960s-1970s, when a suite of first-order environmental values was introduced through legislation and required implementation in a world characterized by diverse competing interests.⁹⁷

A third explanation revolves around the rise of public choice theory. Prior to the introduction of public choice theory in the 1960s, the dominating political theory for administrative agency management was the progressive model. According to the progressive model, administrative agencies function as impartial expert bodies, using science to pursue designated legislative objectives. In contrast, public choice theory assumes that in politics, as in markets, individuals and organizations are motivated mainly

⁹³ Purdy, *supra* note 91 at 879 (“The new environmental statutes... helped to spur, a change in the political attitude of the U.S. business community. An anti-regulatory stance entered the heart of the public debate, from lobbying and campaign contributions to litigation and think tanks.”)

⁹⁴ *Id.*

⁹⁵ Amy Sinden, *The Economics Of Endangered Species: Why Less Is More In The Economic Analysis Of Critical Habitat Designations*, 28 Harvard Env. L. Rev. 129, 135 (2003/2004) (attributing the ascendancy of cost benefit analysis in environmental policymaking to the politically neutral character of mathematical calculations). *See also* Purdy, *supra* note 91 at 861, 878-879 (on similar lines, explaining that the ostensibly objective character of CBA contributed to its appeal among policymakers).

⁹⁶ Smith, *supra* note 76 at 35; *See also* Raymond Plant, MODERN POLITICAL THOUGHT 140–141 (1991) (“Utilitarianism provides a second order way of resolving . . . first order moral conflicts. People may have a wide range of wants and preferences which will be influenced by their particular moral outlook. Utilitarianism resolves these conflicts by the neutral and impersonal rule that of all the policies available to government, the one which is likely in its consequences to procure the greatest amount of want satisfaction is the course which should be chosen.”)

⁹⁷ Purdy, *supra* note 91 at 860-861 (“Unlike in the heady period of new legislation that ran from roughly 1970 through 1977, the pressing questions no longer involved choosing governing values, but instead required balancing established goals that sometimes competed with one another. CBA is especially suited to this kind of decision, and soon both administrators and scholars were engaged in versions of it.”)

by self-interest.⁹⁸ Applying microeconomics models of individual utility maximization to the political marketplace, public choice theorists identified 'market failures' like internal governmental rent-seeking, interest group representation, and agency capture that distort governmental decision-making processes. The rise of public choice theory and the critical assessment of agencies' activities which followed it were fertile ground for welfare economics proponents. As a utilitarian approach that evaluates public policies based on their effect on the aggregate wellbeing of the community (welfare), welfare economics was portrayed as a neutral system for objective agency decision making.⁹⁹

2. *Dreams of Plastic Trees*

In a seminal article published in 1973,¹⁰⁰ Laurence Tribe addressed a trend among U.S. municipalities to replace natural amenities with artificial 'surrogates' like plastic trees, synthetic turf, and man-made shrubs. Tribe recognized that under a welfarist analysis, these surrogates, perpetually green vegetation that does not consume valuable resources, could satisfy all human wants just as well as real trees at less cost. In that case, explained Tribe, welfarist environmental policy requires us to prefer plastic trees over the more expensive and vulnerable natural alternative.¹⁰¹ However, according to Tribe,¹⁰² most people tend to balk at this outcome. The idea that synthetic environments are somehow more 'environmental' than natural landscapes seems wrong. To the welfare economist, the reason for this response is that individuals are not faced with sufficient facts. To Tribe, the discomfort people exhibit with this outcome is a sign of CBA's morally distortive tendencies.

Welfarism, argued Tribe, suffers from a deep ethical flaw. By framing environmental discourse in the terminology of human self-interest, welfarism introduces a system of legal/political discourse "which so structures human thought and feeling as to erode, over the long run, the very sense of obligation which provided the original impetus for protection efforts."¹⁰³ The reason for this process of ethical erosion is the way we form our values. Valuing, explains Tribe, is first and foremost about acknowledging value in something external to us. We choose to commit ourselves to principles that protect ideas and objects only *after* we have come to realize the moral significance of the object or idea.¹⁰⁴ When we structure legal and political discourse around human wants as the only factor in determining what to protect, we erode the process of acknowledging value. We put the cart

⁹⁸ Dennis C. Mueller, *The "Virginia School" and Public Choice* in LECTURES ON VIRGINIA POLITICAL ECONOMY (1985) at 1.

⁹⁹ Kysar, *supra* note 14 at 50. See also Richard L. Revesz, & Michael A. Livermore, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 13 (2008) (justifying CBA as rational check on bureaucrats' discretion).

¹⁰⁰ Tribe, *supra* note 11 at 1315-1348.

¹⁰¹ *Id.* at 1326.

¹⁰² *Id.*

¹⁰³ *Id.* at 1331.

¹⁰⁴ *Id.* at 1326-1327.

before the horse. Committing ourselves to a principle that protects the Bald Eagle might have a price, and it might be a price we are not willing to pay, but the discussion on whether or not to pay the price is secondary to the question whether or not a Bald Eagle is *worthy* of protection. CBA, explains Tribe, takes away our freedom to acknowledge value in the world.¹⁰⁵ It degrades individual autonomy and, in the process, transforms our system of ethical appreciation into a platform for trading “smoothly exchangeable units of satisfaction.”¹⁰⁶

Although deeply concerned with the long-term ethical consequences of welfarism, Tribe nevertheless implicitly acknowledged the importance of CBA as an environmental rulemaking policy. Despite his fierce criticism of CBA, Tribe never called for its elimination. Instead, he focused his efforts on exploring legal solutions that could counter the loss of autonomy and concomitant ethical erosion associated with welfarist rulemaking. Tribe searched for a legal framework that would maintain human freedom to acknowledge value in the natural world, while gradually elevating nature from means-to-a-human-end status to an end-in-itself position. Implicit in this approach is the realization that in an egalitarian environmental society, non-humans will be served by CBA, not consumed by it.¹⁰⁷ To succeed, Tribe’s framework had to satisfy two requirements. It had to protect individual autonomy to acknowledge value in nature (environmental autonomy), and it had to institute some form of reverence toward the natural world (environmental agency).¹⁰⁸ One structural restriction follows from the requirement of environmental autonomy – the legal framework Tribe was trying to develop could not predetermine the ethical principles according to which individuals find value in nature. The reason for this is simple – to be free to choose what to value, individuals must be able to abandon existing ethical principles in favor of new ones.¹⁰⁹

Tribe starts his search for a legal framework of environmental ethical progress with the recognition that the human capacity to “empathy and identification” is elastic and constantly evolving. Throughout history, moral evolution has gradually expanded the bounds of human empathy to include an ever-growing class of moral patients worthy of human protection.¹¹⁰ Once a very limited sphere, confined by close familial and social connections, empathy has grown to encompass humans as a species regardless of race, age, or social function, and in some instances, members of other species as well.¹¹¹ To counter

¹⁰⁵ *Id.* at 1326-1327; Purdy, *supra* note 91 at 865.

¹⁰⁶ Tribe, *supra* note 11 at 1331.

¹⁰⁷ Smith, *supra* note 76 at 35 (cost benefit analysis is a decision-making framework for resolving first-order moral conflicts. If nature is elevated to a position of a moral patient, it is not a second-order value anymore).

¹⁰⁸ Tribe, *supra* note 11 at 1330-1331.

¹⁰⁹ *Id.* at 1338.

¹¹⁰ Moral Patients are subjects of moral responsibility (morally considerable entities).

¹¹¹ Christopher D. Stone, *Should Trees have Standing? Toward Legal rights for Natural Objects*, 45 S. CAL. L. REV. 450, 450-451 (1972).

the process of welfarist-induced ethical erosion, Tribe suggests that we engage in a search for legal frameworks which will facilitate further extensions of human empathy, gradually expanding the community of morally significant entities.¹¹² According to Tribe, Christopher Stone's idea of recognizing the legal rights of nature,¹¹³ meets this requirement.¹¹⁴ As Stone observed, legal rights embody and advance consciousness of the moral value of the rights-holder.¹¹⁵ Therefore, changing legal terminology to discuss natural objects (animate and inanimate) as deserving certain protections, care, and empathy, equates the perceptions of these objects with those of humans, thereby elevating their moral status.

Tribe's and Stone's suggestion of assigning rights to natural objects contemplates 'trickle down' moral guidance. The underlying premise of assigning legal rights to nature is that by changing legal discourse we "spur moral reflection on the importance of... the value of nature."¹¹⁶ This process of moral reflection would not only affect the views of lawmakers, lawyers, policymakers and other professionals, but would eventually trickle down and transform social discourse. In the words of Gary Snyder, "a generation or two in[to] the future" [after rights of nature have been recognized] people might "actually feel on a gut level that non-human nature has rights."¹¹⁷ By placing humans and non-humans on equal or closely-equal legal terms, we will establish a legal framework for ethical experimentation whereby individuals and nonhumans interact in a 'safe environment' designed to facilitate an ever-evolving relationship in which society will make ethical progress.¹¹⁸ Legal rights were supposed to instill reverence toward the natural world while inviting society to engage in continuous and in-depth discussions about our place in the natural world.¹¹⁹

3. *The Problem with Rights*

¹¹² Tribe, *supra* note 11 at 1338, 1340, 1345. Tribe's argument is based on the presupposition that an expansion of human empathy to encompass non-humans is necessarily moral progress. In this, Tribe joins an established strain in environmental ethics. See e.g., Peter Singer, *THE EXPANDING CIRCLE: ETHICS, EVOLUTION, AND MORAL PROGRESS* 120 (1981, 2011) and generally, Tom Regan, *THE CASE FOR ANIMAL RIGHTS* (1983). It is important to note that the view that caring for nature is a moral good is a consensus in ethics. Even hardcore anthropocentrists like Emanuel Kant, who deny any moral standing of animals, support moral duties toward nonhumans as indirect duties toward mankind. Immanuel Kant, *LECTURES ON ETHICS* 239 (Hackett, 1988). A different approach, disconnected from anthropocentrism, biocentrism or ecocentrism, grounds human ethical responsibility to nature in virtues. See Thomas E. Hill, Jr., *Ideals of Human Excellence and Preserving Natural Environments*, 5(3) ENVTL. ETHICS 211, 215 (1983).

¹¹³ Stone, *supra* note 111.

¹¹⁴ Tribe, *supra* note 11 at 1345.

¹¹⁵ Stone, *supra* note 111 at 456.

¹¹⁶ Purdy, *supra* note 91 at 865.

¹¹⁷ Gary Snyder, *THE REAL WORK: INTERVIEWS AND TALKS 1964-1979*, 72 (NY, 1980).

¹¹⁸ Tribe, *supra* note 11 at 1338.

¹¹⁹ Tribe avoids celebrating a specific form of man-nature interaction. Instead, his framework is designed to facilitate moral growth by allowing for pluralistic egalitarian interactions between man and nature. *Id.* at 1338.

Conventional legal thought regarded the idea of assigning legal rights to nature as impractical and superfluous. The common argument against the rights of nature position held that existing legal rules could achieve the same level of environmental protection without facing the difficulties associated with recognizing the legal rights of nature.¹²⁰ The torrent of criticism directed against Tribe and Stone reoriented the debate about rights-based approaches for environmental legal protection; inquiries into the value of rights-based frameworks as a remedy for environmental ethical erosion were overshadowed by discussions of procedural feasibility.

However, regardless of the question whether it is feasible to implement the rights of nature position, a discussion of its merits and demerits as a legal framework for ethical experimentation is worth exploring. In the three decades that have passed since the height of the rights of nature movement, welfarism has become the rulemaking norm in environmental policy. And despite its prevalence as a regulatory approach, concerns about its ethical implications have not subsided.¹²¹ Careful analysis of the merits and demerits of the rights of nature framework as an antithesis of welfarism is warranted, because it sheds light on the path we should take if we are to suggest feasible legal frameworks for countering the ethically corrosive tendencies of welfarism.

The first problem with recognizing the legal rights of nature is that many people do not feel that non-humans are worthy of moral, and therefore, legal consideration.¹²² Thus, legal recognition of nature will necessarily entail social conflicts between proponents and opponents of the idea.¹²³ Moreover, since legal rights are inherently autonomistic and confrontational, rather than broadening the sense of community, a language of legal rights might actually increase friction and alienation:¹²⁴ “Rights, as metaphors for relationships, reify and objectify by virtue of their conceptual nature and destroy communication and interrelatedness by virtue of their accompanying adjudicative process.”¹²⁵ Legal rights demand recognition, and as such, are more focused on identification than on community

¹²⁰ See e.g., P. S. Elder, *Legal Rights for Nature: The Wrong Answer to the Right(s) Question*, 22(2) OSGOODE HALL L. J., 285, 291 (1984); Sagoff (1974), *supra* note 76 at 218-222; Paul Emond, *Cooperation in Nature: A New Foundation for Environmental Law*, 22 OSGOODE HALL L.J. 323, 332 (1984); John Livingston *Rightness or Rights?* 22 OSGOODE HALL L. J. 309 (1984).

¹²¹ See e.g., Sinden, *supra* note 10; Kysar, *supra* note 14; Frank Ackerman & Lisa Heinzerling, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004); Sagoff, *supra* note 16; Sidney A. Shapiro & Robert L. Glicksman, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH (2003); David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 ECOLOGY L. Q. 545, 568, 573-74 (1997).

¹²² Cynthia Giagnocavo & Howard Goldstein, *Law Reform or World Re-form: The Problem of Environmental Rights*, 35 MCGILL L. J. 345, 354 (1990).

¹²³ See Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENVTL. L. J. 295, 314 (2003) (discussing the impediments to legal enforcement when there is no wide consensus regarding the values underlying the legislation).

¹²⁴ Giagnocavo & Goldstein, *supra* note 122 at 371.

¹²⁵ *Id.*

building and empathy. If anything, the language of rights trades empathy for recognition, inhibiting the process of ethical community building.¹²⁶

But the recognition of rights always creates friction. After all, “if there is no struggle, there is no progress.”¹²⁷ In line with this understanding, proponents of the legal rights of nature have presented the civil rights movement as an example of legal recognition of rights that brought about an ethical revolution.¹²⁸ However, in equating humans and non-humans, rights of nature proponents miss an important attribute of natural objects: unlike humans, natural objects do not engage in equal reciprocal relationships with other humans. The lack of ability to engage in egalitarian relationships means that under a legal rights framework, nature will have nothing more than procedural protection, leaving natural objects and people who do not view them as worthy of moral consideration in a state of unending struggle.¹²⁹

Racial integration is a good example to illustrate this difficulty. Unlike natural objects, African Americans used the status they acquired through legal battles to interact as full members of society. It was not legal precedents and asserted rights that brought real change; rather, it was the ability of individuals to use their rights to integrate in society and broaden the realization of reciprocity and identity among members of society with whom they previously lacked equal interaction.¹³⁰ Hence, newly recognized legal rights provide a platform for members of disenfranchised communities to take their rightful place in society through equal interaction with others. It is interaction, not legal discourse which leads to “further extensions“ of “the human capacity for empathy and identification.”¹³¹

Tribe partially acknowledges this problem. He admits that rights-based frameworks may lead to little more than procedural protection, like that provided to corporations as bearers of legal rights.¹³² However, Tribe is hopeful that “[a]t least so long as we remain

¹²⁶ *Id.*

¹²⁷ Frederick Douglass, “If There Is No Struggle, There Is No Progress” (1857).

¹²⁸ Tribe, *supra* note 11 at 1345; Stone, *supra* note 111; Roderick F. Nash, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* (1989).

¹²⁹ See John Rodman, *The Liberation of Nature*, 220 *INQUIRY* 83, 96 (1977).

¹³⁰ See e.g. Morton Deutsch & Marry Evan Collins, *Interracial Housing*, in *AMERICAN SOCIAL PATTERNS* 7, 42-43 (William Peterson ed., 1956) (finding that among Caucasians who held unfavorable attitudes toward African Americans before moving to a housing project, 92% of those who moved to a segregated project still had unfavorable attitudes whereas more than half of those who moved to integrated projects now held favorable views, explaining that “perceiving Negroes as equals provides only the opportunity for the development of friendly feelings; for this opportunity to be fully realized intimate social contacts with Negroes on an equal-status basis seem to be necessary also”). See also John M. Rich & Joseph L. Devitis, *THEORIES OF MORAL DEVELOPMENT* 74 (2d ed. 1994) (integrated housing arrangements can “reduce ethnocentrism and promote greater acceptance of others”); Eric Kaufmann & Gareth Harris, *Mapping the white British response to ethnic change... Changing Places*, *DEMOS* (2014) (experiencing cultural diversity reduces anti-minorities sentiments); Jens Rydgren & Patrick Ruth, *Contextual explanations of radical right-wing support in Sweden: socioeconomic marginalization, group threat, and the halo effect*, 36:4 *ETHNIC AND RACIAL STUD.*, 711 (2013) (same).

¹³¹ Tribe, *supra* note 11 at 1345.

¹³² *Id.* at 1342-1343.

within empathizing distance of the objects whose rights we seek to recognize, it seems reasonable to expect the acknowledgment of such rights to be regarded as more than fictitious.”¹³³ In other words, interaction (remaining within empathizing distance) is a prerequisite for moral recognition. This is so because individual morals are rooted in human empathy.¹³⁴

For feelings of empathy to emerge, one must be in a position for a reciprocal relationship and identification with the object of empathy. If one does not interact with the object of empathy, one cannot develop empathy for that object. No empathy, no ethical obligation.¹³⁵ Empathy requires interaction, because empathy is contingent on our relationship with the object of empathy, our recognition of its welfare, our ability to identify with its plight, and to appreciate its perspective.¹³⁶ This ability is acquired through emotional experiences, not rational learning.¹³⁷ Put simply, meaningful interaction with the natural environment is fundamental to the development of genuine and long-lasting environmental empathy.¹³⁸ Indeed, a growing volume of research suggests that our environmental values are contingent on the formation of emotional connections with nature,¹³⁹ a process that in the absence of other forms of communication, depends on

¹³³ *Id.* at 1343.

¹³⁴ *Id.* at 1330; Stone, *supra* note 111 at 450, 498; *See generally* Schopenhauer, THE BASIS OF MORALITY 1840, Arthur Bullock trans. 170 (London, 1903); David Hume, TREATISE OF HUMAN NATURE II (1739); Martin L. Hoffman, EMPATHY AND MORAL DEVELOPMENT (2000).

¹³⁵ Activities to protect the environment, like any activity by an individual to protect third parties (humans and nonhumans) are the result of two sets of considerations – egoistic considerations and altruistic considerations. Egoistic considerations are divided into pure egoistic considerations, considerations that involve the welfare of the perceiving individual, and social-altruistic considerations which involve concern for a group to which the perceiver belongs. Wesley P. Schultz, *Empathizing with nature: The effects of perspective taking on concern for environmental issues*, 56(3) J. SOC. ISSUES, 391 (2000). Unlike egoistic considerations that involve the welfare of the acting agent, altruistic considerations are based on empathy, an emotional response to a perceived need of the object of empathy. Batson and Shaw, *Evidence for Altruism: Toward a Pluralism of Prosocial Motives*, 2(2) PSYCHOL. MOTIVES 107, (1991); Batson et al, *Empathy and Altruism* in OXFORD HANDBOOK OF POSITIVE PSYCHOLOGY 417 (Snyder & Lopez ed., 2nd ed., 2009).

¹³⁶ Jaime Berenguer, *The Effect of Empathy in Environmental Moral Reasoning*, 42(1) ENVTL. & BEHAVIOR 110 (2008); Lawrence Kohlberg, *The Development of Moral Judgment and Moral Action*, in CHILD PSYCHOLOGY AND CHILDHOOD EDUCATION: A COGNITIVE-DEVELOPMENTAL VIEW 259, 269 (1987); Norma Haan, *Processes of Moral Development: Cognitive or Social Disequilibrium?* 21 DEVELOPMENTAL PSYCHOL. 996 (1985).

¹³⁷ Inge M. Ahammer & John P. Murray, *Kindness In The Kindergarten: The Relative Influence Of Role Playing And Prosocial Television In Facilitating Altruism*, 2(2) INT’L J. BEHAVIORAL DEVELOPMENT, 133 (1979); Berenguer, *supra* note 136; Holly Doremus, *Shaping the Future: The Dialectic of Law and Environmental Values*, 37 U.C. DAVIS L. REV. 233, 242 (2003) and references therein.

¹³⁸ While it is a standard story that distance from nature was a great contributor to a newfound love of it, one must question ‘love’ from afar that is not based on familiarity and personal knowledge but rather on social narratives. Environmental attitudes that are not grounded in meaningful interactions are susceptible to capture and distortion by information brokers and concentrated interests. *See* Doremus, *supra* note 137 at 248 and J. Baird Callicott, *Animal Liberation: A Triangular Affair*, 2(4) ENVTL. ETHICS 311 (1980); *See generally*, Edward S. Reed, THE NECESSITY OF EXPERIENCE (1996).

¹³⁹ Elizabeth Kals et al, *Emotional affinity toward nature as a motivational basis to protect nature* 31(2) ENVTL. & BEHAVIOR, 178 (1999).

physical human-nature interaction.¹⁴⁰ Studies reveal that human beings are evolutionarily ‘hardwired’ to connect with other forms of life and have an “innate tendency to focus on life and lifelike processes.”¹⁴¹ No less important, substantial evidence has established a link between personal experiences of nature and respect and concern for it.¹⁴²

Assuming that humans are within empathizing distance of nature, Tribe relies on his rights-based approach to facilitate stronger connections between humans and nature. But as we have seen, rights-based approaches merely provide frameworks for reciprocal interactions, a necessary but insufficient condition for empathic relationships. Since nature cannot function as an active agent within a legal framework for reciprocal interactions, rights-based approaches are indeed “the wrong answer to the right(s) question.”¹⁴³ However, the recognition that empathizing distance is a prerequisite for moral evolution illuminates further searches for a legal framework that will provide the necessary infrastructure for meaningful and ethical human interaction with nature. In fact, one such framework was established decades ago. It was called Preservation.

PART II: A PRAGMATIST APPROACH TO PRESERVATION

Despite its flaws, Preservation did get one very important thing right: experience matters. It is through experience that we grow and that our knowledge of the world forms and evolves. The essential problem with preservation was that it accorded value to a distinct form of nature and thereby reduced its ethic of experience to a specific and narrow medium of human-nature interactions. Thus, while it succeeded in cultivating and promoting certain environmental values, it failed as a coherent environmental ethic. Anthropocentric approaches to valuing nature suffer from a similar flaw. While seemingly more coherent

¹⁴⁰ Ernest Partridge, *Ecological Morality and Nonmoral Sentiments*, 18 ENVTL. ETHICS 149, 159 (1996); Daniel Levi & Sara Kocher, *Virtual Nature: The Future Effects of Information Technology on Our Relationship to Nature*, 31 ENVTL. & BEHAVIOR 203 (1999); Doremus, *supra* note 137 at 248.

¹⁴¹ Edward O. Wilson, *BIOPHILIA*, 1 (12th ed. 2003); Eleonora Gullone, *The Biophilia Hypothesis and Life In The 21st Century: Increasing Mental Health Or Increasing Pathology?* 1 J. OF HAPPINESS STUD. 293 (2000).

¹⁴² Elizabeth K. Nisbet & John M. Zelenski, *Underestimating Nearby Nature: Affective Forecasting Errors Obscure the Happy Path to Sustainability*, 22 PSYCHOL. SCI. 1101 (2011); Nisbet et al., *The Nature Relatedness Scale Linking Individuals' Connection With Nature to Environmental Concern and Behavior*, 41(5) ENVTL. & BEHAVIOR 715 (2009); Schultz, *supra* note 135; Wesley P. Schultz, *Inclusion With Nature: The Psychology of Human-Nature Relations* in PSYCHOLOGY OF SUSTAINABLE DEVELOPMENT 62 (P. W. Schmuck & W. P. Schultz eds., 2002); Trudi E. Bunting & Larry R. Cousins, *Environmental dispositions among school-age children*, 17(6) ENVTL. & BEHAVIOR 725 (1985); Louise Chawla, *Children's Concern for the Natural Environment*, (5)3 CHILDREN'S ENV'T Q. 13 (1988); Lilian A. Phenice, & Robert J. Griffore, *Young Children and the Natural World*, 4(2) CONTEMP. ISSUES IN EARLY CHILDHOOD 167 (2003); Wesley P. Schultz et al., *Implicit connections with nature*, 24(1) J. ENVTL. PSYCH., 31 (2004); *See generally*, Richard Louv, *LAST CHILD IN THE WOODS: SAVING OUR CHILDREN FROM NATURE-DEFICIT DISORDER* (2008).

¹⁴³ *See* Elder, *supra* note 120.

and manageable,¹⁴⁴ assigning nature a derivative value contingent on its benefit to humans leads down a precarious moral path. Lastly, egalitarian approaches that purport to mediate the two poles have their own flaws: our analysis of Tribe's legal framework for human-nature interactions has revealed it as a procedural framework that lacks the ability to fully integrate man and nature. The question then arises, what can we do? Is the quest for a "theory of the natural order and our place in it" doomed?¹⁴⁵

The answer is "not necessarily." One of the reasons for the rise of CBA in environmental decision-making is the inability of environmental ethics to provide definitive answers to questions of environmental policy.¹⁴⁶ The variety of theories and the different approaches to identify value in nature have rendered environmental ethics unworkable for policymakers. With CBA as the only practical measure to value nature, policymakers proceeded to implement environmental welfarism.¹⁴⁷ However, it may be that the problem is not in the inability to formulate a comprehensive theory of 'everything,' the problem may lie in the quest for an end rather than a means to getting there.

A. *Acknowledging that We Do Not Know*

The lack of a 'theory of everything' is not unique to environmental ethics. Philosophy and ethics, its subsection dealing with morals, are fraught with inconsistencies and competing positions that advance irreconcilable arguments in their efforts to answer existential questions. However, it is exactly the search for a single set of principles to answer these questions that prevents us from developing a comprehensive and pragmatic theory of value.¹⁴⁸ The problem with monism, the belief that there is one overarching set of ethical principles,¹⁴⁹ is that it is impossible to furnish one great answer to all the dilemmas of ethics.¹⁵⁰ One theory of value, nuanced and comprehensive as it may be, cannot be applied to all circumstances.¹⁵¹ Stone suggests that one option for addressing this problem,¹⁵² is to embrace moral pluralism, a position asserting the existence of multiple

¹⁴⁴ See e.g., Eduardo M. Penalver, *Land Virtues*, 94 CORNELL L. REV. 821, 875-876 (2009) (doubting CBA's image as a determinant and accurate methodology).

¹⁴⁵ John Rawls, *A THEORY OF JUSTICE* 512 (1971).

¹⁴⁶ Purdy, *supra* note 91 at 874-877.

¹⁴⁷ Smith, *supra* note 45 at 35 (discussing CBA appeal as "an impersonal method of arriving at social and political decisions" in the absence of a "uniting moral framework"); Raymond Plant, *MODERN POLITICAL THOUGHT* 140-141 (1991) (same).

¹⁴⁸ Christopher Stone, *THE GNAT IS OLDER THAN MAN* 279 (1993).

¹⁴⁹ Or one unique moral principle that can guide moral judgment in every situation. Bryan G. Norton, *Integration or Reduction: Two Approaches to Environmental Values* in *SEARCHING FOR SUSTAINABILITY: INTERDISCIPLINARY ESSAYS IN THE PHILOSOPHY OF CONSERVATION BIOLOGY*, 47 (2002). See also Smith, *supra* note 45 at 18.

¹⁵⁰ Smith, *supra* note 45 at 35; Stone, *supra* note 148 at 279.

¹⁵¹ Smith, *supra* note 45 at 20.

¹⁵² Stone, *supra* note 148 at 279.

moral frameworks that are equally correct and yet in conflict with each other.¹⁵³ To Stone, embracing moral pluralism means using different moral frameworks for different moral actions and actors. For instance, when we speak of persons, we can consider rights and duties, of what is morally mandatory. However, questions that involve lower life could require the application of more flexible judgments, not what is mandatory as a duty but rather what is “morally welcome.”¹⁵⁴

One way to understand the debate about environmental values is that the lack of better answers regarding “the natural order and our place in it” is an indication that our society is still in the beginning stages of the evolution of environmental values, when discourse and experimentation are crucial to the development of clear answers.¹⁵⁵ Only after we have formed clear answers to the perplexing issues underlying human-nature relationship can we progress toward grounding our ethics in more concrete moral structures, like rights.¹⁵⁶ As Tribe correctly observed,¹⁵⁷ pluralism and experimentation are fundamental for the proper function of this process.¹⁵⁸

B. *Ethical Pragmatism*

Pluralism and experimentation are two distinct features of Pragmatism, the philosophic approach that rejects the view of external ‘true’ reality and instead embraces a conception of reality as process and development that “is actively created as we act in and toward the world.”¹⁵⁹ Pragmatism emerged in the second half of the 19th century out of frustration with the inability of philosophy to provide practical guidance and definitive answers to existential questions. But unlike welfarism, which answers a similar gap in environmental policy,¹⁶⁰ pragmatism addresses change by advancing pluralism, not monism.

When applied to ethics, the pragmatist idea of evolving reality means that any given value system must be constantly examined and readjusted, because if reality is not constant, neither is our belief system about what is right or wrong. Focusing on empiricism as a means to validate philosophical conjectures, pragmatism emphasizes the importance of human experience as the fundamental medium where ideas are empirically tested. A focus on human experience as the origin of value and the arena in which perspectives clash, emerge, and dissipate makes for a value theory that “sees ethics as a process of continual

¹⁵³ Smith, *supra* note 45 at 21. Moral pluralism can also be described as the position that no single moral principle can be appropriately applied to all ethical problems Kelly A. Parker, *Pragmatism and Environmental Thought* in ENVIRONMENTAL PRAGMATISM 31-32 (Light & Katz eds., 1996).

¹⁵⁴ Stone, *supra* note 148 at 279.

¹⁵⁵ Anthony Weston, *Before Environmental Ethics*, 14(4) ENV'TL ETHICS, 321, 329-330 (1992).

¹⁵⁶ *Id.*

¹⁵⁷ Tribe, *supra* note 11 at 1338.

¹⁵⁸ Weston, *supra* note 155 at 330.

¹⁵⁹ John Hewitt & David Shulman, SELF AND SOCIETY: A SYMBOLIC INTERACTIONIST SOCIAL PSYCHOLOGY 6 (11th ed., 2011).

¹⁶⁰ See Purdy, *supra* note 91 at 860-862.

mediation of conflict in an ever-changing world.”¹⁶¹ As an experiential moral philosophy, pragmatism “begins with a respect for direct experience and seeks to understand the manner in which values are revealed and how values serve to render the world meaningful.”¹⁶²

Regardless of whether one is willing to accept the pragmatist notion of anti-realism, pragmatism is a useful guide for navigating the path of ethical growth many have tried to delineate. Instead of focusing on a single framework as the baseline for human-nature relationships, pragmatism directs us towards human experience. Since all value emerges in experience,¹⁶³ a pragmatist approach will suggest that to ‘get it right,’ or at least as close as possible to right,¹⁶⁴ we must enhance and enrich the environmental experiences of individuals.¹⁶⁵

In keeping with this notion, Anthony Weston focuses on establishing “social, psychological, and phenomenological preconditions” to “enabl[e] environmental practice[s]” which will facilitate an evolution of new environmental values. He therefore encourages policymakers to create “physical spaces for the emergence of trans-human experience, places within which some return to the experience of and immersion in natural setting is possible.”¹⁶⁶ Such places could be anything from “quiet zones” inhabited by communities that opted to ban “bright outside lights... automobile engines, lawnmowers, and low-flying airplanes” to “Midgleyan mixed communities of humans and other species.”¹⁶⁷

Weston’s suggestion is premised on two realizations: first, Weston understands that the physical environments we inhabit and our social institutions shape and structure human-nature relationships.¹⁶⁸ Because the notion of human-nature interaction as a valuable ethical practice is foreign to our anthropocentric society, the design of our institutions fails

¹⁶¹ Parker, *supra* note 153 at 25.

¹⁶² Charles S. Brown, *The Who of Environmental Ethics: Phenomenology and the Moral Self*, in *THE EXPERIENCE OF NATURE: ECOPSYCHOLOGY, PHENOMENOLOGY, AND THE ENVIRONMENT* (Douglas A. Vakoch & Fernando Castrillón eds.) 144, 157 (2014); Val Plumwood establishes a corresponding feminist framework for experience-based environmental ethics, see Val Plumwood, *Nature, Self, and Gender: Feminism, Environmental Philosophy, and the Critique of Rationalism*, 6(1) *HYPATIA, ECOLOGICAL FEMINISM* 3 (1991); Leopold and Naess have also written about the way interaction with the environment increases empathy and care for its concern. See Aldo Leopold, *A SAND COUNTY ALMANAC WITH ESSAYS ON CONSERVATION FROM ROUND RIVER* 211-212 (1970); Arne Naess, *The Shallow And The Deep, Long-Range Ecology Movement: A Summary*, 16:1 *INQUIRY*, 95, 95-96 (1973).

¹⁶³ Parker, *supra* note 153. See also Brown, *supra* note 162 at 150 (2014); Jarrett Zigon, *Morality and Personal Experience: The Moral Conceptions of a Muscovite Man*, 37 *ETHOS: J. SOC. PSYCH. ANTHROPOLOGY* 78 (2009).

¹⁶⁴ Anthony Weston, *Beyond Intrinsic Value: Pragmatism in Environmental Ethics*, 7 *ENVTL. ETHICS*, 321, 321-339 (1985).

¹⁶⁵ See e.g., Parker, *supra* note 153 at 25; Brown, *supra* note 162 at 150.

¹⁶⁶ Weston, *supra* note 155 at 334.

¹⁶⁷ *Id.* (referring to the famous moral philosopher Mary Midgley).

¹⁶⁸ *Id.* at 325-326.

to promote environmental empathy. If anything, it reduces it.¹⁶⁹ If environmental empathy is contingent on our interaction with nature and such interaction is flattened by our social institutions, then our ability to form lasting and meaningful bonds with nature is reduced as well. Second, a pluralistic framework for valuing nature requires a spectrum of interactions that cannot be achieved by a stroll in a city park or a weekend excursion in the nearest wilderness area. Pluralism of interactions can only arise from experiential forms of living in nature that will allow for “new or stronger environmental values to evolve.”¹⁷⁰ This requires accommodation of as many environmental lifestyles as possible.

Accordingly, we must restructure our institutions to allow individuals and communities to choose what they view as the right way of living with nature. On this point, Weston agrees with Tribe, as both are concerned with individual freedom to discover and acknowledge value in the environment. Tribe’s framework focused on discursive devices for promoting in-depth discussions concerning the man-nature relationship. In contrast, Weston focuses on experiences, not discourse. According to Weston, we must “make space for increasingly divergent styles of living on the land” to facilitate environmental moral growth.¹⁷¹ In other words, a society committed to individual environmental autonomy must provide its members with a robust menu of environmental lifestyles from which to choose and which, according to Weston, is achievable with “[a] little creative zoning.”¹⁷²

Along similar lines, Holly Doremus advocates that we plan our laws and policies “with an eye to their role in building the values of present and future generations and in translating those values into environmentally protective actions.”¹⁷³ This means that we must “make available a variety of nature experiences, ranging in wildness and accessibility,”¹⁷⁴ a recommendation that at the policy level translates to a focus on local efforts rather than national goals because “local land-use decisions have the strongest structural influence on the availability of nature to the community.”¹⁷⁵ Unlike Weston the philosopher, Doremus the law professor understands that, if we are genuinely interested in promoting meaningful pluralism in environmental experiences, mere creativity in zoning is insufficient. Doremus correctly observes that law affects and shapes environmental perspectives and values in countless ways. The law has the capacity to structure society, shape its physical form, affect interpersonal relationships, design institutions, and sanction permitted and unpermitted actions. This ability allows the law to “either facilitate or inhibit the development and maintenance of environmental values and the ability to put those values into practice.”¹⁷⁶

¹⁶⁹ *Id.* at 334.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Doremus, *supra* note 137 at 241.

¹⁷⁴ *Id.* at 257.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 241.

While more comprehensive than Weston, Doremus' legal approach fails to achieve its goal of translating values "into environmentally protective actions."¹⁷⁷ The problem with Doremus' approach is that it determines the character of 'desired' interactions with nature in advance. Doremus' focus on "non-utilitarian enjoyment or appreciation" of nature which "should be comfortable and relaxing,"¹⁷⁸ follows in the footsteps of preservation and collapses on itself in the same manner. As Tribe observed, a framework for ethical exploration must lead us safely on the path to environmental ethical evolution, but it cannot be designed to bring us to a predetermined destination.¹⁷⁹ Weston the philosopher understood this problem, stating that, "the best thing that could be hoped, in my view, is the emergence of many other[] [forms of environmental lifestyles]."¹⁸⁰

Although Weston's and Doremus' efforts to craft a viable model for pluralistic environmental experimentation have failed, their suggestions are nonetheless insightful. Unlike many others in the environmental movement, Weston and Doremus have realized that the proper medium for experiencing nature cannot be found in the wild but rather at home. The only way to discover what an "ethical, sustainable, honorable human place in nature"¹⁸¹ looks like is by making nature part of our *real* lives. The problem with this approach, as Doremus correctly observed, is that encouraging diverse environmental lifestyles requires that we relax environmental controls and allow individuals and communities to experiment in as many different forms of living in and engaging with nature. This, however, entails a risk of environmental degradation. The question therefore remains – how can we encourage experimentation without giving up restraint?

PART III: THE COMMUNITY AS AN EXPERIMENTAL INSTITUTION

A. *Collective Responsibility Regimes*

Since Tribe's "Plastic Trees"¹⁸² there have not been many attempts at creating a blueprint for legal institutions of experimentation. The problem of embracing pluralism makes legal design especially challenging in questions concerning the value of nature. However, in his thoughtful and comprehensive work, Douglas Kysar took a significant step toward identifying a potential solution.¹⁸³ Like Tribe, Kysar begins with an analysis of welfarist policymaking as dangerous to personal autonomy.¹⁸⁴ To solve that problem,

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 246.

¹⁷⁹ Tribe, *supra* note 11 at 1339.

¹⁸⁰ Weston, *supra* note 155 at 152.

¹⁸¹ Cronon, *supra* note 67 at 80-81.

¹⁸² Tribe, *supra* note 11.

¹⁸³ Kysar, *supra* note 14.

¹⁸⁴ , albeit through a process that undermines individual particularity, not the freedom to acknowledge value. *Id.* at 33.

Kysar suggested that we replace welfarism with rulemaking methodologies that increase society's collective responsibility.

Kysar advanced an argument supporting precautionary approaches to environmental decision making. The precautionary principle is a guiding precept for policymakers. With respect to the environment, the precautionary principle, briefly stated, holds that “we should err on the side of caution; we should resolve uncertainties in favor of the environment.”¹⁸⁵ The purpose of the principle is to encourage decision makers to consider the likely harmful effects of potential courses of action before engaging in them.¹⁸⁶ For example, when applied to genetically modified crops, because the health risks associated with GMOs are unknown, a precautionary approach would advise against permitting the use of GMOs until further data concerning the potential risks associated with GMOs are collected.¹⁸⁷ Under precautionary approaches, explains Kysar, “regulation is not merely an opportunity to maximize an existing set of individual preferences or interests, but rather a moment to consider the regulating body's obligations to its present and future members, to other political communities, and to other species.”¹⁸⁸ By instituting an ex ante stance of restraint whenever a proposed activity endangers human health or the environment, a precautionary approach demands ethical consideration of our responsibilities toward others.¹⁸⁹

Kysar's approach, like Tribe's, is correct in concept but flawed in application. Kysar's error is rooted in his focus on collective agency. It is difficult to argue with Kysar's support of individual agency as “an approach that affords conceptual significance to the individual's particularity, in terms of her point of view, her judgment, her reasons.”¹⁹⁰ Indeed, a precautionary approach allows individuals to exercise ethical agency. Promoting ex ante consideration of risks requires individuals to contemplate the potential harmful implications of their actions. However, Kysar's next move is what gets him into trouble. After recognizing the ethical benefits of an individual precautionary approach, Kysar translates it from “the individual to the collective context.”¹⁹¹ That is, Kysar advances a collective precautionary policymaking approach that is based on the ethical benefits Kysar identifies in individual precautionary decision-making. However, nothing supports the assumption implicit in Kysar's work that collective responsibility regimes place citizens

¹⁸⁵ Daniel Bodansky, *The Precautionary Principle in US Environmental Law* in INTERPRETING THE PRECAUTIONARY PRINCIPLE 203 (Timothy O'Riordan & James Cameron eds., 1994).

¹⁸⁶ James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B.C. INT'L & COMP. L. REV. 1, 2 (1991).

¹⁸⁷ Gregory N. Mandel & James Thuo Gathii, Cost Benefit analysis Versus the Precautionary Principle: Beyond Cass Sunstein's Laws of Fear, 5 U. ILL. L. REV. 1037, 1040 (2006). A welfarist approach, on the other hand, would weigh the potential benefits of GMOs against the potential risks. If the benefits outweigh the risks, welfarist calculations would support GMOs.

¹⁸⁸ Kysar, *supra* note 14 at 64.

¹⁸⁹ *Id.* at 14.

¹⁹⁰ *Id.* at 48-49.

¹⁹¹ *Id.* at 49.

who take no part in decision-making in ethically contemplative modes. Like Stone and Tribe, Kysar's approach assumes 'trickle down' morality, i.e. that the precautionary stance adopted by regulators would influence ordinary citizens, thereby "ground[ing] a sense of abiding personal investment in the outcomes of ethical decision making."¹⁹² This hypothesis is tenuous at best.

B. Agent-Relative Approaches

In our dealing with others as part of a social community, we constantly experiment in ethical decision making. Acting as moral agents, we develop and refine our ethical worldview through day-to-day experimentation. We evolve as moral agents by applying judgments, experimenting in actions commensurate with our worldview, circumstances, and reasons. Accordingly, empiricism prefers legal systems that facilitate individual agency in decision-making.¹⁹³

To illustrate how legal systems can promote or hinder individual agency in decision-making, let us revisit the enduring divide between rules and standards in law.¹⁹⁴ The common approach to the divide defines rules as 'bright line' mandates, and standards as flexible legislative directives. For example, "driving above 70 miles per hour is punishable by a \$100 fine" is a rule. In contrast, "driving at an unsafe speed is prohibited" is a standard.¹⁹⁵ Rules leave little discretion to the actor, while standards require the actor to evaluate the situation and exercise judgment. Unlike rules, standards are morally contemplative. Standards invite the individual to apply discretion that is guided by an underlying set of values.¹⁹⁶ As windows to the moral ideals of society with regard to a particular activity, standards facilitate a process of ethical deliberation.¹⁹⁷ Hence, individuals acting in standards-based systems tend to exhibit higher levels of ethical behavior while rule-based compliance systems encourage "calculative, self-interested responses... unlikely to enhance organizational commitment or communication."¹⁹⁸

In *Crystals and Mud in Property Law*¹⁹⁹ Carol Rose divided property rules into 'muddy,' that is, open-ended, flexible standards, and 'crystal' i.e., hard-edged, strict prescriptive rules. Rose notes that almost no theory provides a definitive answer to the

¹⁹² *Id.* at 48-49.

¹⁹³ Kysar, *supra* note 14 at 48-49.

¹⁹⁴ See Dan Awrey, *Regulating Financial Innovation: A More Principles-Based Proposal?* 5:2 BROOKLYN J. CORP., FIN. & COM. L., 273, 275-279 (2011) and references therein.

¹⁹⁵ Adam Kolber, *Smooth and Bumpy Laws*, 102 CALIF. L. REV. 655, 666 (2014).

¹⁹⁶ Philip Selznick, *Communitarian Jurisprudence* in TO PROMOTE THE GENERAL WELFARE: A COMMUNITARIAN LEGAL READER, 11-12 (David E Carney ed., 1999).

¹⁹⁷ *Id.* at 12.

¹⁹⁸ Gary R. Weaver & Linda K. Trevino, *Compliance and values oriented ethics programs: Influences on employees' attitudes and behavior*, 9(2) BUS. ETHICS Q., 315, 323 (1999); See also, Zabihollah Rezaee et al., *Ethical Behavior in Higher Educational Institutions: The Role of the Code of Conduct*, 30 J. BUS. ETHICS 171 (2001).

¹⁹⁹ Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

question of when muddy/ crystal rules should be used. Following Duncan Kennedy,²⁰⁰ Rose observed that, by design, crystal hard-edged rules “tell the bad man the limits within which he can get away with his badness.” Muddy flexible standards, on the other hand, “are aimed at protecting goodness and altruism.”²⁰¹ Turning to contract theory, Rose noted that short-term contractual relationships are characterized by ‘crystal’ norms while parties in long-term relationships tend to “relax the letter of their respective obligations.”²⁰² Clear and enforceable rules are used to navigate in a commercial world of strangers. Flexible standards, however, leave us room to experiment in travels through personal or communal terrain.²⁰³ Thus, property rules that deal with long-term or communal relationships will tend to be muddier, while property norms that deal with short-term commercial transactions will tend to be rigid.

C. *Communities as Vehicles for Ethical Experimentation*

1. *Agency is strengthened in Communal Settings*

As Kysar rightly explained, for legal frameworks to facilitate moral progress, they must institute an ex-ante position of moral agency. According to Rose, in communal settings, property norms function as the communal version of the ethically-contemplative precautionary principle Kysar celebrates. A landowner’s responsibility is enhanced in communitarian ownership structures, because communities confer on their members “ideals of mutual trust, respect, reconciliation, and interdependence” which involve “extending the reach of responsibility.”²⁰⁴ Simply put, communities “emphasize responsibility to the social [...] network in which the individual[] is enmeshed.”²⁰⁵ As sources of particularity and freedom,²⁰⁶ communities serve as a bedrock for exercising meaningful autonomy but impose restraints on the individual’s ability to act unhindered. Before taking an action with potential externalizing costs, a landowner in a community must apply her judgment broadly, asking herself not only whether her actions might harm another, but also ensure that the contemplated action is consistent with her community’s vision of what constitutes ethical conduct.²⁰⁷

If she is unable to determine an appropriate course of action, an individual in ‘muddy’ communities is forced to engage the members of her community, communicate her

²⁰⁰ Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1745, 1774 (1976).

²⁰¹ Rose, *supra* note 199 at 592.

²⁰² *Id.* at 601.

²⁰³ *Id.* at 601-602.

²⁰⁴ Selznick, *supra* note 196 at 7.

²⁰⁵ Gregory S. Alexander, Takings and the Post-Modern Dialectic of Property, 9 CONST. COMMENTARY 259, 263 (1992).

²⁰⁶ *Id.*

²⁰⁷ Eric T. Freyfogle, *Ethics, Community, and Private Land*, 23 ECOLOGY L. Q. 631, 639 (1996) and references therein.

intentions, and work with others to find a solution that conforms with the community's set of values.²⁰⁸ The closer the relationships within the community, the stronger the urge to communicate, contemplate, and respect the wishes and values of other members and the community as a whole. A close community confers on its members a sense of moral agency, it facilitates ethical contemplation, and promotes self-imposed restraint.

Empirical evidence supports the observation that communal environments engender self-restraint and agency. In 1968, Garret Hardin published his famous article "the Tragedy of the Commons."²⁰⁹ According to Hardin, when left unchecked, individuals will exhaust open access common pool resources. The reason for this outcome is that each individual user maximizes her own interest.²¹⁰ The tendency to maximize one's own interest in disregard of the collective interest to sustainably manage the common resource leads to a race to the bottom which exhausts the resource and harms all users.²¹¹ Game theory supports Hardin's observation which is often depicted as resulting from a 'prisoner's dilemma.'²¹² However, despite its sound theoretical underpinnings, an abundance of empirical evidence demonstrates that, time and again, communities have successfully avoided Hardin's tragedy.²¹³ Under certain circumstances, individuals in communal settings exercise restraint and do not act opportunistically.²¹⁴

Nobel laureate Elinor Ostrom, who studied communities that have managed to overcome the tragedy of the commons, observed that the capacity of individuals to extricate themselves from the prisoner's dilemma is rooted in communal trust.²¹⁵ In communal settings, reciprocity and communication contribute to the development of communal 'trust capital,' which Ostrom defines as "the expectation of one person about the actions of others that affects the first person's choice, when an action must be taken before the actions of others are known."²¹⁶ It is this sense of communal trust that contributes to member restraint and safeguards against maximizing short-term self-interest at the expense of the communal interest. Because reciprocity, communication, and trust "feed one another,"²¹⁷ the smaller and more symmetrical the community, the better the chances it will develop trust capital

²⁰⁸ *Id.* at 641; Pierre Schlag, Rules and Standards 33 UCLA L. REV. 379, 388 (1985).

²⁰⁹ Garrett Hardin, *The Tragedy of the Commons*, 162(3859) SCIENCE 1243 (1968).

²¹⁰ Elinor Ostrom, *A Behavioral Approach to the Rational Choice Theory of Collective Action: Presidential Address, American Political Science Association*, 1997, 92(1) AM. POL. SCI. REV., 1, 1 (1998) (explaining the process as resulting from a "social dilemma" which occurs "whenever individuals in interdependent situations face choices in which the maximization of short-term self-interest yields outcomes leaving all participants worse off than feasible alternatives.")

²¹¹ Hardin, *supra* note 209 at 1244 (1968).

²¹² Elinor Ostrom, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 3 (1990, 2015).

²¹³ See e.g., David Feeny et al., *Questioning the Assumptions of the "Tragedy of the Commons" Model of Fisheries*, 72(2) LAND ECON. 187, 187 (1996) and references therein.

²¹⁴ Ostrom, *supra* note 212 at 58-88.

²¹⁵ Ostrom, *supra* note 210 at 12-14.

²¹⁶ *Id.* at 12.

²¹⁷ *Id.* at 14.

which will instill a sense of restraint and agency in its members.²¹⁸ Indeed, As Peter Schlag observed, muddy communal norms facilitate the evolution of rituals of communication between members of a community.²¹⁹ Communal deliberation builds communal trust, promotes individual agency, and facilitates evolution of new ethical practices.

2. *An observation on the Malleability of Property*²²⁰

The previous subsection identified strong communities as facilitators of moral agency, one of the two prerequisites for a framework of environmental ethical evolution. This subsection explores the potential of close-knit communities to function as vehicles of environmental experimentation.

Property is an extremely flexible legal mechanism.²²¹ The ability of property to be extended or shaped is not limited to the legal conditions and frameworks that constitute ownership but is also expressed in the physical world. Because property rights always concern a thing, ownership, with its various rights, values, and preferences is manifest in various physical forms.²²² Personal property is constitutive of personal autonomy.²²³ One expresses one's character and expectations through property,²²⁴ and it is through ownership of things that we act on the external world.²²⁵ Similarly, communal property is constitutive of communal autonomy and facilitates the physical and social expression of communal preferences, values, perceptions, and sentiments.²²⁶ This is because both spheres of human interrelationships – the physical and the legal – are structured in accordance with our values, perceptions, beliefs, etc.²²⁷ Since the set of values that governs interrelationships in communal settings differs from the one that governs other social environments, it produces distinct physical *and* normative spaces. When a community holds property rights in a physical space and controls its management and development, the community has the power to recreate its physical environment in its own image, according to its beliefs, knowledge, understanding, attitudes, values, and sentiments. Self-governed communities

²¹⁸ *Id.*

²¹⁹ Schlag, *supra* note 208 at 388.

²²⁰ This section is borrowed from an earlier work of the author, Ori Sharon, *Fields of Dreams: An Economic Democracy Framework for Addressing NIMBYism*, 49 ENVTL L. REP. 10264, 10282-10283 (2019).

²²¹ Richard A. Barnes, *The Capacity of Property Rights to Accommodate Social-Ecological Resilience*, 18(1) ECOLOGY AND SOC. 6, 11 (2013).

²²² And non-physical forms, when it is in respect of intangible property.

²²³ Margaret J. Radin, *Property and Personhood* 34 STAN. L. REV. 957, 960, 977 (1982). *See also* Hanoch Dagan, *The Craft of Property*, 91 Cal. L. Rev., 1517, 1559 note 208 (2003).

²²⁴ *Id.* at 968.

²²⁵ *Id.* at 960

²²⁶ Radin's personhood theory of property is only one of the many theoretical foundations offered by scholars to explain/ justify property. The purpose of this section is not to vindicate the personhood theory of property but rather to offer a plausible personhood-based explanation to an observed social phenomenon.

²²⁷ Barnes, *supra* note 221 at 11; Hanoch Dagan, *Pluralism and Perfectionism In Private Law*, 112 COL. L. REV., 1409, 1412 (2012).

are therefore an elastic but ethically contemplative environment that allows its members to experiment in shared forms of ethical living.

The potential of communities to function as laboratories for experimental ethical living is illustrated in the property structures established by intentional communities, i.e. groups that embrace a shared living ethic that is manifestly different from mainstream culture.²²⁸ Members of intentional communities “share a substantial common denominator of ideology, values, or beliefs that is highly distinctive from those of general society.”²²⁹ To maintain and uphold these values, intentional communities rely on internal norms and institutions specifically tailored to organize practical life in a manner commensurate with their distinct ideologies.²³⁰ Examples of intentional communities include ecovillages, shared households, cohousing arrangements, kibbutzim, spiritual communities (members of convents, native tribes, ultra-orthodox Jews, Amish, Hutterites), egalitarian communities, therapeutic communities, communes, and co-ops.²³¹ In intentional communities, one often finds property regimes in “which the core conception of property for a certain resource may be changed as a matter of both practice and theory.”²³²

Because property institutions are social structures shaped and defined by values underlying the interpersonal relationships they facilitate,²³³ an “explicitly and clearly distinctive” set of values, as found in intentional communities,²³⁴ tends to generate distinct property regimes. For instance, environmentally-conscious intentional communities usually adopt land use restrictions and property arrangements designed to “retain the integrity of the property, preserve the natural habitat, and demonstrate the ability of a group of people with common mind and purpose to choose intelligent and prudent means of living.”²³⁵ In that way, such communities create a normative and physical space that exemplifies the unique set of values they believe in, allowing them to pursue their chosen lifestyle according to their views and beliefs. When given a measure of autonomy, different communities will structure the physical and normative spaces they inhabit in different ways, each according to its unique set of values. Ecovillages are structured and governed by norms manifestly different than those which govern kibbutzim; and cohousing arrangements express a different set of values than communes.

²²⁸ Elizabeth L. Carter, *Community Planning, Sharing Law and the Creation of Intentional Communities: Promoting Alternative Economies and Economic Self-Sufficiency Among Low-Income Communities*, 44 SW. L. REV. 669, 685 (2015)

²²⁹ Amnon Lehavi, *The Property Puzzle*, 96 GEO. L.J. 1987, 2007 (2008); Debbie Van Schyndel Kasper, *Redefining Community in the Ecovillage*, 15(1) HUMAN ECOLOGY REV., 12, 15 (2008).

²³⁰ Lehavi, *supra* note 229 at 2007.

²³¹ *Id.*; Fellowship for Intentional Community, Major Types of Communities, available at <https://www.ic.org/wiki/category-types-of-community/> (last visited Jan. 31, 2019).

²³² Lehavi, *supra* note 229 at 2007.

²³³ Hanoch Dagan, *Pluralism and Perfectionism In Private Law*, 112 COL. L. REV., 1409, 1412 (2012).

²³⁴ Lehavi, *supra* note 229 at 2007.

²³⁵ Kasper, *supra* note 229 at 17.

Muddy communities are therefore potential vehicles for environmental experimentation; they are ‘potential’ because experimentation requires a certain degree of autonomy.²³⁶ Without the freedom to deviate from the norm, a community is unable to experiment with innovative environmental lifestyles.²³⁷ As explained by Elinor Ostrom, there is a multitude of potential organizational structures that could emerge at the communal level if provided sufficient government support.²³⁸ Members of communities will overcome conflicts and devise workable internal communal rules if “external governmental officials give at least minimal recognition to the legitimacy of such rules.”²³⁹ To self-organize, some measure of communal jurisdiction must be recognized by the government.²⁴⁰

Given the right degree of communal autonomy for experimentation, communities with varying sets of environmental values will find innovative ways to live ethically in their surrounding environment. Muddy communities, therefore, may serve as the ‘safe environment’ Tribe was searching for, a social framework that promotes environmental experimentation, while instilling in its members a sense of ethical agency. The result is an elastic but ethically contemplative environment that allows its members to experiment in shared forms of ethical living. Community-based environmental experimentation therefore addresses the concerns of opponents of welfarism and skeptics of preservation. Muddy communities institute an *ex-ante* collective agency of the kind Kysar unsuccessfully attempts to introduce through wholesale adoption of the precautionary principle. Similarly, communal environmentalism involves everyday experiences of concrete engagement with the natural environment. The communal sphere functions as a framework for practicing a shared environmental ethic in one’s home and daily routine, importing the ‘higher’ values of nature into everyday life. In so doing, communal environmentalism implements preservationist engagement without falling into the trap of dualism and alienation.²⁴¹

PART IV: EVIDENCE FROM THE FIELD

The hypothesis suggested in the previous section is that greater autonomy will allow communities to experiment in forms of living in which unique values are manifested, while maintaining high degrees of moral agency. This hypothesis was recently substantiated in the UK. By enacting the Localism Act 2011,²⁴² Parliament introduced a new model for

²³⁶ See Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 28-33 (1989) and references therein.

²³⁷ See Clayton P. Gillette, *Courts, Covenants, and Communities*, 61(4) CHICAGO L. REV., 1375, 1381 (1994).

²³⁸ Ostrom, *supra* note 212 at 14, 89, 90, 101.

²³⁹ *Id.* at 101.

²⁴⁰ *Id.* at 20, 90, 101.

²⁴¹ Purdy, *supra* note 33 at 284.

²⁴² UK ST 2011 c. 20 Pt 1 c. 1 s. 1 *et seq.*

development, giving communities the power to propose and develop real estate projects.²⁴³ Under the Localism Act, communities were given the option to draw up neighborhood development plans which “will set out a vision, policies and proposals for the future development of an area.”²⁴⁴ A neighborhood plan could be drafted by a parish, a town council, or a neighborhood forum consisting of twenty one or more representatives of a local area.²⁴⁵ The neighborhood plan is then submitted for review by an independent planning inspector.²⁴⁶ The process of review is less onerous than the standard approval procedure for development plans and is mainly concerned with guaranteeing that the neighborhood plan does not violate the broader planning vision for the region.²⁴⁷ After passing cursory external review, the neighborhood plan is submitted to a local referendum and must receive majority support.²⁴⁸ Once approved, a Neighborhood Development Order is issued, confirming the neighborhood plan as a legally binding planning instrument.²⁴⁹

A similar process was instituted for communal development of land.²⁵⁰ Known as ‘Community Right to Build,’ this planning and development approach gives local communities the power to promote development that aligns with their needs and desires.²⁵¹ To exercise Community Right to Build, a community must form a local organization with the purpose of “furthering the social, economic and environmental well-being of individuals living, or wanting to live in a particular area.”²⁵² The organization then applies to the local authority to confirm the geographical boundaries of the site to be developed.²⁵³ Once boundaries are approved, the local organization is required to draw up a development plan that identifies involved partners (i.e. private developers, housing associations, et al.). The plan is then submitted for public comments and legal review by designated legal

²⁴³ Penny Norton & Martin Hughes, PUBLIC CONSULTATION AND COMMUNITY INVOLVEMENT IN PLANNING: A TWENTY-FIRST CENTURY GUIDE 112 (2018).

²⁴⁴ Sue Brownill & Quintin Bradley, LOCALISM AND NEIGHBOURHOOD PLANNING: POWER TO THE PEOPLE? 25 (2017); Gavin Parker et al., *Examining Neighbourhood Plans in England: The Experience So Far*. University of Reading Working Paper (2017) at 2.

²⁴⁵ Brownill & Bradley, *supra* note 244 at 25; Martin Field & Antonia Layard, *Locating Community-led Housing Within Neighbourhood Plans as a Response to England’s Housing Needs*, 37(2) PUB. MONEY & MGMT., 105, 106 (2017).

²⁴⁶ Brownill & Bradley, *supra* note 244 at 25; Norton & Hughes, *supra* note 243 at 112.

²⁴⁷ Brownill & Bradley, *supra* note 244 at 25; Parker et al., *supra* note 244 at 6-7; Norton & Hughes, *supra* note 243 at 112; UK DEPT. FOR COMMUNITIES AND LOCAL GOVERNMENT, *A plain English guide to the Localism Act* (2011) at 12.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/5959/1896534.pdf (last visited Jan. 31st, 2019).

²⁴⁸ Quintin Bradley and William Sparling, *The impact of neighbourhood planning and localism on house-building in England* 34(1) HOUSING THEORY & SOC., 106, 110, 113 (2017). Norton & Hughes, *supra* note 243 at 112.

²⁴⁹ Brownill & Bradley, *supra* note 244 at 26.

²⁵⁰ Louise Smith, *Neighbourhood Planning* 3 (2016) LIBRARY OF HOUSE OF COMMONS, Briefing Paper Number 05838.

²⁵¹ Norton & Hughes, *supra* note 243 at 112-113.

²⁵² A proposed project could also be submitted by an existing neighborhood forum or a parish council. *Id.*

²⁵³ *Id.* at 113.

consultants as well as examination by an independent planning inspector.²⁵⁴ Once approved, the plan is put to a local referendum.²⁵⁵ If supported by a majority of the local residents, a Community Right to Build Order is issued for the community, which may then proceed with development of the project without a traditional planning application.²⁵⁶

According to the sponsors of the Localism Act, the devolution of power from planning authorities to the members of the local community was designed to allow locals to “develop a shared vision for their neighbourhood and take control of the look and feel of the places where they live.”²⁵⁷ The planning reform under the Localism Act was strongly informed by notions of community engagement with place and communal autonomy.²⁵⁸ The spirit of communal autonomy was further strengthened in administrative and legal decisions that enforced the reform. In 2014, a developer’s permit to build 111 homes in Broughton Astley, a large village near Leicester, was revoked by the UK Secretary of State.²⁵⁹ The revocation came after the local community adopted a neighborhood plan that conflicted with the developer’s plans.²⁶⁰ Under the new neighborhood plan, the area proposed for development by the developer was no longer designated for housing construction.²⁶¹ Cancelling the permit, the Secretary of State noted that the new reform supported community autonomy to “shape and direct sustainable development” and therefore “very substantial negative weight” should be given to the fact that the claimant’s proposal conflicted with the neighbourhood plan.²⁶² The Secretary’s decision is especially striking, in light of the fact that the neighborhood plan was not in-line with new state-wide development policies that demanded plans to “demonstrate a five years supply of housing.”²⁶³ The Secretary explained that “the community empowerment aims of neighbourhood planning were more important than ensuring housing growth.”²⁶⁴ The decision of the Secretary demonstrated that while the reform was designed to promote housing developments and communal autonomy,²⁶⁵ the latter prevails in the event of a conflict.²⁶⁶

Opponents of the reform were concerned that greater communal autonomy would allow communities to block development for parochial reasons or to promote developments that

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ UK DEPT. FOR COMMUNITIES AND LOCAL GOVERNMENT, *supra* note 247 at 13.

²⁵⁷ Bradley & Sparling, *supra* note 248 at 110.

²⁵⁸ *Id.* at 110, 113.

²⁵⁹ Bradley & Sparling, *supra* note 248 at 106, 110, 113.

²⁶⁰ Crane v. Secretary of State for Communities and Local Government, 2015 WL 685439.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Bradley & Sparling, *supra* note 248 at 106, 110, 113.

²⁶⁴ *Id.*

²⁶⁵ Nick Bailey, *Housing at the Neighbourhood Level: A Review of the Initial Approaches to Neighbourhood Development Plans Under the Localism Act 2011 in England*, 10(1) J. URB. INT’L RES. PLACEMAKING AND URB. SUSTAINABILITY 1, 1 (2017).

²⁶⁶ *Id.* at 8 (discussing two other cases with similar results).

serve short-sighted community interests at the expense of broader social needs.²⁶⁷ These concerns were unwarranted. In practice, greater communal autonomy facilitated forms of development that expressed heightened levels of social and environmental responsibility. Of the first seventy-five neighborhood plans to receive approval, most did not restrict development but rather allocated *new* housing sites and, more importantly, included policies on affordable housing.²⁶⁸ Analysis of neighborhood plans revealed that local plans tended to allocate more sites for housing than required by law.²⁶⁹ Most importantly, the increase in housing developments did not come at the expense of the environment, local interests, or local identity. A majority of the plans included provisions requiring more green spaces, additional recreation opportunities, mandatory pedestrian and cycle routes, affordable housing, and promotion of local distinctiveness.²⁷⁰

The most prominent policy communities chose to advance through neighborhood plans was promotion of developments that protect and advance distinct local lifestyles. Almost 90% of plans were designed in a manner that emphasized communal concern for the preservation of local values and unique local lifestyles.²⁷¹ The most significant effect of the UK planning reform was its ability “to shape the spatial practice of neighbourhood plans so that their housing policies enhanced a sense of place and provided for identified local need.”²⁷² Since the enactment of the reform, the UK has seen a surge in custom-built, innovative, sustainable, and affordable housing that costs less and is better tailored to the unique lifestyles and values of local communities.²⁷³

The proliferation of community-led development projects across the UK has caused “a shift in geographical imaginations about government... open[ing] up political opportunities for a cadre of citizens to engage in the development of their local communities and to reconfigure the balance of power between citizens and the state.”²⁷⁴ Not less important, the UK reform exemplifies how recognition of communal autonomy allows communities to promote policies that align with their specific values, unique lifestyles, and local visions, while strengthening social and environmental responsibility.

Attempts to empower communities through the adoption of polycentric forms of land use regimes are not unique to the UK. In the US as well, academics have called for transferring zoning and land use decision-making from the municipal to the communal

²⁶⁷ *Id.* at 1, 3.

²⁶⁸ UK GOV. DEPT. FOR COMMUNITIES & LOCAL GOV., *Notes on Neighbourhood Planning*, (16th ed., 2015). <https://www.gov.uk/government/collections/notes-on-neighbourhood-planning> (last visited Jan. 31st 2019). See also Bradley & Sparling, *supra* note 248 at 110, 111.

²⁶⁹ Bradley & Sparling, *supra* note 248 at 112.

²⁷⁰ UK GOV. DEPT. FOR COMMUNITIES & LOCAL GOV., *supra* note 268 at 5.

²⁷¹ *Id.*

²⁷² Bradley & Sparling, *supra* note 248 at 114.

²⁷³ *Id.* at 110, 114-116.

²⁷⁴ Field & Layard, *supra* note 245 at 106.

level.²⁷⁵ This is by no means the only course of action available to US policymakers interested in promoting communal autonomy. For instance, supporting community ownership of production measures,²⁷⁶ or reducing regulatory encroachment by adopting non-intrusive regulatory design,²⁷⁷ are only two of many potential reforms.

The important point in this discussion is not *which* reforms should be advanced, but rather that it is time for a change. To promote pluralistic modes of ethical environmental experimentation, U.S. legislators and policymakers should support legal reforms that respect and promote communal autonomy. While seemingly simple, such a change in law and policy would mark a stark departure from the American legal tradition that disfavors concepts of communal autonomy.²⁷⁸ Historically, communal rights in the US are associated with exclusionary politics and parochialism.²⁷⁹ Generally speaking, the legal apparatus in the US fails to recognize “the importance of [] communal values within national framework[s],” because it falsely labels communal values as “competitors of national values.”²⁸⁰ This state of affairs is unfortunate, because greater communal autonomy promotes value-pluralism without setting a specified ethical destination, an important and extremely elusive social goal.

CONCLUSION

Bill Bishop recently observed that “[i]t used to be that people were born as part of a community, and had to find their place as individuals. Now people are born as individuals, and have to find their community.”²⁸¹ This Article argues that an erosion of communal structures reduces the variety of lifestyles available for individuals to choose from and, in the process, undermines individual ability to exercise meaningful autonomy. As I explain, such a shift is especially problematic in a welfarist society, because welfarism introduces forces that undermine individual particularity. To counter these forces, I argue that we should explore legal reforms that strengthen, encourage, and respect communal autonomy.

²⁷⁵ See e.g., Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 762 (1973); Eric T. Freyfogle, *Better Ways to Work Together*, in L. MacDonnell & S. F. Bates, *THE EVOLUTION OF NATURAL RESOURCES LAW AND POLICY*, 98 (ABA Books, 2010); Lee Anne Fennell, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* 102 (2009).

²⁷⁶ Sharon, *supra* note 220 at 10276.

²⁷⁷ William D. Eggers, *Land Use Reform through Performance Zoning*, Reason Foundation Policy Study (California, 1990) at 8.

²⁷⁸ Eric T. Freyfogle, *Ethics, Community, and Private Land*, 23 ECOLOGY L. Q. 631, 644 (1996)

²⁷⁹ Joseph L. Sax, *Do Communities Have Rights? The National Parks as a Laboratory of New Ideas*, 45 U. PITT. L. REV. 499, 501 (1984); Kathryn Abrams, *Law's Republicanism*, 97 YALE L. J. 1591, 1607 (1988).

²⁸⁰ Sax, *supra* note 279 at 502.

²⁸¹ Megan Garber, *What Does 'Community' Mean?* The Atlantic (Jul. 3, 2017). Available at <https://www.theatlantic.com/entertainment/archive/2017/07/what-does-community-mean/532518/> (last visited Jan. 31, 2018).

The analysis provided in this Article started with the observation that welfarist approaches for valuing nature erode personal freedom and flatten our moral outlook. To overcome this problem, I develop a theory of empirical ethics with three conceptual legs: an understanding that human experience is the birthplace of value, a commitment to pluralism as a means for environmental ethical evolution, and respect for communities as facilitators of empiricism and environmental agency. The theoretical foundations laid down in the Article demonstrate that a state committed to human freedom should ensure individuals' continuing ability to choose among a diverse set of environmental lifestyles.

While the focus of this Article is human-nature interactions and the development of environmental values, the argument developed herein is not limited to environmental ethics. Finding value and meaning in the world is universal. A commitment to pluralism in legal design benefits all aspects of human existence, irrespective of the underlying interrelationships they encompass.²⁸² Some have claimed that to accommodate change and progress, the state must actively support experimental or utopian forms of interrelationships.²⁸³ This Article suggests the alternative of communities. It does so with the conviction that strong communities are the bedrock of a resilient and ethically-contemplative society. Policymakers and scholars in the US would therefore be wise to study the UK planning reform and other suggestions for regulatory design that support greater communal autonomy.

²⁸² Hanoch Dagan & Michael Heller, *THE CHOICE THEORY OF CONTRACTS* 4 (2017) (developing a somewhat similar argument in contract law, arguing that a state committed to human freedom “must be proactive in shaping contract law, including ensuring availability of a diverse body of normatively attractive types [of contracts]”).

²⁸³ *Id.* at 20.