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Nineteenth Annual Frank M. Coffin Lecture on Law and Public Service: Community, Rights, and Climate: A Challenge to a Clever Species

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NINETEENTH ANNUAL FRANK M. COFFIN LECTURE ON LAW AND PUBLIC SERVICE

EDITORS' NOTE

The Nineteenth Annual Frank M. Coffin Lecture on Law and Public Service was held in the fall of 2011. Jonathan Lash, former President of the World Resource Institute and current President of Hampshire College, delivered the lecture. Established in 1992, the lecture honors the late Judge Frank M. Coffin, Senior Circuit Judge of the United States Court of Appeals for the First Circuit, an inspiration, mentor, and friend to the University of Maine School of Law.¹

1. Past lectures from this series include: Joseph J. Rauh, Jr., *Nomination and Confirmation of Supreme Court Justices: Some Personal Observations*, 45 Me. L. Rev. 1 (1993) (delivered posthumously by Mr. Rauh's widow, Olie Rauh, and their son, Michael Rauh, who were joined by Justice William Brennan); Arthur Schlesinger, Jr., *Multiculturalism and the Bill of Rights*, 46 Me. L. Rev. 189 (1994); Patricia M. Wald, *Whose Public Interest is it Anyway?: Advice for Altruistic Young Lawyers*, 47 Me. L. Rev. 3 (1995); Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 Me. L. Rev. 179 (1996); Alvin J. Bronstein, *Representing the Powerless: Lawyers Can Make a Difference*, 49 Me. L. Rev. 1 (1997); Robert R. Reich, *What Happened to the American Social Compact?*, 50 Me. L. Rev. 1 (1998); Warren B. Rudman, *The Law of Unintended Results: The Independent Counsel Law*, 51 Me. L. Rev. 1 (1999); Justice Ruth Bader Ginsberg, *In Pursuit of the Public Good: Lawyers Who Care*, 52 Me. L. Rev. 301 (2000); Alan B. Morrison, *Must the Interests of the Client Always Come First?*, 53 Me. L. Rev. 471 (2001); Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender*, 54 Me. L. Rev. 159 (2002); Cruz Reynoso, *The Lawyer as a Public Citizen*, 55 Me. L. Rev. 335 (2003); Scott Harshbarger, *Strengthening Democracy: The Challenge of Public Interest Law*, 56 Me. L. Rev. 214 (2004); Judge Judith S. Kaye, *Shaping State Courts for the New Century: What Chief Judges Can Do*, 61 Me. L. Rev. 356 (2009); Stephen Oleskey, *Reflections on Forty Years of Private Practice and Sustained Pro Bono Advocacy*, 63 Me. L. Rev. 514.

COMMUNITY, RIGHTS, AND CLIMATE: A CHALLENGE TO A CLEVER SPECIES

Jonathan Lash

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COMMUNITY, RIGHTS, AND CLIMATE: A CHALLENGE TO A CLEVER SPECIES

*Jonathan Lash**

I. INTRODUCTION

Thank you Laura [Kaster], Dean [Peter] Pitegoff, members of the wonderful Coffin Clan...and the Coffin "Clever." I am very pleased to be here with you, and deeply honored to be included among the remarkable series of leaders and thinkers who have delivered previous Coffin lectures.

Although I blushed happily listening to Laura's kind introduction, I do want to add something of a disclaimer: I am a lapsed lawyer—I haven't been in a courtroom in decades—a recovering bureaucrat, a refugee from the heady, self-important, and increasingly mean-spirited world of Washington policy and politics. I am also a rookie college president.

I was not planning to leave the World Resources Institute—a fabulously effective and innovative organization—but, last March, when I was contacted by Hampshire's head-hunter, I found myself musing about failure and the future. I had been at this business of trying to solve environmental problems for thirty-five years and, while I'd gotten to work on great projects with remarkable people ranging from the president of Brazil to the chairman of General Electric, the big global trends of environmental destruction that I had been struggling to address had gotten a whole lot worse. It just seemed like a good time to take the chance to work with students who will have to be the ones to change the world. We have left them little choice.

So now I work with 1,500 very smart, passionate, sometimes obstreperous, and inspiringly idealistic college students, and 125 professors engaged in a remarkable educational enterprise. It is built around the notion that if one challenges students to dig deeply and questioningly into ideas and issues that interest them, they will thrive and grow; that, once asked to take responsibility for their learning, students will produce extraordinary and innovative results, and will ultimately learn to adapt and succeed in a rapidly changing world.

Hampshire has been named among the greenest, brainiest, and hippest campuses . . . whatever that means. I do know that our alumni *say* that they are good at change. Their ranks include an astonishing number of successful social entrepreneurs. For example, the founders of companies like Stonyfield Yogurt, Australis Aquaculture, Applegate Farms, and Seventh Generation, who are creating

* Jonathan Lash, President of Hampshire College, presented the nineteenth Annual Frank M. Coffin Lecture on Law and Public Service on October 20, 2011 at the Abromson Community Education Center in Portland, Maine. Lash was President of the World Resources Institute (WRI) for two decades and was appointed earlier this year as President of Hampshire College. Lash also served as a clerk for the late Judge Coffin. The Frank M. Coffin Lecture on Law and Public Service, sponsored by the University of Maine School of Law, honors the late Judge Frank M. Coffin, longtime federal judge on the U.S. Court of Appeals for the First Circuit, former member of Congress, and renowned leader and mentor in public service.

new models for sustainable food and consumer products, are all Hampshire alumni. The alumni ranks also include three Oscar-winning filmmakers, a disproportionate number of environmental scientists, and a big group who have invented their own jobs.

It is fun. I do not miss Washington . . . at all. I do miss the Judge.

Like each of his clerks, I was profoundly influenced by the experience of working for the Judge. Not only did I get my real legal education in his chambers, I have spent the last three and a half decades trying to live up to the standards of integrity, wisdom, and humanity he set by the way he went about the job of being a judge. He was the model of how a wise, good man can elevate those around him. I only wish I could live up to his sense of humor.

II. COMMUNITY, RIGHTS, AND CLIMATE

I want to talk to you today about individual rights and community. I have been struck in reading the Judge's books and recalling working with him how he honored two competing ideas simultaneously: respect for individual liberty, and a deep belief in the power of government to enhance fairness and promote public well-being. As I shall explain, the tension between those ideas has become increasingly important in the debate over how to address global environmental problems.

I'll begin with ants. The great Harvard biologist, E. O. Wilson, has spent a lifetime studying the nature, organization, and behavior of ants. He has become increasingly intrigued by the *altruism* of ants. Individual ants will sacrifice themselves not only for their offspring, but also for their colony—their community. Wilson observes that ants and human beings are among the few species animated by altruism, *and* that the species that do behave altruistically seem remarkably successful, in evolutionary terms.

Most human cultures highly value altruism. We give medals to those who sacrifice themselves for others on the battlefield. We celebrate the Good Samaritan. Religions treat selfless sacrifice as holy.

Human beings do not see altruistic acts as the fulfillment of a genetic mandate, but, rather, as a supreme exercise of free will, a manifestation of the qualities that make us human. It is the freedom to act for the good of others—or not—that ennobles the choice. And, of course, America's founding documents—the Declaration of Independence, the Constitution, and the Bill of Rights—enshrine the idea that individual rights are essential to freedom, reflecting Enlightenment notions of the importance of free will, and the value of individual responsibility that shaped the philosophy of the Founders.

But, of course, those founding documents were the basis for daring and creative *collective* action—a revolution and creation of a new nation. And they set up one of the basic tensions of our free society by also establishing the basis and mechanisms for those collective actions. The Declaration offered the rationale, and the Constitution established the mechanism, to bind citizens to obey collective decisions that run counter to their desires.

The juxtaposition of individual freedom, on the one hand, and community interest expressed through the exercise of government authority, on the other, is not

just an artifact of the Founders' fear of the power of the king. It is a central element of our national character. And it creates a challenge for environmentalists because the need for collective action to avert environmental catastrophe is so strong, and the actions needed inevitably limit personal choice and personal freedom.

The \$75 trillion world economy runs a big environmental deficit and *nature* doesn't do bailouts. We take more *from* nature to live the way we do, and dump more waste *back into* natural systems by living as we do, than nature can sustain.

Each of the basic cycles of Earth's ecosystem—the carbon cycle, the nitrogen cycle, and the hydrologic cycle—has been disrupted on a very large scale by human activity. We are changing the chemistry of the earth, modifying its climate, and drawing down freshwater supplies. It is a big deal. We live in the Anthropocene Era, shaped by human activity. The way we live is altering the biogeochemical system that we are part of and depend upon.

This is not a “catalog of environmental doom” speech. The world will not end tomorrow; the sky will not fall. But I would offer, as a premise, that it *is* now and *will be* ever more obvious and urgent that humankind must change its patterns of consumption and waste for survival.

Doing so will require both individual and collective action. We have to change both norms and policies. Those are actions people in my field have talked about, proposed, negotiated about, and claimed to be starting on for most of the last four decades. We are not making much progress.

Notwithstanding a brief period of environmental leadership in the 1970s, and sporadic innovations since then, the United States has been more an obstacle to, than a model for, action, especially on the most compelling global threat: climate change.

The political reaction that has made the current House of Representatives, in Congressman Henry Waxman's words, “the most anti-environmental in history” and has lodged climate skepticism, with advocacy of absolute gun rights and opposition to abortion, as a litmus-test political issue for the right, has little to do with science and everything to do with rejection of limits on behavior.

A lot of people in the United States say in all sincerity that they care about the environment, but they don't like environmentalists. They see us as bent on restricting consumption, taking away choice, and making life, well, a lot less fun.

That suspicion about environmentalists' intentions, our too-easy willingness to restrict freedom in order to protect nature, is not just a Tea Party phenomenon. I have seen it divide environmentalists from human rights advocates as well, although one would think that our views would most often align. (I struggle with selecting the right pronoun here as I count myself an ardent adherent of both camps.)

Think of some notorious examples of environmental pillage and its consequences:

- Chico Mendes, the Brazilian rubber tapper from Xaipuri in the Amazon, murdered by ranchers for protesting their destruction of the forest that his community lived in and came from;
- Ken Saro Wiwa, the Nigerian NGO leader executed for protesting oil pollution and corruption;

- Yosepha Aloman, the Elder of the Amungma people in Irian Jaya, tortured and imprisoned in a cell a foot deep in feces for leading protests against the environmental destruction and violent suppression of rights associated with creation of the Freeport McMoran mine;
- The thousands of Chinese peasants beaten and imprisoned for protesting massive and illegal pollution from local enterprises, often partly owned by local officials; and
- The community of Anniston, Alabama, that was victimized by toxic pollution from a Monsanto plant for thirty years after a Monsanto consultant had told the company that the plant's discharge was so toxic it killed fish faster than battery acid.

These are flagrant cases of environmental destruction that injures people's lives and livelihoods directly, eliminating their source of sustenance and income, wrecking their homes, or threatening their health. In each case, the victims also suffered from corrupt and illegal decisions, and often-violent repression of legitimate protest.

Indeed, environmental protest and movements for political rights often become intertwined. Natural resource destruction often causes human misery. It is frequently accompanied by abuse of the most basic human rights. The victims are usually poor. The poor are least able to defend their interests, least likely to have or assert property rights. They have the least access to technology to protect themselves.

These are not hard cases. Of course, environmental harm that injures people, degrades their land, destroys their livelihood, and steals their hopes for the future also violates the victims' rights. What happened in the cases I described was morally wrong, politically antediluvian, and environmentally reprehensible: the trifecta of abuse. But it is worth turning the analysis around for another look. There is still the puzzling tension between human rights and environmental activists. If environmental and human rights abuse are often linked, are rights—access to information, opportunity to participate, the right of judicial redress—an effective antidote to environmental destruction? Well, that is not so hard either.

There is the National Environmental Policy Act, a superb bundle of procedural rights that has proven to be a killing ground for really bad ideas. The Toxic Release Inventory and Community Right-to-Know legislation, which require disclosure of industry's use or release of toxic chemicals, have proven to be powerful incentives to reduce pollution.

Information is power. Governments have always sought to control and manage it, applying the harshest penalties for espionage—for those who steal information. Gutenberg launched revolutionary change, and ultimately the industrial revolution, when he invented movable type. Twice in recent years the Nobel Prize for economics was given for work that explored the power of information—to Amrtya Sen who demonstrated that there has never been a famine in a democratic society with a free press, and to Joe Stiglitz who showed how the efficiency of markets is distorted without the free flow of information.

If information is power, power is shifting. It took forty-six years from the time that the first power lines were rigged for one-quarter of Americans to get electricity; thirty-five years for the telephone; sixteen years for twenty-five percent

of Americans to get a PC; seven years for Internet access; and, how long . . . 9 minutes and 40 seconds for twenty-five percent of Americans between twenty and forty to get an iPhone 4?

Then there has been a simultaneous flowering of civil society. There are some 200 nations, over 20,000 multi-national corporations; but there are several million NGOs, each needing no more than web access to achieve global reach. And, from the Orange Revolution in Ukraine to the Arab Spring, ad hoc groups organized by text message have swept away governments.

The simultaneous expansion of access, reach, and usability provides an unprecedented opportunity for people to have a voice. It enables groups to form and act and amplify their voices. In a connected world, procedural rights and access to information are powerful tools to strengthen the rights of the excluded.

But the right to information is only part of the story. The satisfyingly symmetrical view that fewer rights mean more destruction—and more rights must mean less destruction—does not always work out.

Those who act destructively assert rights as well. Remember where we started. The history of environmental regulation is one of applying coercive measures to restrict the individual's freedom to harm the environment. Coercion and individual rights just are not comfortable bedfellows. That is the tension.

Contrast the frameworks by which environmentalists and rights advocates tend to view issues. Human rights advocates and environmental groups generally start from different premises:

- Human rights advocates address present harm, while environmentalists tend to focus on future risk;
- Human rights advocates are concerned with harm to people, while environmentalists deal with human loss in the context of harm to nature;
- Human rights advocates defend the individual against the tyranny of the majority, while environmentalists fight for the common good against narrow individual interests; and
- Human rights advocates seek to limit the power of the state, while environmentalists often rely on the regulatory power of the state.

This did not seem so difficult an issue when President Teddy Roosevelt was trying to protect wildlife and establish the rule of law in a few national parks. Forty years ago, when Senator Ed Muskie was pushing through legislation to stop egregious corporate pollution, there were arguments about jobs and growth, but Americans for the most part saw government's role in compelling compliance as necessary and appropriate.

In the Anthropocene Era, however, as we confront problems that are creating consequences that are big, global, and irreversible, and can only be addressed through large-scale changes in behavior, the question of individual freedom becomes more difficult. People are not so sure government should restrict their right to choose inefficient light bulbs, wasteful toilets, and big heavy vehicles in order to avert harm to people they do not know in nations they will never visit.

Consider global warming. Climate change is real, it is under way, and the emissions that cause it are increasing rapidly. Warming is happening more quickly with more significant consequences than science predicted. I don't need to catalogue the evidence here with this audience, do I? I have a flash drive right here

with 500-odd global warming slides, and I am not afraid to use it.

Climate change is the quintessential global environmental issue: Emissions from one area of the globe affect the climate everywhere, although not equally. All countries contribute to the problem, although, again, not equally. While every country has emissions of CO₂, most of the emissions come from industrialized countries, and the United States, with less than five percent of the world's population, is responsible for over twenty percent of CO₂ emissions. The average American is responsible for twenty times the emissions of the average Indian, ten times the average Chinese. Two billion people have no access to electric power, and another two billion have limited access to communication and motorized transport. Their lives have little impact on warming, but warming will have a significant impact on them.

When sea level rises and storms worsen due to climate change, the Dutch build dikes, American vacation homeowners demand government-subsidized flood and storm insurance, and the people of Pacific Island states have to look for new places to put their countries. This raises some interesting questions about justice and rights. Whose rights? Justice for whom?

When our generation makes choices—or, more importantly, fails to make choices and thereby creates environmental changes that our children will be unable to reverse but of which they will have to suffer the consequences—what principle can we articulate for our allocation of rights between current and future generations? It is a question of whose rights should be protected, and who should pay the cost.

This brings us back to ants. Putting aside the fact that we sometimes slip into denial when we don't like the truth, in the end, we are an altruistic species. We do act to protect our community. The trouble is, we struggle to decide how many of our fellow human beings are part of our community, affected by perceived boundaries of race, faith, culture, or nationality.

Can we ever act for broader human good? When I am tempted to despair, I think about great campaigns to change human culture and behavior that have succeeded:

- The elimination of state sanctioned slavery;
- The enactment of women's suffrage;
- The slow but steady reduction of smoking; and
- Global cooperation on vaccination and the control of infectious disease.

It has often been a heartbreakingly slow process where the moral cause long precedes action. It took sixty years after James Wilburforce won abolition of slavery in Britain to abolish it in the United States, and decades more to free slaves in Brazil and emancipate the serfs in Russia—and that transition required economic and technological change, as well as moral suasion. But change did come. Human societies have fundamentally altered behavior and norms.

Human ingenuity is so extraordinary. The fact that when we use knowledge, it is not depleted but grows is so powerful that I remain optimistic that, faced with an existential challenge, we will respond. I hope it is soon enough.

