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## Finding Eden in a Cost–Benefit State

Ori Sharon\*

### Introduction

In the introduction of his 2002 book on cost–benefit analysis (“CBA”), Professor Cass R. Sunstein predicted that despite fierce opposition from opponents of CBA, the US would gradually become “a cost-benefit state.”<sup>1</sup> Many factors underlie Sunstein’s prediction, the strongest was his observation that throughout government, the “first generation” debate whether CBA is desirable as a rulemaking policy is concluding with a clear victory for CBA’s proponents.<sup>2</sup> 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,<sup>3</sup> the legislature,<sup>4</sup> and the

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\* Postdoctoral Researcher at Bar Ilan University Faculty of Law, Ramat Gan, Israel. S.J.D. 2018, Duke University School of Law; L.L.M. 2013, Duke University School of Law; L.L.B. 2009, Tel Aviv University School of Law. I want to thank Jedediah Purdy and Hanoch Dagan for their useful insights and advice. I am indebted to participants at the Tel Aviv Law School Energy and Environment Workshop for their valuable comments. Particular thanks go to Yael Orlev for her unconditional support during the long days, nights, and weekends I spent writing this Article.

<sup>1</sup> CASS R. SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION*, at ix (2002).

<sup>2</sup> *Id.* at xi.

<sup>3</sup> One example of CBA’s influence in the executive branch is President Reagan’s Executive Order requiring federal agencies to analyze the costs and benefits of “major” regulations 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 §§ 1(b), 2(b), 3 C.F.R. 127, 127–28 (1982) (revoked 1993). President Reagan’s mandate has been expanded through succeeding administrations. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 802–06 (2012); Exec. Order 13,258, 3 C.F.R. 204 (2003) (revoked 2009); Exec. Order No. 13,563 § 1(b), 3 C.F.R. 215, 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 816–17 (2012). CBA is also “institutionally structured into the administrative decisionmaking process through Office of Management and Budget (OMB) review of regulations.” RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 11 (2008).

<sup>4</sup> *See, e.g.,* ROBERT W. HAHN, *REVIVING REGULATORY REFORM: A GLOBAL PERSPECTIVE* 22–29 (2000); REVESZ & LIVERMORE, *supra* note 3, at 11; CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* 4 (2002).

states,<sup>5</sup> CBA has now captured the courts.<sup>6</sup> The US Supreme Court's decision in *Michigan v. EPA*<sup>7</sup> marks the conquest of the polity's summit.<sup>8</sup> We have finally entered a new era, the age of the cost-benefit state.<sup>9</sup>

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, the normative debate about the merits of CBA is far from settled despite CBA's prevalence in government. 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.<sup>10</sup> Writers have attacked CBA's underlying premise—that human welfare is the *only* morally significant value—as ethically degrading,<sup>11</sup> undermining to human freedom,<sup>12</sup> and metaphysically wrong.<sup>13</sup> Others have criticized the loss of individuality imposed by CBA,<sup>14</sup> its failure to facilitate moral agency,<sup>15</sup> and the ethical limitations of a calculative rulemaking methodology.<sup>16</sup> 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.<sup>17</sup> To CBA proponents, the critique of the methodology

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<sup>5</sup> See HAHN, *supra* note 4, at 4.

<sup>6</sup> See REVESZ & LIVERMORE, *supra* note 3, 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.” (footnote omitted)).

<sup>7</sup> 135 S. Ct. 2699 (2015).

<sup>8</sup> The Court held that the Environmental Protection Agency acted “unreasonably when it deemed cost irrelevant to the decision to regulate power plants” under Section 7412 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 regulations. *Id.* at 2707.

<sup>9</sup> See Cass R. Sunstein, *Thanks, Justice Scalia, for the Cost-Benefit State*, BLOOMBERG (July 7, 2015, 9:00 AM), <https://perma.cc/QT9R-J24K>.

<sup>10</sup> See Amy Sinden, *Cass Sunstein's Cost-Benefit Lite: Economics for Liberals*, 29 COLUM. J. ENVTL. L. 191, 192–93, 192 n.7 (2004).

<sup>11</sup> See Laurence H. Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1330–32 (1974).

<sup>12</sup> See *id.* at 1326–27.

<sup>13</sup> See Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, 5 REG. 33, 35–36, 40 (1981).

<sup>14</sup> See DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 109–10, 113–14 (2010); see also Bernard Williams, *A Critique of Utilitarianism*, in UTILITARIANISM: FOR AND AGAINST 82 (1973), reprinted in ETHICS: HISTORY, THEORY, AND CONTEMPORARY ISSUES 657 (Steven M. Cahn & Peter Markie eds., 5th ed. 2012).

<sup>15</sup> See KYSAR, *supra* note 14, at 33, 36; Williams, *supra* note 14, at 657.

<sup>16</sup> See Kelman, *supra* note 13, at 34; MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT 75–88 (1988).

<sup>17</sup> See SUNSTEIN, *supra* note 4, at 6–9.

is no cause for concern but rather an incentive for its further development.<sup>18</sup>

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, what are the necessary structural characteristics of a legal regime that can maintain ethical resiliency in a cost-benefit state? To answer this question, the Article enters 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; it 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.<sup>19</sup> For opponents of environmental CBA, nature is much more than an “instrument” for human benefit: it is 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.<sup>20</sup> 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.<sup>21</sup> Questions about the value of nature often 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.<sup>22</sup> Along similar lines, if natural constructs are morally significant,

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<sup>18</sup> See, e.g., REVESZ & LIVERMORE, *supra* note 3, at 15.

<sup>19</sup> This is not necessarily the case for all utilitarian environmental approaches. See, e.g., Jonathan Baert Wiener, *Law and the New Ecology: Evolution, Categories, and Consequences*, 22 *ECOLOGY L.Q.* 325, 353 n.140 (1995) (reviewing JONATHAN WIENER, *THE BEAK OF THE FINCH: A STORY OF EVOLUTION IN OUR TIME* (1994)) (explaining that “at least on first principles” utilitarian environmental approaches advocate “maximizing the happiness of everything that suffers, human and otherwise”).

<sup>20</sup> See Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 *YALE L.J.* 1122, 1160–89 (2010).

<sup>21</sup> See *id.*

<sup>22</sup> *TVA v. Hill*, 437 U.S. 153, 187 (1978) (“[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, buttressed by its legislative history, shows clearly that Congress

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then it may be argued that mountains, valleys, and species should have standing to sue for human aggressions committed against them.<sup>23</sup>

The Article compares two opposing environmental stances by considering 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, the Article concludes that their flaws caution against using either as the *sole* rationale underlying environmental policies. Instead, it advocates for value pluralism in environmental law and policy. 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, this Article asks: what is the origin of values? To answer, the Article engages in a theoretical analysis of the emergence of values and identifies human experience as the birthplace of value. Individual perspectives, values, and ethical approaches are a sum of the individual’s lifelong 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 worldview and ethical thinking.

Guided by the understanding that human experience is the origin of value, this Article argues 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 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, this Article argues that

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viewed the value of endangered species as “incalculable.”); *see also id.* at 174 (stating that Congress’s intent in passing the Endangered Species Act was to prevent the extinction of further species even at the expense of “many millions of dollars in public funds”).

<sup>23</sup> *See* *Sierra Club v. Morton*, 405 U.S. 727, 741–52 (1972) (Douglas, J., dissenting).

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communities may function as pluralistic laboratories for ethical experimentation if given the right measure of autonomy. This observation leads to the conclusion that to promote pluralism of experiences, law must 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, this Article explores 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. The Article concludes 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 approach that embraces the utilitarian maxim of the “greatest good for the greatest number.” Part I discusses the merits and demerits of each approach, providing an assessment of the reasons that led to the fall of preservation as a leading driver of environmental policies and the rise of utilitarian approaches to environmental policymaking in the US. The basic tenets of welfarism, the dominant strain of utilitarianism underlying environmental rulemaking today, are then explained. Part I concludes with a synthesis of Professor Laurence Tribe’s ethical critique of welfarist environmental policies and an explanation of the conceptual flaws in Tribe’s framework.

Part II develops a pragmatist framework for environmental valuation. Pragmatic thought focuses on human experience as the origin of value. Building on pragmatic scholarship, Part II observes that environmental ethical progress requires pluralistic legal frameworks that enrich the environmental experiences of individuals. Part II then surveys the writings of legal scholars who have suggested such frameworks and identifies designing 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. It explains why principles-based legal systems promote individual agency better than rule-oriented systems. Based on this explanation and an analysis of communities as principles-based governance regimes, Part III advances 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 advanced in this Article: environmental pluralism and experimentation. Part IV concludes with a synthesis of the framework it develops and a call for further exploration of its merits.

## I. The Conservation Schism

Since the first decades of the twentieth century, a lasting divide has split American environmentalism into two opposing camps.<sup>24</sup> The first camp—usually referred to as the preservation movement—has been largely driven by a wilderness ethos.<sup>25</sup> According to this ethos, wild nature, as a construct of creation, must be preserved in its natural, untainted form.<sup>26</sup> For more than a century, the wilderness ethos nurtured a growing national movement of environmental preservation.<sup>27</sup> 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.<sup>28</sup> From Thoreau's immersion in nature at Walden Pond to John Muir's adventures in the Sierra Nevada, being a preservationist was first and foremost about the experience of being *in nature*.<sup>29</sup> Preservationists, therefore, worked to promote human encounters with nature as a means

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<sup>24</sup> See Roderick Nash, *John Muir, William Kent, and the Conservation Schism*, 36 PAC. HIST. REV. 423, 427–28 (1967).

<sup>25</sup> See Christine Oravec, *Conservationism vs. Preservationism: The "Public Interest" in the Hetch Hetchy Controversy*, 70 Q.J. SPEECH 444, 444 (1984); see also Jessica Sheffield, *Theodore Roosevelt, "Conservation as a National Duty"*, 5 VOICES OF DEMOCRACY 89, 93–94 (2010).

<sup>26</sup> See William Cronon, *Introduction: In Search of Nature*, in UNCOMMON GROUND: TOWARD REINVENTING NATURE 23, 25 (William Cronon ed., 1995).

<sup>27</sup> See Robert J. Brulle, *Environmental Discourse and Social Movement Organizations: A Historical and Rhetorical Perspective on the Development of U.S. Environmental Organizations*, 66 SOCIOLOGICAL INQUIRY 58, 69 (1996); Oravec, *supra* note 25, at 444–45.

<sup>28</sup> See JOHN MUIR, OUR NATIONAL PARKS 7–10 (1901); see also Joel Pace, *Wordsworth and America: Reception and Reform*, in THE CAMBRIDGE COMPANION TO WORDSWORTH 230, 241–42 (Stephen Gill ed., 2003); Brulle, *supra* note 27, at 58, 68–69. See generally JAMES MITCHELL CLARKE, THE LIFE AND ADVENTURES OF JOHN MUIR (Sierra Club Books 1980) (1979).

<sup>29</sup> The writings of Thoreau were highly influential in the emergence of the preservation movement. See CLARKE, *supra* note 28, at 36 (noting that Muir found Thoreau "particularly congenial"); Brulle, *supra* note 27, at 69 (noting that preservation origins "can be traced through the transcendentalism of Emerson to the writings of Thoreau").

to facilitate public recognition of nature's unique value and to mobilize support for its protection.<sup>30</sup>

The second camp—known as the conservation movement—emerged at the end of the nineteenth century out of a growing recognition that American resources, if not managed properly, would not last.<sup>31</sup> The conservation movement endorsed the utilitarian principle of the “greatest good for the greatest number.”<sup>32</sup> When applied to environmental policy, the utilitarian principle required that natural resources be managed in the most efficient manner to maximize human welfare.<sup>33</sup> The three fathers of the conservation movement in the US are George Perkins Marsh, Theodore Roosevelt—the “conservationist President”—and Gifford Pinchot—the famous forester.<sup>34</sup> Two notable examples of preservation and conservation as expressed in American environmental law and policy are the conservation-based US Forest Service and preservation-based US Park Service.<sup>35</sup>

The two camps of environmentalism were often at odds. For the preservationists, conservationists were too materialistic, lacking any sense of reverence for nature.<sup>36</sup> In John Muir's words, conservationists were “despoiling gain-seekers and mischief-makers . . . eagerly trying to make everything immediately and selfishly commercial.”<sup>37</sup> They were “devotees of ravaging commercialism” who “seem[ed] to have a perfect contempt for Nature, and, instead of lifting their eyes to the God of the mountains, lift[ed] them to the Almighty Dollar.”<sup>38</sup> In return, conservationists viewed preservationists as parochial. Conservationists could not understand the

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<sup>30</sup> In 1892, Muir founded 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 with the belief that an increase in both the size and number of gardens and national parks would eventually lead to the recognition of their value); see also HOLWAY R. JONES, *JOHN MUIR AND THE SIERRA CLUB: THE BATTLE FOR YOSEMITE* 3–23 (1965) (tracing the Sierra Club's origins and initial mission).

<sup>31</sup> See Theodore Roosevelt, U.S. President, *Conservation as a National Duty*, Keynote Address Before the 1908 Conference of Governors (May 13, 1908) (transcript available at <https://perma.cc/3YBA-DUXA>).

<sup>32</sup> Oravec, *supra* note 25, at 444.

<sup>33</sup> See, e.g., GIFFORD PINCHOT, *BREAKING NEW GROUND* 326 (Island Press 1998) (1947); Gifford Pinchot, *Principles of Conservation*, in *CONSERVATION IN THE PROGRESSIVE ERA: CLASSIC TEXTS* 19, 20 (David Stradling ed., 2004); Roosevelt, *supra* note 31.

<sup>34</sup> See PINCHOT, *supra* note 33, at 326; JEDEDIAH PURDY, *AFTER NATURE: A POLITICS FOR THE ANTHROPOCENE* 37–38 (2015).

<sup>35</sup> See Jamison E. Colburn, *Habitat and Humanity: Public Lands Law in the Age of Ecology*, 39 *ARIZ. ST. L.J.* 145, 153–63 (2007).

<sup>36</sup> See MUIR, *supra* note 30, at 257–62.

<sup>37</sup> *Id.* at 257.

<sup>38</sup> *Id.* at 261–62.

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.<sup>39</sup> As Gifford Pinchot explained 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 into the 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 . . .<sup>40</sup>

However, the preservationist “fixation” on aesthetics was not myopic.<sup>41</sup> 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.<sup>42</sup> 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, should bring us as close as possible to God.<sup>43</sup> Under this view, aesthetic responses of awe, comfort, and inspiration were accepted as natural human reactions to divine presence.<sup>44</sup> Keeping wild nature in its pristine state was therefore not less a matter of religious belief than of national duty.<sup>45</sup>

### 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

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<sup>39</sup> See Anne Whiston Spirn, *Constructing Nature: The Legacy of Fredrick Law Olmsted*, in UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE 91, 111–13 (William Cronon ed., 1996) (1995).

<sup>40</sup> *Hetch Hetchy Dam Site: Hearing on H.R. 6281 Before the H. Comm. on the Pub. Lands*, 63d Cong. 26 (1913) (statement of Gifford Pinchot, former Chief of the US Forest Service).

<sup>41</sup> Purdy, *supra* note 20, at 1127 n.3.

<sup>42</sup> See *id.* at 1159; Mark Sagoff, *Settling America or the Concept of Place in Environmental Ethics*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 349, 404–05 (1992).

<sup>43</sup> Nash, *supra* note 24, at 424–25.

<sup>44</sup> See PURDY, *supra* note 34, at 118–23.

<sup>45</sup> 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, 439–42 (1999); see also PAUL SHEPARD, *MAN IN THE LANDSCAPE: A HISTORIC VIEW OF THE ESTHETICS OF NATURE* 188–89 (Univ. of Ga. Press 2002) (1967); Thomas Cole, *Essay on American Scenery*, 1 AM. MONTHLY MAG. 1, 12 (1836).

century.<sup>46</sup> Preservationists incorporated this notion into the service of an environmental movement. John Muir, the preservation “prophet,”<sup>47</sup> took transcendentalist principles of engaging nature as a form of inner ethical discovery and repackaged them as a popular message about exalted human experiences.<sup>48</sup> The transcendentalist “inner wilderness”—a contemplative quality that is available anywhere<sup>49</sup>—was reborn as a spectacular *oeuvre*, a sublime work of art to be enjoyed and appreciated by the well-to-do.<sup>50</sup> 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. Eventually, 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.<sup>51</sup>

Preservation was so successful because the wilderness ethos thrived on loathing urban living and the rise of the city, two prevalent and coterminous developments in the US and Europe during the nineteenth and early twentieth centuries. In an era when growing cities were characterized by “filth and squalor and disease,”<sup>52</sup> the wilderness ethos that celebrated the purity of forests, rivers, mountains, and valleys resonated with many upper-class urbanites.<sup>53</sup> For preservationists, modern city life was unhealthy, morally degrading, and mentally

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<sup>46</sup> See, e.g., LORD BYRON, *Childe Harold's Pilgrimage: Canto IV*, in THE WORKS OF LORD BYRON COMPLETE IN ONE VOLUME ¶ 178 (Francefort O. M. ed., 1826) (1818); GEORGE P. MARSH, MAN AND NATURE; OR, PHYSICAL GEOGRAPHY AS MODIFIED BY HUMAN ACTION 290 (1864); JEAN-JACQUES ROUSSEAU, LA NOUVELLE HELOÏSE 304–15 (Judith H. McDowell trans., Penn. State Univ. Press 1968) (1761); Tony Seaton, *Tourism and Romantic Myths of Nature*, in THE ROUTLEDGE HANDBOOK OF TOURISM AND THE ENVIRONMENT 94, 101–02 (Andrew Holden & David Fennell eds., 2013); HENRY DAVID THOREAU, *Walden*, in THOREAU: WALDEN AND OTHER WRITINGS 1, 172–73 (Joseph Wood Krutch ed., 1971) (1962); WILLIAM WORDSWORTH, *The Tables Turned*, in THE COMPLETE POETICAL WORKS OF WILLIAM WORDSWORTH 85 (2d prt. 1889) (1888).

<sup>47</sup> Michael B. Smith, *The Value of a Tree: Public Debates of John Muir and Gifford Pinchot*, 60 HISTORIAN 757, 759 (1998).

<sup>48</sup> See Doremus, *supra* note 45, at 448.

<sup>49</sup> See THOREAU, *supra* note 46, at 172–73, 224–26, 261.

<sup>50</sup> See Purdy, *supra* note 20, at 1163–64; Smith, *supra* note 47, at 759.

<sup>51</sup> See Brulle, *supra* note 27, at 68–69.

<sup>52</sup> DAVID OWEN, GREEN METROPOLIS: WHY LIVING SMALLER, LIVING CLOSER, AND DRIVING LESS ARE THE KEYS TO SUSTAINABILITY 20 (2009).

<sup>53</sup> See Brulle, *supra* note 27, at 69.

exhausting.<sup>54</sup> Going into the wild was therefore a necessity for reclaiming one's very soul, not just an exclusive privilege.<sup>55</sup> 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.<sup>56</sup> The wild awakens one from "the stupefying effects of the vice of over-industry and the deadly apathy of luxury . . . to get rid of rust and disease."<sup>57</sup>

### 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 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. While nourishing an ever-growing environmental movement, the success of the recreation-oriented preservationist ideal had negative environmental impacts as well. As the number of encounters with wild nature increased,<sup>58</sup> the myth about the non-consumptive nature of recreation started to unravel.<sup>59</sup> Unlike its benign image, recreation leaves a significant ecological footprint on the environment.<sup>60</sup> High-volume, unchecked recreation adversely impacts

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<sup>54</sup> See ROBERT GOTTLIEB, *FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT* 63 (rev. ed. 2005) (1993).

<sup>55</sup> See *id.* at 64; OWEN, *supra* note 52, at 21.

<sup>56</sup> MUIR, *supra* note 28, at 1.

<sup>57</sup> *Id.*; see also JOHN MUIR, *JOHN OF THE MOUNTAINS: THE UNPUBLISHED JOURNALS OF JOHN MUIR 190-93* (Linnie Marsh Wolfe ed., Univ. of Wis. Press 1979) (1938).

<sup>58</sup> See James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?* 31 ENVTL. L. 1, 25 (2001).

<sup>59</sup> See Kelly Nolen, *Residents at Risk: Wildlife and the Bureau of Land Management's Planning Process*, 26 ENVTL. L. 771, 787 (1996) (writing that Congress recognized recreation as a "nonconsumptive use[]" of the land); John W. Ragsdale, Jr., *National Forest Land Exchanges and the Growth of Vail and Other Gateway Communities*, 31 URB. LAW. 1, 5 (1999); John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 870 (1994) (arguing that "preservation permits future nonconsumptive human usage of wild lands, including recreation").

<sup>60</sup> See Rasband, *supra* note 58, at 35-39.

biodiversity,<sup>61</sup> pollutes bodies of water,<sup>62</sup> contributes to soil erosion,<sup>63</sup> introduces invasive species,<sup>64</sup> and increases uncontrolled fires.<sup>65</sup> As more Americans adopted the wilderness ethos, environmentalists started to wonder whether we were “[l]oving [o]ur [n]ational [p]arks to [d]eath.”<sup>66</sup>

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

Unintended environmental impacts were not the only challenge preservation introduced. From an ethical perspective, preservation suffers from a substantial inherent flaw. The wilderness ethos at the heart of preservation embraces, nourishes, and entrenches a dualist view of nature and man as separate and opposite: untainted nature represents the purest form of creation while man represents the problem with which environmentalism must deal.<sup>67</sup> 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 adoption of an alternative form of life in the city. It presents no solution, and it requires no action.<sup>68</sup> As a human-nature alienating philosophy, preservation leaves us very “little hope of discovering what an ethical, sustainable, *honorable* human place in nature might actually look like.”<sup>69</sup> In fact, taken to the extreme, a wholly preservationist world is devoid of people.<sup>70</sup>

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<sup>61</sup> See David N. Cole & Richard L. Knight, *Impacts of Recreation on Biodiversity in Wilderness*, 0 NAT. RESOURCES & ENVTL. ISSUES 33, 36–37 (1990).

<sup>62</sup> See Rasband, *supra* note 58, at 36; Stephen M. Turton, *Managing Environmental Impacts of Recreation and Tourism in Rainforests of the Wet Tropics of Queensland World Heritage Area*, 43 GEOGRAPHICAL RES. 140, 142 (2005).

<sup>63</sup> See Ralf Buckley & John Pannell, *Environmental Impacts of Tourism and Recreation in National Parks and Conservation Reserves*, 1 J. TOURISM STUD. 24, 25 (1990).

<sup>64</sup> See Aaron P. Potito, *Impacts of Recreation Trails on Exotic and Ruderal Species Distribution in Grassland Areas Along the Colorado Front Range*, 36 ENVTL. MGMT. 230, 230 (2005).

<sup>65</sup> See Buckley & Pannell, *supra* note 63, at 25.

<sup>66</sup> Joseph L. Sax, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS 1 (1980).

<sup>67</sup> See *id.* at 1–2.

<sup>68</sup> See William Cronon, *The Trouble With Wilderness; or, Getting Back to the Wrong Nature*, in UNCOMMON GROUND *supra* note 26, at 69, 80 (explaining that all 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” and that going out into nature is an excursion, a visit to “the natural, unfallen antithesis of an unnatural civilization that has lost its soul”).

<sup>69</sup> *Id.* at 81.

<sup>70</sup> See WENDELL BERRY, THE UNSETTLING OF AMERICA: CULTURE & AGRICULTURE 27–29 (1977).

### 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.<sup>71</sup> 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 deserved their efforts and resources. Other issues, like urban growth, sustainable development, biodiversity, or ecosystem protection were not on the preservationists’ agenda.<sup>72</sup> As external stresses on the environment increased and as legal reforms, technological advances, and social changes reconstructed and diversified human encounters with nature, preservation became less relevant.<sup>73</sup> The dichotomy of pristine nature versus tainted lands cannot support a conservation ethic when the realm of untainted nature grows narrower. On the contrary, it leaves too much out of environmental discourse.<sup>74</sup>

#### 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.<sup>75</sup> However, in a long process that began around 1970, utilitarianism, an ideological tenet of the conservation movement, became the leading approach for environmental policymaking.<sup>76</sup> The version of utilitarianism which gradually came to encompass environmental policy is welfare economics, a practical methodology for welfarism, which is in turn a utilitarian-oriented ethical

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<sup>71</sup> See *The United Nations World Water Development Report 2018: Nature-Based Solutions for Water*, Rep. of the U.N. Educational, Scientific and Cultural Organization, submitted on behalf of UN-Water, at 10, 17 (2018).

<sup>72</sup> See GOTTLIEB, *supra* note 54, at 64; R. Edward Grumbine, *Using Biodiversity as a Justification for Nature Protection in the US (1996)*, in *THE GREAT NEW WILDERNESS DEBATE* 595, 604 (J. Baird Callicott & Michael P. Nelson eds., 1998).

<sup>73</sup> See BERRY, *supra* note 70 at 25–26.

<sup>74</sup> See Purdy, *supra* note 20, at 123.

<sup>75</sup> See generally *id.* at 116–88.

<sup>76</sup> See 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, THE EU AND USA* 352, 353, 366 (Nicolas de Sadeleer ed., 2007).

theory.<sup>77</sup> 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.<sup>78</sup> To implement welfarism, policymakers use CBA. CBA defines benefits as increases in human well-being (utility) and costs as reductions in human well-being.<sup>79</sup> In order “[f]or a project or policy to qualify on cost-benefit grounds, its social benefits [or utility] must exceed its social costs.”<sup>80</sup>

Viewed from a welfarist, cost-benefit perspective, the question whether 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: one with both the dam and injury to the species and one without both 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 account for the well-being derived from the species and discount it from the benefits the dam would create if built. Thus, cheaper electricity and fewer greenhouse gas emissions will be weighed against the aesthetic and recreational benefits the species confers on humans.<sup>81</sup>

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. In a welfarist maximization scheme, the only value of nonhumans derives from the utility they confer on humans, the dollar value of their “services.”<sup>82</sup> Hence, in a world of welfarist-based environmental policymaking, the soon-to-be extinct species has no

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<sup>77</sup> See GRAHAM SMITH, *DELIBERATIVE DEMOCRACY AND THE ENVIRONMENT* 35 (2003); Sagoff, *supra* note 42, at 405; Mark Sagoff, *On Preserving the Natural Environment*, 84 *YALE L.J.* 205, 215 (1974).

<sup>78</sup> See, e.g., Amartya Sen, *Utilitarianism and Welfarism*, 76 *J. PHIL.* 463, 468 (1979) (defining the principle of “welfarism”).

<sup>79</sup> See DAVID PEARCE ET AL., *COST-BENEFIT ANALYSIS AND THE ENVIRONMENT: RECENT DEVELOPMENTS* 16 (2006).

<sup>80</sup> GILES ATKINSON ET AL., *COST-BENEFIT ANALYSIS AND THE ENVIRONMENT: FURTHER DEVELOPMENTS AND POLICY USE* 45 (2018).

<sup>81</sup> Welfarist accounting may also consider non-use values of the species like the bequest value (the well-being individuals derive from knowing that the species and the benefits it creates for humans will be available to their descendants and future generations), and the existence value (the well-being individuals derive from simply knowing the species exist).

<sup>82</sup> To measure well-being, CBA requires commensurable units of well-being measurement. Units of currency are the most common (but not mandatory) form of measurement to be used in this calculation.

standing in the courtroom of utility maximization.<sup>83</sup> For an environmental welfarist, the talk about wilderness or nature's intrinsic value is superfluous: like Coca-Cola, iPhones, 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 merely indicates that those people are willing to pay more for its conservation.<sup>84</sup>

### 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, a myth of balance dominated the view of nature in Western civilization. According to this myth, natural systems aspire to equilibrium. This equilibrium is attainable as long as human disturbance is avoided; when achieved, the equilibrium is the best condition for natural systems.<sup>85</sup> However, beginning in the late 1960s, ecologists uncovered more evidence suggesting that nature is characterized by change, not stability.<sup>86</sup> In a series of studies, researchers discovered that nature is not static at all; in effect, nature defaults to dynamism. Environmental disturbances like 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.<sup>87</sup>

The transition from an equilibrium view of nature to a paradigm of dynamism immensely impacted conservation practices: if nature is characterized by change, focusing on preservation could actually harm nature because preservation's main idea is maintaining constancy, keeping an ecological system *unchanged*.<sup>88</sup> 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, where man—an external force unjustly harming nature with his actions—and nature—

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<sup>83</sup> See generally LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002) (supporting welfarism as the only valid methodology for rulemaking).

<sup>84</sup> Cf. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 980 (2001).

<sup>85</sup> See Daniel B. Botkin, *Adjusting Law to Nature's Discordant Harmonies*, 7 DUKE ENV'T'L. & POL'Y F. 25, 26 (1996).

<sup>86</sup> *Id.* at 27.

<sup>87</sup> See Wiener, *supra* note 19, at 326–31; Judy L. Meyer, *The Dance of Nature: New Concepts in Ecology*, 69 CHI.-KENT L. REV. 875, 876 (1994).

<sup>88</sup> See Wiener, *supra* note 19, at 333–34.

an unwavering source of nonhuman values to reflect upon—are separate and distinct.<sup>89</sup> This dualist view collapsed in the face of the “nature as change” paradigm. If nature is unstable, dynamic, and oftentimes a product of human design,<sup>90</sup> then nothing is left to support the ethos of untainted sacred wilderness to be shielded from human interference.<sup>91</sup>

More importantly, if humans are part of nature and human-induced change is integral to the natural disturbances of healthy evolution, how can we distinguish between a “good” disturbance and a “bad” one? Under a preservationist view, the answer was easy: humans should stay out of nature. But the new paradigm complicates things considerably. The dynamic paradigm of nature does not care about the facilitator of disturbance but rather the rate and magnitude of the change induced.<sup>92</sup> In other words, the new paradigm required a regulatory platform designed for managing change, regardless of its origin (human or nonhuman).<sup>93</sup> 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.<sup>94</sup>

A second explanation, suggested by Professor Jedediah Purdy, focuses on political economy.<sup>95</sup> According to Purdy, in response to the environmental protections introduced into law during the environmental revolution of the 1960s and 1970s,<sup>96</sup> the American business community mobilized to prevent additional restrictions on production.<sup>97</sup> Declaring a

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<sup>89</sup> See Cronon, *supra* note 26, at 25.

<sup>90</sup> See Botkin, *supra* note 85, at 30–31 (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 Miscast Ecologist*, in *ECOLOGICAL CONSCIOUSNESS: ESSAYS FROM THE EARTHDAY X COLLOQUIUM* 137, 137–47 (Robert C. Shultz & J. Donald Hughes eds., 1981); Spirn, *supra* note 39, at 92–102 (providing examples of natural preserves reconstructed or designed by Fredrick Law Olmsted, like Niagara Falls, Yosemite, and the forest that today surrounds the Biltmore Estate in Asheville, N.C.).

<sup>91</sup> See Wiener, *supra* note 19, at 338–40.

<sup>92</sup> See *id.* at 351.

<sup>93</sup> See *id.* at 353–54.

<sup>94</sup> See *id.* at 355–56.

<sup>95</sup> See generally Jedediah Purdy, *Our Place in the World: A New Relationship for Environmental Ethics and Law*, 62 *DUKE L.J.* 857 (2013).

<sup>96</sup> See, e.g., Insecticide, Fungicide, and Rodenticide Act of 1972, 7 U.S.C. §§ 135–136y (2012); Toxic Substance Control Act of 1976, 15 U.S.C. §§ 2601–2629 (2012); Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012); Safe Drinking Water Act of 1974, 42 U.S.C. § 300f (2012); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2012); Clean Air Act of 1970, 42 U.S.C. §§ 7401–7671q (2012).

<sup>97</sup> See Purdy, *supra* note 95, at 879.

political war to save markets and efficiency from the evils of overregulation, those most affected by environmental restrictions worked to change US decision-making processes and to introduce a pro-business, anti-regulation voice.<sup>98</sup> These efforts bore fruit, and by the late 1970s and early 1980s, the window for major environmental reforms in the US had closed.<sup>99</sup>

The political atmosphere that emerged at the beginning of the 1980s made the work of environmental decision makers very difficult.<sup>100</sup> 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 environmental revolution without embracing a contested environmental narrative.<sup>101</sup> CBA, as an “objective” contrivance for calculating human welfare, perfectly fits the requirement.<sup>102</sup> CBA’s appeal is strongest when CBA 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.<sup>103</sup> This is exactly the state of affairs regulators faced following the environmental revolution of the 1960s–1970s. After legislation introduced a suite of first-order environmental values, regulators had to implement them in a world characterized by diverse competing interests.<sup>104</sup>

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<sup>98</sup> See *id.* (stating further “[t]he 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”).

<sup>99</sup> See *id.*

<sup>100</sup> See *id.* at 879–81.

<sup>101</sup> See *id.* at 881.

<sup>102</sup> See Amy Sinden, *The Economics of Endangered Species: Why Less Is More in the Economic Analysis of Critical Habitat Designations*, 28 HARV. ENVTL. L. REV. 129, 135 (2004) (attributing the ascendancy of cost-benefit analysis in environmental policymaking to the politically neutral character of mathematical calculations); see also Purdy, *supra* note 95, at 878–79 (explaining that the ostensibly objective character of CBA contributed to its appeal among policymakers).

<sup>103</sup> See SMITH, *supra* note 77, at 35; see also RAYMOND PLANT, MODERN POLITICAL THOUGHT 140–41 (6th prt. 1999) (1991) (“Utilitarianism provides a second order way of resolving . . . first order moral conflicts. People may have a wide range of varied 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.”).

<sup>104</sup> See Purdy, *supra* note 95, at 860–61 (“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

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.<sup>105</sup> According to the progressive model, administrative agencies function as impartial expert bodies that use science to pursue designated legislative objectives.<sup>106</sup> In contrast, public choice theory assumes that in politics, as in markets, individuals and organizations are motivated mainly by self-interest.<sup>107</sup> 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.<sup>108</sup> The rise of public choice theory and the critical assessment of agencies’ activities which followed it laid fertile ground for welfare economics proponents. As a utilitarian approach that evaluates public policies based on their effect on the aggregate well-being of the community, welfare economics was portrayed as a neutral system for objective agency decision-making.<sup>109</sup>

## 2. Dreams of Plastic Trees

In a seminal article published in 1973, Professor Laurence Tribe addressed a trend among US municipalities to replace natural amenities with artificial “surrogates” like plastic trees, synthetic turf, and man-made shrubs.<sup>110</sup> 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.<sup>111</sup> In that case, explained Tribe, welfarist environmental policy requires us to prefer plastic trees over the more expensive and vulnerable

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especially suited to this kind of decision, and soon both administrators and scholars were engaged in versions of it.”)

<sup>105</sup> See Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1623–37 (2011).

<sup>106</sup> See *id.* at 1566–67.

<sup>107</sup> See DENNIS C. MUELLER, LECTURES ON VIRGINIA POLITICAL ECONOMY: THE “VIRGINIA SCHOOL” AND PUBLIC CHOICE 1 (1985).

<sup>108</sup> See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 54–56, 63–67 (1998).

<sup>109</sup> See KYSAR, *supra* note 14, at 50; see also REVESZ & LIVERMORE, *supra* note 3, at 12–13 (justifying CBA as rational check on bureaucrats’ discretion).

<sup>110</sup> Tribe, *supra* note 11, at 1316; see also *id.* at 1315–16, 1326.

<sup>111</sup> See *id.* at 1316–17.

natural alternative.<sup>112</sup> According to Tribe, however, most people tend to balk at this outcome.<sup>113</sup> 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.<sup>114</sup> To Tribe, the discomfort people exhibit with this outcome is a sign of CBA’s morally distortive tendencies.<sup>115</sup>

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 and political discourse “which so structures human thought and feeling as to erode, over the long run, the very sense of obligation which provided the initial impetus for [human] protection efforts.”<sup>116</sup> The reason for this process of ethical erosion is the way we form our values. Valuing is first and foremost about acknowledging value in something external to us.<sup>117</sup> 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.<sup>118</sup> When we structure legal and political discourse around human desires as the only factor in determining what to protect, we erode the process of acknowledging value. We put the cart 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 to pay the price is secondary to the question whether a bald eagle is *worthy* of protection. CBA takes away our freedom to acknowledge value in the world.<sup>119</sup> It degrades individual autonomy and, in the process, transforms our system of ethical appreciation into a platform for trading “smoothly exchangeable units of satisfaction.”<sup>120</sup>

Although deeply concerned with the long-term ethical consequences of welfarism, Tribe nevertheless implicitly acknowledged the importance of CBA as an environmental rulemaking policy.<sup>121</sup> 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

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<sup>112</sup> See *id.* at 1326.

<sup>113</sup> See *id.*

<sup>114</sup> See *id.* at 1323–25.

<sup>115</sup> See *id.* at 1326–27.

<sup>116</sup> Tribe, *supra* note 11, at 1330–31.

<sup>117</sup> See *id.* at 1326, 1339.

<sup>118</sup> See *id.* at 1326–27.

<sup>119</sup> See *id.*; see also Purdy, *supra* note 95, at 865.

<sup>120</sup> Tribe, *supra* note 11, at 1331.

<sup>121</sup> See *id.* at 1341, 1346.

rulemaking.<sup>122</sup> Tribe searched for a legal framework that would maintain human freedom to acknowledge value in the natural world, while gradually elevating nature from a means-to-a-human-end status to an end-in-itself position.<sup>123</sup> Implicit in this approach is the realization that in an egalitarian environmental society, nonhumans will be served by CBA, not consumed by it.<sup>124</sup> To succeed, Tribe's framework had to satisfy two requirements: first, it had to protect individual autonomy to acknowledge value in nature (environmental autonomy), and second, it had to institute some form of reverence toward the natural world (environmental agency).<sup>125</sup> One structural restriction follows from the requirement of environmental autonomy: the legal framework Tribe tried 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.<sup>126</sup>

Tribe starts his search for a legal framework of environmental ethical progress with the recognition that the human capacity for "empathy and identification" is elastic and constantly evolving.<sup>127</sup> 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.<sup>128</sup> Once a very limited sphere confined by close familial and social connections, a human's capacity for empathy has grown to encompass the human species irrespective of race, age, or social function and, in some instances, members of other species as well.<sup>129</sup> To counter 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.<sup>130</sup> Professor Christopher Stone's idea of

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<sup>122</sup> See generally *id.* at 1315–48.

<sup>123</sup> See *id.* at 1323–25, 1338–41.

<sup>124</sup> See SMITH, *supra* note 77, at 35 (explaining that CBA 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).

<sup>125</sup> See Tribe, *supra* note 11, at 1330–31.

<sup>126</sup> See *id.* at 1338.

<sup>127</sup> *Id.* at 1345.

<sup>128</sup> Moral patients are subjects of moral responsibility (morally considerable entities).

<sup>129</sup> See Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 450 (1972).

<sup>130</sup> See Tribe, *supra* note 11, at 1338, 1340, 1345. Tribe's argument is based on the presupposition that an expansion of human empathy to encompass nonhumans 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* 120–22 (Princeton Univ. Press 2011) (1979); see also

recognizing the legal rights of nature<sup>131</sup> seems to fulfill Tribe's framework.<sup>132</sup> As Stone observed, legal rights embody and advance consciousness of the moral value of the rights holder.<sup>133</sup> Therefore, changing legal terminology to discuss natural objects (animate and inanimate) as deserving protection, care, and empathy, equates the perceptions of these objects with those of humans to elevate the objects' moral status.

Tribe 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."<sup>134</sup> This process of moral reflection would not only affect the views of lawmakers, lawyers, policymakers, and other professionals, but it would also eventually trickle down and transform social discourse. In the words of author 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 nonhuman nature has rights."<sup>135</sup> By placing humans and nonhumans on equal or closely equal legal terms, we will establish a legal framework for ethical experimentation whereby humans and nonhumans interact in a safe environment designed to facilitate an ever-evolving relationship in which society will make ethical progress.<sup>136</sup> Legal rights are intended to instill reverence toward the natural world while inviting society to engage in continuous and in-depth discussions about its place in the natural world.<sup>137</sup>

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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 Immanuel Kant, who deny any moral standing of animals, support moral duties toward nonhumans as indirect duties toward humankind. See IMMANUEL KANT, *LECTURES ON ETHICS* 239–41 (Louis Infield trans., Hackett Publ'g Co. 1980) (1930) (discussing ethical duties towards "Animals and Spirits"). 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 ENVTL. ETHICS 211, 215 (1983).

<sup>131</sup> See Stone, *supra* note 129, at 456.

<sup>132</sup> See Tribe, *supra* note 11, at 1345.

<sup>133</sup> See Stone, *supra* note 129, at 456.

<sup>134</sup> Purdy, *supra* note 95, at 865.

<sup>135</sup> GARY SNYDER, *The Real Work*, in *THE REAL WORK: INTERVIEWS AND TALKS 1964–1979*, at 55, 72 (Wm. Scott McLean ed., New Directions Paperbook 1980) (1969).

<sup>136</sup> See Tribe, *supra* note 11, at 1338.

<sup>137</sup> Tribe avoids celebrating a specific form of human-nature interaction. Instead, his framework is designed to facilitate moral growth by allowing for pluralistic egalitarian interactions between human and nature. See *id.*

### 3. The Problem with Rights

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 nature's legal rights.<sup>138</sup> The torrent of criticism directed against Tribe and Stone reoriented the debate about rights-based approaches for environmental legal protection; discussions of procedural feasibility overshadowed inquiries into the value of rights-based frameworks as a remedy for environmental ethical erosion.<sup>139</sup>

But regardless of the question of 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.<sup>140</sup> And despite its prevalence as a regulatory approach, concerns about its ethical implications have not subsided.<sup>141</sup> Careful analysis of the merits and demerits of the rights-of-nature position as an antithesis of welfarism is warranted because it illuminates 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 nonhumans are "worthy of moral, and therefore, legal consideration."<sup>142</sup> Thus, legal recognition of nature will necessarily entail social conflicts between proponents and opponents of the idea.<sup>143</sup> Moreover, since legal rights are inherently autonomist and

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<sup>138</sup> See, e.g., P.S. Elder, *Legal Rights for Nature—The Wrong Answer to the Right(s) Question*, 22 OSGOODE HALL L.J. 285, 291–93 (1984); D. Paul Emond, *Co-operation 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, 309–10 (1984); Sagoff, *supra* note 77, at 218–23.

<sup>139</sup> See Cynthia Giagnocavo & Howard Goldstein, *Law Reform or World Re-form: The Problem of Environmental Rights*, 35 MCGILL L.J. 345, 359–61 (1990).

<sup>140</sup> See Sinden, *supra* note 10, at 195–97.

<sup>141</sup> See, e.g., FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 233–34 (2004); KYSAR, *supra* note 14, at 46–47; SAGOFF, *supra* note 16, at 80; SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 8–9 (2003); David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 ECOLOGY L.Q. 545, 568, 573–74 (1997); Sinden, *supra* note 10, at 193.

<sup>142</sup> Giagnocavo & Goldstein, *supra* note 139, at 354.

<sup>143</sup> See Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENVTL. L.J. 295, 14 (2003) (discussing the impediments to legal enforcement when there is no wide consensus regarding the values underlying the legislation).

confrontational, a language of legal rights might actually increase friction and alienation instead of broadening the sense of community: “[r]ights, 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.”<sup>144</sup> Legal rights demand recognition and identification rather than community building and empathy. If anything, the language of rights trades empathy for recognition, inhibiting the process of ethical community building.<sup>145</sup>

But the recognition of rights always creates friction. After all, “[i]f there is no struggle there is no progress.”<sup>146</sup> In line with this understanding, proponents of the rights-of-nature position have presented the civil rights movement as an example of legal recognition of rights that brought about an ethical revolution.<sup>147</sup> In equating humans and nonhumans, however, rights-of-nature proponents miss an important attribute of nature: unlike humans, nature does not engage in equal reciprocal relationships with 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 nature and humans who do not view it as worthy of moral consideration in a state of unending struggle.<sup>148</sup>

Racial integration illustrates this difficulty. Unlike natural objects, African Americans used the status they acquired through legal battles to interact as full members of society. Legal precedents and asserted rights did not bring real change; rather, individuals brought about real change by using 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.<sup>149</sup> Hence, newly recognized legal

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<sup>144</sup> Giagnocavo & Goldstein, *supra* note 139, at 371.

<sup>145</sup> *See id.*

<sup>146</sup> Frederick Douglass, Speech on West India Emancipation Delivered at Canandaigua, New York (Aug. 3, 1857) (transcript available at <https://perma.cc/CXG3-GKVM>).

<sup>147</sup> *See* RODERICK FRAZIER NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS 47–48 (1989); Stone, *supra* note 129, at 496–97; Tribe, *supra* note 11, at 1345.

<sup>148</sup> *See* John Rodman, *The Liberation of Nature?*, 20 INQUIRY 83, 96 (1977).

<sup>149</sup> *See, e.g.*, Morton Deutsch & Mary Evans Collins, *Interracial Housing*, in AMERICAN SOCIAL PATTERNS: STUDIES OF RACE RELATIONS, POPULAR HEROES, VOTING, UNION DEMOCRACY, AND GOVERNMENT BUREAUCRACY 7, 40, 42–43 (William Petersen 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, and further explaining that “[p]erceiving 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 MARTIN RICH & JOSEPH L. DEVITIS, THEORIES OF MORAL DEVELOPMENT 74 (2d ed. 1994) (1985) (asserting that integrated housing arrangements can “reduce ethnocentrism and promote greater acceptance of others”); ERIC KAUFMANN & GARETH HARRIS,

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.”<sup>150</sup>

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.<sup>151</sup> However, Tribe is hopeful that “[a]t least so long as we remain within empathizing distance of the [people or] objects whose rights we seek to recognize, it seems reasonable to expect the acknowledgment of such rights to be regarded as more than fictitious.”<sup>152</sup> In other words, interaction (remaining within empathizing distance) is a prerequisite for moral recognition because individual morals are rooted in human empathy.<sup>153</sup>

For feelings of empathy to emerge, one must be positioned for a reciprocal relationship and identification with the moral group (persons or things) that is the subject of mistreatment. If one does not interact with a given moral group, one cannot develop empathy for its members.<sup>154</sup> No empathy, no ethical obligation.<sup>155</sup> Empathy requires interaction because empathy is contingent on our relationship with the subject of empathy, our recognition of its welfare, and our ability to identify with its plight and

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CHANGING PLACES: MAPPING THE WHITE BRITISH RESPONSE TO ETHNIC CHANGE 12–14 (2014) (acknowledging that experience with 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 ETHNIC & RACIAL STUD. 711, 718 (2013) (same).

<sup>150</sup> Tribe, *supra* note 11, at 1345.

<sup>151</sup> See *id.* at 1342–43.

<sup>152</sup> *Id.* at 1343.

<sup>153</sup> See *id.* at 1330; see also Stone, *supra* note 129, at 450, 498; MARTIN L. HOFFMAN, EMPATHY AND MORAL DEVELOPMENT: IMPLICATIONS FOR CARING AND JUSTICE 246–48 (2000); DAVID HUME, A TREATISE OF HUMAN NATURE 281, 366, 368, 454 (L.A. Selby-Bigge ed., 2d ed. 1978) (1888); ARTHUR SCHOPENHAUER, THE BASIS OF MORALITY 170 (Arthur Brodrick Bullock trans., 1903) (1840).

<sup>154</sup> See HOFFMAN, *supra* note 153, at 245.

<sup>155</sup> 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. See P. Wesley Schultz, *Empathizing With Nature: The Effects of Perspective Taking on Concern for Environmental Issues*, 56 J. SOC. ISSUES 391, 391–92 (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. See C. Daniel Batson et al., *Empathy and Altruism*, in OXFORD HANDBOOK OF POSITIVE PSYCHOLOGY 417, 417 (C. R. Snyder & Shane J. Lopez eds., 2009); C. Daniel Batson & Laura L. Shaw, *Evidence for Altruism: Toward a Pluralism of Prosocial Motives*, 2 PSYCHOL. INQUIRY 107, 120 (1991).

appreciate its perspective.<sup>156</sup> This ability is acquired through emotional experiences, not rational learning.<sup>157</sup> Put simply, meaningful interaction with the natural environment is fundamental to the development of genuine and long-lasting environmental empathy.<sup>158</sup> Indeed, a growing volume of research suggests that our environmental values are contingent on the formation of emotional connections with nature,<sup>159</sup> a process that, absent other forms of communication, depends on physical human-nature interaction.<sup>160</sup> Studies reveal that humans are evolutionarily hardwired to connect with other forms of life and have an “innate tendency to focus on life and lifelike processes.”<sup>161</sup> No less important, substantial evidence has established a link between personal experiences of nature and respect and concern for it.<sup>162</sup>

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<sup>156</sup> See Lawrence Kohlberg, *The Development of Moral Judgment and Moral Action*, in CHILD PSYCHOLOGY AND CHILDHOOD EDUCATION: A COGNITIVE-DEVELOPMENTAL VIEW 259, 269 (Lawrence Kohlberg ed., 1987); Jaime Berenguer, *The Effect of Empathy in Environmental Moral Reasoning*, 42 ENV'T & BEHAV. 110, 125 (2010); Norma Haan, *Processes of Moral Development: Cognitive or Social Disequilibrium?*, 21 DEVELOPMENTAL PSYCHOL. 996, 1005 (1985).

<sup>157</sup> See Inge M. Ahammer & John P. Murray, *Kindness in the Kindergarten: The Relative Influence of Role Playing and Prosocial Television in Facilitating Altruism*, 2 INT'L J. BEHAV. DEV. 133, 154–55 (1979); Berenguer, *supra* note 156, at 126–27; Holly Doremus, *Shaping the Future: The Dialectic of Law and Environmental Values*, 37 U.C. DAVIS L. REV. 233, 242–43 (2003).

<sup>158</sup> 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 J. Baird Callicott, *Animal Liberation: A Triangular Affair*, 2 ENVTL. ETHICS 311, 336–37 (1980); Doremus, *supra* note 157, at 248; see also EDWARD S. REED, *THE NECESSITY OF EXPERIENCE* (1996).

<sup>159</sup> See Elizabeth Kals et al., *Emotional Affinity Toward Nature as a Motivational Basis to Protect Nature*, 31 ENV'T & BEHAV. 178, 179–80 (1999).

<sup>160</sup> See Doremus, *supra* note 157, at 248; Daniel Levi & Sara Kocher, *Virtual Nature: The Future Effects of Information Technology on Our Relationship to Nature*, 31 ENV'T & BEHAV. 203, 223–24 (1999); Ernest Partridge, *Ecological Morality and Nonmoral Sentiments*, 18 ENVTL. ETHICS 149, 159 (1996).

<sup>161</sup> EDWARD. O. WILSON, *BIOPHILIA* 1 (1984); see also Eleonora Gullone, *The Biophilia Hypothesis and Life in the 21st Century: Increasing Mental Health or Increasing Pathology?*, 1 J. HAPPINESS STUD. 293, 294 (2000) (quoting WILSON, *supra* note 161, at 1).

<sup>162</sup> See, e.g., P. Wesley Schultz, *Inclusion With Nature: The Psychology of Human-Nature Relations*, in PSYCHOLOGY OF SUSTAINABLE DEVELOPMENT 61, 62–64 (Peter Schmuck & P. Wesley Schultz eds., 2002); Trudi E. Bunting & Larry R. Cousins, *Environmental Dispositions Among School-Age Children: A Preliminary Investigation*, 17 ENV'T & BEHAV. 725, 757 (1985); Louise Chawla, *Children's Concern for the Natural Environment*, 5 CHILD. ENV'TS Q. 13, 17–18 (1988); Elizabeth K. Nisbet et al., *The Nature Relatedness Scale: Linking Individuals' Connection With Nature to Environmental Concern and Behavior*, 41 ENV'T & BEHAV. 715, 717–18 (2009); Elizabeth K. Nisbet & John M. Zelenski, *Underestimating Nearby Nature: Affective Forecasting Errors Obscure the Happy Path to Sustainability*, 22 PSYCHOL. SCI. 1101, 1101 (2011); Lilian A. Phenice & Robert J. Griffore, *Young Children and the Natural World*, 4 CONTEMP. ISSUES EARLY CHILDHOOD 167, 169–70 (2003); Schultz, *supra* note 155, at 391–95; P. Wesley Schultz et al.,

Assuming that humans are within empathizing distance of nature, Tribe relies on his rights-based approach to facilitate stronger connections between humans and nature.<sup>163</sup> 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 “[t]he [w]rong [a]nswer to the [r]ight(s) [q]uestion.”<sup>164</sup> 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: preservation.

## II. A Pragmatist Approach to Preservation

Despite its flaws, preservation was right about one very important truth: 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 and manageable,<sup>165</sup> 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?<sup>166</sup>

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.<sup>167</sup> The

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*Implicit Connections With Nature*, 24 J. ENVTL. PSYCHOL. 31, 39–40 (2004); see also RICHARD LOUV, *LAST CHILD IN THE WOODS: SAVING OUR CHILDREN FROM NATURE-DEFICIT DISORDER* (2d ed. 2008) (2005).

<sup>163</sup> See Tribe, *supra* note 11, at 1343.

<sup>164</sup> Elder, *supra* note 138, at 285; see also *id.* at 288.

<sup>165</sup> See, e.g., Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 875–76 (2009) (doubting CBA’s image as a determinant and accurate methodology).

<sup>166</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 512 (1971).

<sup>167</sup> See Purdy, *supra* note 95, at 874–78.

variety of theories and 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.<sup>168</sup> But 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*

Lacking a “theory of everything” is not unique to environmental ethics. Philosophy—and ethics, its subsection dealing with morals—is fraught with inconsistencies and competing positions that advance irreconcilable arguments to answer existential questions.<sup>169</sup> 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.<sup>170</sup> The problem with monism—the belief that there is one overarching set of ethical principles<sup>171</sup>—is that it is impossible to furnish one great answer to all the dilemmas of ethics.<sup>172</sup> One theory of value, nuanced and comprehensive as it may be, cannot apply to all circumstances.<sup>173</sup> Stone suggests that one solution is to embrace moral pluralism,<sup>174</sup> a position asserting the existence of multiple moral frameworks that are equally correct yet conflict with each other.<sup>175</sup> To Stone, embracing moral pluralism means using different moral frameworks for different moral actions and actors.<sup>176</sup> For instance, when

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<sup>168</sup> See SMITH, *supra* note 77, at 35 (discussing CBA appeal as “an impersonal method of arriving at social and political decisions” in the absence of a “uniting moral framework”); see also PLANT, *supra* note 103.

<sup>169</sup> See SMITH, *supra* note 77, at 19–20.

<sup>170</sup> See CHRISTOPHER D. STONE, *THE GNAT IS OLDER THAN MAN: GLOBAL ENVIRONMENT AND HUMAN AGENDA* 278–79 (1993).

<sup>171</sup> Otherwise stated as one unique moral principle that can guide moral judgment in every situation. See BRYAN G. NORTON, *Integration or Reduction: Two Approaches to Environmental Values*, in *SEARCHING FOR SUSTAINABILITY: INTERDISCIPLINARY ESSAYS IN THE PHILOSOPHY OF CONSERVATION BIOLOGY* 47 (2004); see also SMITH, *supra* note 77, at 18–19.

<sup>172</sup> See SMITH, *supra* note 77, at 35; STONE, *supra* note 170, at 278–79.

<sup>173</sup> See SMITH, *supra* note 77, at 20.

<sup>174</sup> See STONE, *supra* note 170, at 279.

<sup>175</sup> See SMITH, *supra* note 77, at 21. Moral pluralism can also be described as the position that “no single moral principle . . . can be appropriately applied in all ethically problematic situations.” Kelly A. Parker, *Pragmatism and Environmental Thought*, in *ENVIRONMENTAL PRAGMATISM* 21, 31–32 (Andrew Light & Eric Katz eds., 1996).

<sup>176</sup> See STONE, *supra* note 170, at 279.

we speak of persons, we can consider rights and duties of what is morally mandatory. But questions that involve nonhumans could require applying more flexible judgments, not what is mandatory as a duty but rather what is “morally welcome.”<sup>177</sup>

The lack of better answers regarding “the natural order and our place in it” indicates that the evolution of our society’s environmental values is still in its beginning stages, when discourse and experimentation are crucial to the development of clear answers.<sup>178</sup> Only after we have formed clear answers to the perplexing issues underlying the human-nature relationship can we progress toward grounding our ethics in more concrete moral structures like rights.<sup>179</sup> As Tribe correctly observed,<sup>180</sup> pluralism and experimentation are fundamental for the proper function of this process.<sup>181</sup>

### 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 that “is actively created as we act in and toward the world.”<sup>182</sup> Pragmatism emerged in the second half of the nineteenth century out of frustration with the inability of philosophy to provide practical guidance and definitive answers to existential questions.<sup>183</sup> But unlike welfarism, which answers a similar gap in environmental policy, pragmatism addresses change by advancing pluralism, not monism.<sup>184</sup>

When applied to ethics, the pragmatist idea of evolving reality means that any given value system must be constantly examined and readjusted. 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

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<sup>177</sup> *Id.*

<sup>178</sup> RAWLS, *supra* note 166, at 512; *see also* Anthony Weston, *Before Environmental Ethics*, 14 ENVTL. ETHICS 321, 329–30 (1992).

<sup>179</sup> *See* Weston, *supra* note 178, at 329–30.

<sup>180</sup> *See* Tribe, *supra* note 11, at 1338.

<sup>181</sup> *See* Weston, *supra* note 178, at 330.

<sup>182</sup> JOHN P. HEWITT & DAVID SHULMAN, *SELF AND SOCIETY: A SYMBOLIC INTERACTIONIST SOCIAL PSYCHOLOGY* 6 (11th ed. 2011).

<sup>183</sup> *See* Frithjof Nungesser, *The Evolution of Pragmatism: On the Scientific Background of the Pragmatist Conception of History, Action, and Sociality*, 58 EUR. J. SOC. 327, 352–53 (2017).

<sup>184</sup> *See* Purdy, *supra* note 95, at 860–62.

tested.<sup>185</sup> 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 mediation of conflict in an ever-changing world.”<sup>186</sup> 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.”<sup>187</sup>

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 “[a]ll value emerges in experience,”<sup>188</sup> a pragmatist approach will suggest that to get it right, or at least as close as possible to right,<sup>189</sup> we must enhance and enrich the environmental experiences of individuals.<sup>190</sup>

In keeping with this notion, Professor 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.<sup>191</sup> 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.”<sup>192</sup> Such places could be anything from “quiet zones” inhabited by communities that opted to ban “automobile engines, lawnmowers, and low-flying airplanes . . . [as well as] bright outside lights” to “Midgleyan mixed communities of humans and other species.”<sup>193</sup>

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<sup>185</sup> See Charles S. Brown, *The Who of Environmental Ethics: Phenomenology and the Moral Self*, in *ECOPSYCHOLOGY, PHENOMENOLOGY, AND THE ENVIRONMENT: THE EXPERIENCE OF NATURE* 143, 145 (Douglas A. Vakoch & Fernando Castrillón eds., 2014).

<sup>186</sup> Parker, *supra* note 175, at 25.

<sup>187</sup> Brown, *supra* note 185, at 157. Ecofeminist Val Plumwood has established 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 *HYPATIA* 3, 7 (1991). Ecologist Aldo Leopold and philosopher Arne Næss 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* 211–12 (Ballantine Books 22d prt. 1986) (1966); Arne Næss, *The Shallow and the Deep, Long-Range Ecology Movement*, 16 *INQUIRY* 95, 95–96 (1973).

<sup>188</sup> Parker, *supra* note 175, at 25; see also Brown, *supra* note 185, at 150; Jarrett Zigon, *Morality and Personal Experience: The Moral Conceptions of a Muscovite Man*, 37 *ETHOS* 78, 78 (2009).

<sup>189</sup> See Weston, *supra* note 178, at 334–39.

<sup>190</sup> See, e.g., Brown, *supra* note 185, at 150; Parker, *supra* note 175, at 25.

<sup>191</sup> Weston, *supra* note 178, at 334 (emphasis omitted).

<sup>192</sup> *Id.* (emphasis omitted).

<sup>193</sup> *Id.* (referring to moral philosopher Mary Midgley).

Weston's suggestion is premised on two realizations. First, Weston understands that our physical environments and our social institutions shape and structure human-nature relationships.<sup>194</sup> Because the notion of human-nature interaction as a valuable ethical practice is foreign to our anthropocentric society, the design of our institutions fails to promote environmental empathy. If anything, it reduces it.<sup>195</sup> 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.<sup>196</sup> Second, Weston understands that 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.<sup>197</sup> Pluralism of interactions can only arise from experiential forms of living in nature that will allow for "new or stronger environmental values to evolve."<sup>198</sup> 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 focuses on discursive devices for promoting in-depth discussions concerning the human-nature relationship.<sup>199</sup> In contrast, Weston's framework 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.<sup>200</sup> 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; according to Weston, this is achievable with "[a] little creative zoning."<sup>201</sup>

Similarly, Professor 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."<sup>202</sup> This means that we must "make available a variety of nature experiences, ranging in wildness and accessibility," a

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<sup>194</sup> See *id.* at 325-26.

<sup>195</sup> See *id.* at 334.

<sup>196</sup> See *id.* at 331.

<sup>197</sup> See Weston, *supra* note 178, at 324, 335-36.

<sup>198</sup> *Id.* at 334.

<sup>199</sup> See Tribe, *supra* note 11, at 1341.

<sup>200</sup> Weston, *supra* note 178, at 334.

<sup>201</sup> *Id.*

<sup>202</sup> Doremus, *supra* note 157, at 241.

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.”<sup>203</sup> Unlike Weston, a philosopher, Doremus, a 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 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.”<sup>204</sup>

While more comprehensive than Weston’s theory, Doremus’s legal approach fails to achieve its goal of translating values “into environmentally protective actions.”<sup>205</sup> The problem with Doremus’s approach is that it predetermines the character of *desired* interactions with nature. Doremus’s focus on “non-utilitarian enjoyment or appreciation” of nature which “should be comfortable and relaxing” follows in the footsteps of preservation and collapses on itself in the same manner.<sup>206</sup> 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.<sup>207</sup> 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].”<sup>208</sup>

Although Weston’s and Doremus’s 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” looks like is by making nature part of our *real* lives.<sup>209</sup> The problem with this approach, as Doremus correctly observed, is that encouraging diverse environmental lifestyles requires relaxing

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<sup>203</sup> *Id.* at 257.

<sup>204</sup> *Id.* at 241.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 246.

<sup>207</sup> See Tribe, *supra* note 11, at 1339.

<sup>208</sup> Weston, *supra* note 178, at 334.

<sup>209</sup> Cronon, *supra* note 68, at 81 (emphasis omitted).

environmental controls and allowing individuals and communities to experiment in 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?

### III. The Community as an Experimental Institution

#### A. *Collective Responsibility Regimes*

Since Tribe's *Plastic Trees*, 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 for questions concerning the value of nature. In his thoughtful and comprehensive work, Professor Douglas Kysar took a significant step toward identifying a potential solution.<sup>210</sup> Like Tribe, Kysar begins with an analysis of welfarist policymaking as dangerous to personal autonomy.<sup>211</sup> To solve that problem, Kysar suggests 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."<sup>212</sup> 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.<sup>213</sup> For example, when applied to genetically modified organisms ("GMOs"), a precautionary approach would advise against permitting their use until further data concerning their potential health risks are collected.<sup>214</sup> 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

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<sup>210</sup> See generally KYSAR, *supra* note 14.

<sup>211</sup> Kysar finds that welfarist policymaking is dangerous to autonomy through a process that undermines individual particularity, not the freedom to acknowledge value. See *id.* at 33.

<sup>212</sup> Daniel Bodansky, *The Precautionary Principle in US Environmental Law*, in INTERPRETING THE PRECAUTIONARY PRINCIPLE 203, 203 (Timothy O'Riordan & James Cameron eds., 1994).

<sup>213</sup> See James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 BOS. C. INT'L & COMP. L. REV. 1, 2 (1991).

<sup>214</sup> See Gregory N. Mandel & James Thuo Gathii, *Cost Benefit Analysis Versus the Precautionary Principle: Beyond Cass Sunstein's Laws of Fear*, 2006 U. ILL. L. REV. 1037, 1040. 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.

the regulating body's obligations to its present and future members, to other political communities, and to other species."<sup>215</sup> 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.<sup>216</sup>

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."<sup>217</sup> Indeed, a precautionary approach allows individuals to exercise ethical agency. Promoting ex ante consideration of risks requires individuals to contemplate the potentially harmful implications of their actions. But 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."<sup>218</sup> 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 Kysar's implicit assumption that collective responsibility regimes place citizens who take no part in decision-making in ethically contemplative modes. Like the approaches of 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").<sup>219</sup> 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.<sup>220</sup>

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<sup>215</sup> KYSAR, *supra* note 14, at 64.

<sup>216</sup> *See id.* at 14.

<sup>217</sup> *Id.* at 47-48.

<sup>218</sup> *Id.* at 48.

<sup>219</sup> *Id.* at 48.

<sup>220</sup> *See id.* at 48-49.

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.<sup>221</sup> The common approach defines rules as bright-line mandates and standards as flexible legislative directives.<sup>222</sup> For example, a law prohibiting driving above seventy miles per hour, punishable by a \$100 fine, is a rule.<sup>223</sup> In contrast, a law prohibiting “driving at an unsafe speed” is a standard.<sup>224</sup> 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.<sup>225</sup> As windows to the moral ideals of society with regard to a particular activity, standards facilitate a process of ethical deliberation.<sup>226</sup> 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.”<sup>227</sup>

In *Crystals and Mud in Property Law*, Professor Carol Rose divided property rules into two categories: “muddy” (i.e., open-ended, flexible standards) and “crystal” (i.e., hard-edged, strict prescriptive rules).<sup>228</sup> Rose notes that almost no theory provides a definitive answer to the question of when muddy or crystal rules should be used.<sup>229</sup> Following Professor Duncan Kennedy,<sup>230</sup> Rose observes that, by design, crystal, hard-edged rules “tell the bad man the limits within which he can get away with his badness.”<sup>231</sup> On the other hand, muddy, open-ended rules “are aimed at

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<sup>221</sup> See Dan Awrey, *Regulating Financial Innovation: A More Principles-Based Proposal?*, 5 BROOK. J. CORP. FIN. & COM. L., 273, 275–79 (2011) (offering an overview of the differential between rules and standards in legal scholarship).

<sup>222</sup> See Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379–85, 398 (1985).

<sup>223</sup> See Adam J. Kolber, *Smooth and Bumpy Laws*, 102 CALIF. L. REV. 655 (2014).

<sup>224</sup> *Id.* at 666.

<sup>225</sup> See Philip Selznick, *Communitarian Jurisprudence*, in TO PROMOTE THE GENERAL WELFARE: A COMMUNITARIAN LEGAL READER 3, 11–13 (David E. Carney ed., 1999).

<sup>226</sup> *See id.* at 12.

<sup>227</sup> Gary R. Weaver & Linda Klebe Treviño, *Compliance and Values Oriented Ethics Programs: Influences on Employees' Attitudes and Behavior*, 9 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, 172–73 (2001).

<sup>228</sup> See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577–90 (1988).

<sup>229</sup> *See id.* at 592.

<sup>230</sup> See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1745, 1774 (1976).

<sup>231</sup> Rose, *supra* note 228, at 592.

protecting goodness and altruism.”<sup>232</sup> 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.”<sup>233</sup> 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.<sup>234</sup> Thus, property rules that deal with long-term or communal relationships will tend to be muddier, while property rules that deal with short-term commercial transactions will tend to be clearer.

### C. *Communities as Vehicles for Ethical Experimentation*

#### 1. Agency Is Strengthened in Communal Settings

As Kysar rightly explained, legal frameworks must institute an *ex ante* position of moral agency to facilitate moral progress.<sup>235</sup> According to Rose, in communal settings, property norms function as the communal version of the ethically contemplative precautionary principle Kysar celebrates.<sup>236</sup> 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.”<sup>237</sup> Simply put, communities “emphasize responsibility to the social . . . networks in which individuals are enmeshed.”<sup>238</sup> As sources of particularity and freedom, communities serve as a bedrock for exercising meaningful autonomy but impose restraints on the individual’s ability to act unhindered.<sup>239</sup> Before taking an action with potential externalizing costs, a landowner in a community must apply her judgment broadly, asking herself if her actions might harm another and if her contemplated action is consistent with her community’s vision of ethical conduct.<sup>240</sup>

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

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<sup>232</sup> *Id.* (citing Kennedy, *supra* note 230, at 1773–74).

<sup>233</sup> *Id.* at 601.

<sup>234</sup> *See id.* at 601–02.

<sup>235</sup> *See* KYSAR, *supra* note 14, at 47–48.

<sup>236</sup> *See* Rose, *supra* note 228, at 586, 602, 604.

<sup>237</sup> Selznick, *supra* note 225, at 7.

<sup>238</sup> Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COMMENT. 259, 263 (1992).

<sup>239</sup> *See id.*

<sup>240</sup> *See* Eric T. Freyfogle, *Ethics, Community, and Private Land*, 23 ECOLOGY L.Q. 631, 639 (1996).

community, communicate her intentions, and work with others to find a solution that conforms with the community's set of values.<sup>241</sup> 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, facilitates ethical contemplation, and promotes self-imposed restraint.

Empirical evidence supports the observation that communal environments engender self-restraint and agency. In 1968, Professor Garrett Hardin published his famous article *The Tragedy of the Commons*.<sup>242</sup> According to Hardin, when left unchecked, individuals will exhaust open access common pool resources.<sup>243</sup> The reason for this outcome is that each individual user maximizes her own interest.<sup>244</sup> 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.<sup>245</sup> Game theory supports Hardin's observation, which is often depicted as resulting from a "prisoner's dilemma."<sup>246</sup> However, despite its sound theoretical underpinnings, an abundance of empirical evidence demonstrates that, time and again, communities have successfully avoided Hardin's tragedy.<sup>247</sup> Under certain circumstances, individuals in communal settings exercise restraint and do not act opportunistically.<sup>248</sup>

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.<sup>249</sup> In communal settings, reciprocity and communication contribute to the development of communal "trust," which Ostrom defines as "the expectation of one person about the actions

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<sup>241</sup> See *id.* at 641; Schlag, *supra* note 222, at 388-89.

<sup>242</sup> See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

<sup>243</sup> See *id.* at 1244.

<sup>244</sup> See *id.*; see also Elinor Ostrom, *A Behavioral Approach to the Rational Choice Theory of Collective Action*, 92 *AM. POL. SCI. REV.* 1, 1 (1998) (explaining the process as resulting from "social dilemmas" which occur "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").

<sup>245</sup> See Hardin, *supra* note 242, at 1244.

<sup>246</sup> ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 3 (1990).

<sup>247</sup> See, e.g., David Feeny et al., *Questioning the Assumptions of the "Tragedy of the Commons" Model of Fisheries*, 72 *LAND ECON.* 187, 187 (1996).

<sup>248</sup> See OSTROM, *supra* note 246, at 36, 58-88.

<sup>249</sup> See Ostrom, *supra* note 244, at 12-14.

of others that affects the first person's choice, when an action must be taken before the actions of others are known."<sup>250</sup> 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," the smaller and more symmetrical the community, the better the chances it will develop trust capital which will instill a sense of restraint and agency in its members.<sup>251</sup> Indeed, as Professor Pierre Schlag observed, muddy communal norms facilitate the evolution of ritualistic communication between members of a community.<sup>252</sup> Communal deliberation builds communal trust, promotes individual agency, and facilitates evolution of new ethical practices.

## 2. An Observation on the Malleability of Property<sup>253</sup>

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.<sup>254</sup> 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 manifested in various physical forms.<sup>255</sup> Personal property is constitutive of personal autonomy.<sup>256</sup> One expresses one's character and expectations through property, and it is through ownership of things that we act on the external world.<sup>257</sup> Similarly, communal property is constitutive of communal autonomy and facilitates the physical and social expression of communal

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<sup>250</sup> *Id.* at 12.

<sup>251</sup> *Id.* at 14.

<sup>252</sup> See Schlag, *supra* note 222, at 388–89.

<sup>253</sup> This section is borrowed from an earlier work of the author. See Ori Sharon, *Fields of Dreams: An Economic Democracy Framework for Addressing NIMBYism*, 49 ENVTL. L. REP. 10264, 10282–83 (2019).

<sup>254</sup> See Richard A. Barnes, *The Capacity of Property Rights to Accommodate Social-Ecological Resilience*, 18 ECOLOGY & SOC'Y 6, 11 (2013).

<sup>255</sup> And non-physical forms, when it is in respect of intangible property.

<sup>256</sup> See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 960, 977 (1982); see also Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517, 1559 n.208 (2003).

<sup>257</sup> See Radin, *supra* note 256, at 960, 968.

preferences, values, perceptions, and sentiments.<sup>258</sup> This is because both spheres of human interrelationships—the physical and the legal—are structured in accordance with our values, perceptions, and beliefs.<sup>259</sup> 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 are therefore an elastic but ethically contemplative environment that allow 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).<sup>260</sup> Members of intentional communities “share a substantial common denominator of ideology, values, or beliefs that is highly distinctive from those of general society.”<sup>261</sup> 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.<sup>262</sup> Examples of intentional communities include ecovillages, shared households, cohousing arrangements, kibbutzim, spiritual communities (e.g., members of convents, native tribes, ultra-orthodox Jews, Amish, and Hutterites), egalitarian communities, therapeutic communities, communes, and co-ops.<sup>263</sup> In intentional communities, one often finds property regimes in “which the

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<sup>258</sup> Radin's personhood theory of property is only one of the many theoretical foundations offered by scholars to explain or 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.

<sup>259</sup> See Barnes, *supra* note 254, at 11; Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1412 (2012).

<sup>260</sup> See 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).

<sup>261</sup> Amnon Lehavi, *The Property Puzzle*, 96 GEO. L.J. 1987, 2007 (2008); see also Debbie Van Schyndel Kasper, *Redefining Community in the Ecovillage*, 15 HUM. ECOLOGY REV. 12, 15 (2008).

<sup>262</sup> See Lehavi, *supra* note 261, at 2007.

<sup>263</sup> See *id.*; *Community Types*, FOUNDATION FOR INTENTIONAL COMMUNITY, <https://perma.cc/QC8J-BKYD>.

core conception of property for a certain resource may be changed as a matter of both practice and theory.”<sup>264</sup>

Because property institutions are social structures shaped and defined by values underlying the interpersonal relationships they facilitate,<sup>265</sup> an “explicitly and clearly distinctive” set of values, as found in intentional communities, tends to generate distinct property regimes.<sup>266</sup> 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.”<sup>267</sup> 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.

Muddy communities are therefore potential vehicles for environmental experimentation; they are *potential* because experimentation requires a certain degree of autonomy.<sup>268</sup> Without the freedom to deviate from the norm, a community is unable to experiment with innovative environmental lifestyles.<sup>269</sup> 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.<sup>270</sup> 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.”<sup>271</sup> For these communities to self-organize, the government must recognize some measure of communal jurisdiction.<sup>272</sup>

Given the right degree of communal autonomy for experimentation, communities with varying sets of environmental values will find

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<sup>264</sup> Lehari, *supra* note 261, at 2007.

<sup>265</sup> See Dagan, *supra* note 259, at 1412.

<sup>266</sup> Lehari, *supra* note 261, at 2007.

<sup>267</sup> Kasper, *supra* note 261, at 17.

<sup>268</sup> See Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 28-33 (1989).

<sup>269</sup> See Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1381 (1994).

<sup>270</sup> See OSTROM, *supra* note 246, at 14, 89-90, 101.

<sup>271</sup> *Id.* at 101.

<sup>272</sup> See *id.* at 20, 90, 101.

innovative ways to live ethically in their surrounding environment. Muddy communities, therefore, may serve as the “safe environment” Tribe searched 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 attempted 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.<sup>273</sup>

#### IV. Evidence from the Field

The previous Section suggested 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 in 2011,<sup>274</sup> Parliament introduced a new model for development: giving communities the power to propose and develop real estate projects.<sup>275</sup> 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.”<sup>276</sup> 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.<sup>277</sup> The

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<sup>273</sup> See PURDY, *supra* note 34, at 1168–69.

<sup>274</sup> See Localism Act 2011, ch. 20, § 1 (U.K.).

<sup>275</sup> See PENNY NORTON & MARTIN HUGHES, PUBLIC CONSULTATION AND COMMUNITY INVOLVEMENT IN PLANNING: A TWENTY-FIRST CENTURY GUIDE 112 (2018).

<sup>276</sup> Sue Brownill, *Neighbourhood Planning and the Purposes and Practices of Localism*, in LOCALISM AND NEIGHBOURHOOD PLANNING: POWER TO THE PEOPLE? 19, 25 (Sue Brownill & Quintin Bradley eds., 2017) (internal quotation marks omitted); see also Gavin Parker et al., *Examining Neighbourhood Plans in England: The Experience So Far*, 1, 2 (Apr. 1, 2017) (unpublished working paper, on file at <https://perma.cc/4KTK-CQ9K>).

<sup>277</sup> See Brownill, *supra* note 276, at 25; see also Martin Field & Antonia Layard, *Locating Community-Led Housing Within Neighbourhood Plans as a Response to England’s Housing Needs*, 37 PUB. MONEY & MGMT. 105, 106 (2017).

neighborhood plan is then submitted for review by an independent planning inspector.<sup>278</sup> 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.<sup>279</sup> After passing cursory external review, the neighborhood plan is submitted to a local referendum and must receive majority support.<sup>280</sup> Once approved, a Neighborhood Development Order is issued, confirming the neighborhood plan as a legally binding planning instrument.<sup>281</sup>

A similar process was instituted for communal development of land.<sup>282</sup> 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.<sup>283</sup> 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.”<sup>284</sup> The organization then applies to the local authority to confirm the geographical boundaries of the site to be developed.<sup>285</sup> Once boundaries are approved, the local organization is required to draw up a development plan that identifies involved partners (e.g., private developers or housing associations).<sup>286</sup> The plan is then submitted for public comments, legal review by designated consultants, and examination by an independent planning inspector.<sup>287</sup> Once approved, the plan is put to a local referendum.<sup>288</sup> If supported by a majority of the local residents, a Community Right to Build Order is issued for the community, which may

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<sup>278</sup> See Brownill, *supra* note 276, at 25; see also NORTON & HUGHES, *supra* note 275, at 112.

<sup>279</sup> See Brownill, *supra* note 276, at 25; see also NORTON & HUGHES, *supra* note 275, at 112; U.K. DEPT. FOR COMMUNITIES AND LOCAL GOVERNMENT, A PLAIN ENGLISH GUIDE TO THE LOCALISM ACT 12 (2011); Parker et al., *supra* note 276, at 6–7.

<sup>280</sup> See NORTON & HUGHES, *supra* note 275, at 112; see also Quintin Bradley & William Sparling, *The Impact of Neighbourhood Planning and Localism on House-Building in England*, 34 HOUSING THEORY & SOC’Y 106, 110, 113 (2017).

<sup>281</sup> See Brownill, *supra* note 276, at 26.

<sup>282</sup> See LOUISE SMITH, NEIGHBOURHOOD PLANNING, LIBRARY OF HOUSE OF COMMONS, BRIEFING PAPER NO. 05838, at 3 (2016).

<sup>283</sup> See NORTON & HUGHES, *supra* note 275, at 113–14, 121–22.

<sup>284</sup> Rachael Walsh, *The Evolving Relationship Between Property and Participation in English Planning Law*, in MODERN STUDIES IN PROPERTY LAW 263, 275 (Nicholas Hopkins ed., 2013). A proposed project could also be submitted by an existing neighborhood forum or a parish council. See NORTON & Hughes, *supra* note 275, at 113–14.

<sup>285</sup> See *id.* at 114.

<sup>286</sup> See *id.*

<sup>287</sup> See *id.*

<sup>288</sup> See *id.*

then proceed with developing the project without a traditional planning application.<sup>289</sup>

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.”<sup>290</sup> The planning reform under the Localism Act was strongly informed by notions of community engagement with place and communal autonomy.<sup>291</sup> 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.<sup>292</sup> The revocation came after the local community adopted a neighborhood plan that conflicted with the developer’s plans.<sup>293</sup> Under the new neighborhood plan, the area proposed for development was no longer designated for housing construction.<sup>294</sup> 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.”<sup>295</sup> The Secretary’s decision is especially striking since the neighborhood plan was not in line with new statewide development policies that demanded plans to “demonstrate a five-year supply of housing.”<sup>296</sup> The Secretary explained that “the community empowerment aims of neighbourhood planning were more important than ensuring housing growth.”<sup>297</sup> The decision of the Secretary demonstrated that while the reform was designed to promote housing developments and communal autonomy, the latter prevails in the event of a conflict.<sup>298</sup>

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

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<sup>289</sup> See U.K. DEPT. OF COMMUNITIES, *supra* note 279, at 13.

<sup>290</sup> Bradley & Sparling, *supra* note 280, at 110 (internal quotation marks omitted).

<sup>291</sup> See *id.* at 110, 113.

<sup>292</sup> See *id.* at 106, 110, 113.

<sup>293</sup> See *Crane v. Sec’y of State for Communities & Local Gov’t* [2015] EWHC 425 (Admin.) (Q.B.).

<sup>294</sup> See *id.*

<sup>295</sup> *Id.*

<sup>296</sup> Bradley & Sparling, *supra* note 280, at 113.

<sup>297</sup> *Id.*

<sup>298</sup> See 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 J. URBANISM 1, 2 (2015); see also *id.* at 8 (discussing two other cases with similar results).

interests at the expense of broader social needs.<sup>299</sup> These concerns were unwarranted. In practice, greater communal autonomy facilitated forms of development that expressed heightened levels of social and environmental responsibility.<sup>300</sup> 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.<sup>301</sup> Analysis of neighborhood plans revealed that local plans tended to allocate more sites for housing than required by law.<sup>302</sup> 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.<sup>303</sup>

Most prominently, communities chose to promote developments that protected and advanced distinct local lifestyles and values—a policy expressed by almost ninety percent of plans.<sup>304</sup> 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.”<sup>305</sup> 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.<sup>306</sup>

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.”<sup>307</sup> No 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 land use regimes are not unique to the UK. In the US, scholars

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<sup>299</sup> See *id.* at 1, 3.

<sup>300</sup> See U.K. DEPT. FOR COMMUNITIES & LOCAL GOV., NOTES ON NEIGHBOURHOOD PLANNING 5 (16th ed., 2015).

<sup>301</sup> See *id.* at 5; see also Bradley & Sparling, *supra* note 280, at 110, 111.

<sup>302</sup> See Bradley & Sparling, *supra* note 280, at 112.

<sup>303</sup> See U.K. DEPT. FOR COMMUNITIES, *supra* note 300, at 5.

<sup>304</sup> See *id.*

<sup>305</sup> Bradley & Sparling, *supra* note 280, at 114.

<sup>306</sup> See *id.* at 110, 114–16.

<sup>307</sup> Field & Layard, *supra* note 277, at 106 (internal quotation marks omitted).

have called for transferring zoning and land use decision-making from the municipal to the communal level.<sup>308</sup> 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<sup>309</sup> or reducing regulatory encroachment by adopting non-intrusive regulatory design<sup>310</sup> 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, US 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.<sup>311</sup> Historically, communal rights in the US are associated with exclusionary politics and parochialism.<sup>312</sup> Generally speaking, the legal apparatus in the US fails to recognize the importance of communal values within national frameworks because it falsely labels communal values as “competitors of[] national values.”<sup>313</sup> 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

Author and journalist 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.”<sup>314</sup> This Article argues that an erosion of communal

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<sup>308</sup> See, e.g., LEE ANNE FENNELL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* 102 (2009); Eric T. Freyfogle, *Better Ways to Work Together*, in *THE EVOLUTION OF NATURAL RESOURCES LAW AND POLICY* 98, 98–99 (Lawrence J. MacDonnell & Sarah F. Bates eds., 2010); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 762 (1973).

<sup>309</sup> See Sharon, *supra* note 253, at 10276.

<sup>310</sup> See William D. Eggers, *Land Use Reform through Performance Zoning* 8 (Reason Foundation, Working Paper No. 120, 1990).

<sup>311</sup> See Freyfogle, *supra* note 240, at 644.

<sup>312</sup> See, e.g., Kathryn Abrams, *Law's Republicanism*, 97 YALE L.J. 1591, 1607 (1988); Joseph L. Sax, *Do Communities Have Rights? The National Parks as a Laboratory of New Ideas*, 45 U. PITT. L. REV. 499, 501 (1984).

<sup>313</sup> Sax, *supra* note 312, at 502.

<sup>314</sup> Megan Garber, *What Does 'Community' Mean?*, ATLANTIC, (Jul. 3, 2017), <https://perma.cc/LKF2-RDHV> (internal quotation marks omitted).

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structures reduces the variety of lifestyles available for individuals and, in the process, undermines individual ability to exercise meaningful autonomy. Such a shift is especially problematic in a welfarist society because welfarism introduces forces that undermine individual particularity. To counter these forces, we should explore legal reforms that strengthen, encourage, and respect communal autonomy.

Welfarist approaches for valuing nature erode personal freedom and flatten our moral outlook. This problem is overcome by a theory of empirical ethics with three conceptual legs: (1) an understanding that human experience is the birthplace of value, (2) a commitment to pluralism as a means for environmental ethical evolution, and (3) a respect for communities as facilitators of empiricism and environmental agency. These theoretical foundations demonstrate that a state committed to human freedom should ensure individuals' continuing ability to choose among a diverse set of environmental lifestyles.

This Article's focus on human-nature interactions and environmental values does not limit its argument 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.<sup>315</sup> Some have claimed that to accommodate change and progress, the state must actively support experimental or utopian forms of interrelationships.<sup>316</sup> This Article suggests an alternative: communities. 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.

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<sup>315</sup> See 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]").

<sup>316</sup> See *id.* at 20.