

**Greening Environmental Law:  
From Sectoral Reform to Systemic Re-Formation**

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A pair of enemies brandishing sticks is fighting in the midst of a patch of quicksand. Attentive to the other’s tactics, each answers blow for blow, counterattacking and dodging. Outside the painting’s frame, we spectators observe the symmetry of their gestures over time: what a magnificent spectacle—and how banal! ...

But aren’t we forgetting the world of things themselves, the sand, the water, the mud, the reeds of the marsh? In what quicksands are we, active adversaries and sick voyeurs, floundering side by side? And I who write this, in the solitary peace of dawn?

Michel Serres, *The Natural Contract*<sup>2</sup>

## 1. INTRODUCTION

Over the past decade, the word “sustainability” has been used with profligate abandon, becoming a staple of the political lexicon. Meanwhile, the reality of unsustainability has deepened and spread as the momentum of ecological and social erosion accelerates globally, with consequences escalating beyond our imaginations. The legal situation is equally unsettling. Despite the rhetoric of response, the challenge of reform has been met by inattention and inaction. As the English columnist, George Monbiot, wrote recently in relation to a future under climate change, “We live in a dreamworld... Our dreaming will, as it has begun to do already, destroy the conditions necessary for human life on earth.... The future has been laid before us,

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<sup>2</sup> M. Serres, *The Natural Contract*, trans. E. MacArthur & W. Paulson (Michigan: University of Michigan Press, 1995) at 1.

but the deep eye with which we place ourselves on earth will not see it.”<sup>3</sup>

Ironically, this social paralysis reflects the systemic nature of the “environmental issue.” It is precisely because unsustainability is embedded in every aspect of economic and political life that it is so difficult to address. This conundrum also characterizes the history of “environmental law.” From its birth in the late 1960s to the present, environmental law has been notable as much for what it does not, as for what it does, do. Environmental laws and policies attempt to tackle multiple manifestations of systemic decline—protecting species that have become endangered, limiting levels of emissions into already polluted environments, restricting rates of extraction of already depleted resources. But what about the nature of the decline itself? How are our laws to tackle its systemic causes?

Given this pattern, this paper argues that we must “problematize” not just environmental law but the content and process of *law itself* — generally understood as formal, state-based regulation -- and the institutional structures that it creates and supports. This is not easy, for as Jane Holder notes, “[t]o question the ecological content of *law* is to question the morality of modern law in general.”<sup>4</sup> But what else are we to do when, as David Boyd puts it, we are “like a person diagnosed with lung cancer who begins taking medication and undergoing treatment but continues to smoke two packs of cigarettes per day”?<sup>5</sup> Such a rethinking about law and legal change is, we would suggest, *the* “environmental priority” for Canada and environmental lawyers.

This essay addresses this pervasive situation. It is part of a larger research effort at POLIS to develop what we are calling a “green legal theory.” Our goal is to examine the role of law (as defined above) in both creating systemic unsustainability, and in impeding or facilitating its resolution. From this vantage point, *environmental* law must be assessed self-reflectively, both as a field of intellectual endeavour and as a vehicle for practical action, with particular attention to

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<sup>3</sup> G. Monbiot, “Sleepwalking to Extinction” *The Guardian* (12 August 2003). online: <[www.monbiot.com/dsp\\_article.cfm?article\\_id=599](http://www.monbiot.com/dsp_article.cfm?article_id=599)> (last accessed: 15 May 2004).

<sup>4</sup> J. Holder, “New Age: Rediscovering Natural Law” (2000) 53 *Curr. Leg. Probs.* 151 at 179.

<sup>5</sup> D. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 277.

its often implicit theoretical underpinnings. How, for example, does environmental law necessarily tend to be confined by the same philosophical premises, institutional boundaries, and pre-existing power relations that underpin unsustainability generally, including the unsustainability embedded in all manner of legal constructions? In this regard, one must ask whether, by occupying a certain intellectual space, the paradigm of environmental law stands as at least a partial obstacle to this systemic transformation. If so, a more radical green legal theory may help to open up this space in a creative way.

After examining a few examples of the limits of environmental law, we will briefly introduce the intellectual context for a new green legal theory (GLT). With this background, we then look (again, briefly) at how GLT might deepen the environmental critique, in order to address more systemic concerns. The paper attempts to link its analysis to the insights of earlier papers in this volume. We conclude by pointing to some ways in which this new approach to law in general, and environmental law in particular, might assist us in moving from *environmental reform* to *systemic re-formation*.

## **2. ON THE LIMITS OF ENVIRONMENTAL LAW**

As part of the modern, Western, developed, democratic world, environmental law is inherently embedded within many of the paradigmatic assumptions of that world. Relations between humans and nature are divided, hierarchical, and utilitarian in character, even when we “protect” “wilderness.” Despite criticisms of unsustainable growth, our well-being is intimately bound up with the acquisition and consumption of material goods; wealth *as capital* is us. So too, when we petition governments and turn to the courts, we implicitly accept a whole history of the central state and its unique sources of authority and legitimacy. An examination of any number of sectors of traditional environmental law reveals the embedded nature of these assumptions--and their untouchability.

Take, for example, the huge endeavour of “environmental impact assessment” (EIA). What would one discover if we did an objective “assessment” of the “environmental impact” of the nature-using, wealth-creating, state-supporting world just described? The answer is fairly obvious--unsustainability. Instead, the field of EIA is far more limited. Of course, environmental lawyers attempt to use EIAs to challenge many damaging developments, occasionally with

landmark success, however temporary it might be (e.g. the Cheviot mine). Nevertheless, despite a plethora of laws and regulations throughout the industrialized world, the field largely fails to address the important questions such as the real need for the project, the general impact of the industry behind the specific development, the possibilities for alternatives and, above all, the potential for a different development path altogether. Generally, environmental “assessment” addresses how the proposed mine, offshore oil well, or new airport runway will affect the surrounding environments and what (minor) alterations might reduce their impacts. Most legislation makes at least cursory reference to the need to address alternatives, but regulators rarely, if ever, make a serious or systematic attempt to assess innovations that might emerge from a different approach to economic development, an approach which might render the project unnecessary, or even re-direct the particular industry. While this is a continuous frustration, the systemic problems with environmental impact assessment receive limited treatment in the legal literature, both American and Canadian.<sup>6</sup> Recent thinking about “ecosystem-based” and “community-based” development points to the need to create new contexts that are more responsive to the needs of sustainability. Yet assessment processes remain rooted in the paradigm of continued economic growth, still more resource development, and a deference to the industrial worldview of the targeted project. We *do* need more planes, more oil and more coal.

Climate change provides a textbook example of how environmental law absorbs such problematic assumptions. The main focus of climate change law is the level of *emissions* resulting from industrial activity, while every environmentalist knows that the systemic culprit is

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<sup>6</sup> For an older critique of environmental assessment along the lines of this paper, see W.E. Rees, “Economics, Ecology and the Role of Environmental Assessment in achieving Sustainable Development” in P. Jacobs & B. Sadler, eds., *Sustainable Development and Environmental Assessment: Perspectives on Planning for a Common Future* (Hull, Quebec: Canadian Environmental Assessment Research Council, 1990) at 123. For a more recent analysis, see A.D. Levy, “A Review of Environmental Assessment in Ontario” (2002) 11 J. Env. L. & Prac. 175.

the level of fossil fuel energy *consumption* that underlies the growth economy.<sup>7</sup> Nevertheless, Canada has yet, at any level of government, to legislate meaningful controls on carbon dioxide emissions, let alone address the massive industrial retooling needed to reduce consumption to sustainable levels.<sup>8</sup> The international situation is not much better, consisting of “...a ‘weak patchwork’ of laws, covering narrow and segregated sectors of international activity.”<sup>9</sup> The difficulty is, of course, that the problem is not amenable to a technical solution. High energy use is perhaps *the* systemic anomaly of industrialism, an anomaly that pervades our social and economic structures. Again we see “the irony of relevance”—the problem is so serious that it is off limits to anyone wishing to remain credible with decision-makers. Thus Bruce Pardy argues that, insofar as it encourages a traditional, harmful form of economic development, and seeks to manage rather than prevent climate change, the Kyoto Protocol, a sacred cow of environmental law, could well do considerably more harm than good.<sup>10</sup>

Canada’s water protection laws show similar inadequacies, with increasingly problematic layers of neglect. Our limited water law regime focuses almost entirely on achieving ambient water quality by setting standards at the end of the pipe, rather than protecting water sources on an ecosystem or watershed level, or developing zero-discharge rules that might force dramatic technological innovation in industries for whom environmental externalities represent a large

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<sup>7</sup> For an excellent review of the disruptive effects of limiting levels of consumption (due to resource depletion) see R. Heinberg, *The Party's Over: Oil, War and the Fate of Industrial Societies* (Gabriola Island, BC: New Society, 2003).

<sup>8</sup> Boyd, *supra* note 5 at 89.

<sup>9</sup> P. Taylor, “Heads in the Sand as the Tide Rises: Environmental ethics and the Law on Climate Change” (2000-2002) 19 U.C.L.A J. Envtl. L. & Policy 247 at 247.

<sup>10</sup> B. Pardy, “The Kyoto Protocol: Bad News for the Global Environment” (2004) JELP Conference Paper. [Hereinafter “Kyoto Protocol”] His conclusions accord with Prue Taylor’s finding that, in international climate change agreements, “...the prevalent value is one of preserving current forms of economic prosperity, i.e., maintaining the economic status quo—‘business-as-usual.’” Taylor, *supra* note 9 at 248.

economic subsidy.<sup>11</sup> As such, Canadian water law fails to acknowledge the patterns of production and consumption that lie at the root of water quality and water supply concerns.<sup>12</sup> As William Pedersen notes, “[t]o clean the water, our system would rather impose ten billion dollars in regulatory costs on the politically vulnerable than achieve a greater clean up, and save money, by eliminating subsidies and tax preferences.”<sup>13</sup> Much like climate change, water pollution and over-use are problems that extend beyond just one small sector of society. It is indeed sobering to consider how, despite its relative ease, moderating water use in homes and businesses continues to encounter resistance from Canadian citizens, industries and regulators. Looking to the state for answers is again ironic insofar as our governments, writes Pardy, are arguably the worst water polluters in the country.<sup>14</sup>

Forest law continues to run in similar circles.<sup>15</sup> In British Columbia (as in every

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<sup>11</sup> See, for example, B. Pardy “Seven Deadly Sins of Canadian Water Law” (2003) 13 J. Env. L. and Prac. 89 at 91, 102. [Hereinafter “Seven Deadly Sins”] See also Boyd, *supra* note 5 at 25. For an early analysis of the need for a new approach to regulation that does attempt such technology-forcing, see R.M. M’Gonigle, T.L. Jamieson, M.K. McAllister & R.M. Peterman, “Taking Uncertainty Seriously: From Permissive Regulation to Preventative Design in Environmental Decision-Making” (1994) 32 Osgoode Hall L. J. 99.

<sup>12</sup> For a recent study of this in relation to urban water use, see O. Brandes & K. Ferguson, *The Future in Every Drop: The Benefits, Barriers and Practice of Urban Water Demand Management in Canada* (Victoria, B.C.: The POLIS Project on Ecological Governance, University of Victoria, 2004) at 11.

<sup>13</sup> W.F. Pedersen, “‘Protecting the Environment’ - What Does That Mean?” (1993) 27 Loyola Los Angeles L. Rev. 969 at 970. Pedersen argues that environmental law fails because of its lack of goals or vision, and that it is the job of academics and writers to generate possible “relevant utopias.”

<sup>14</sup> Seven Deadly Sins, *supra* note 11 at 98.

<sup>15</sup> For a general discussion of the need for, and nature of, truly structural reform of the B.C. forest regime, see M. M’Gonigle, “Structural Instruments and Sustainable Forests” in C.

province), reams of analysis have revealed the vast scale, and negative social and environmental impacts, of corporate over-cutting. Yet no government has been able to address this issue with the sort of tenure and industrial reform necessary to achieve sustainability. On the contrary, the only government in BC that has been able to advance notable changes to the tenure system has done so by dramatically increasing corporate control and, ultimately, private ownership of the public forest resource.<sup>16</sup> Thus, despite decades of effort, environmental law has not addressed the underlying systemic factors that might actually move us towards sustainable forest law. This was, for example, the failure of the major government initiative in BC in the mid-1990s to create a “forest practices code”, a failure rooted in the unrealistic belief that one could legally restrain an industry by regulating the very logging techniques that were (and are) the basis of its profits. No rules redressed the unsustainable levels of production or the unaccountable levels of industry control. No remedies were considered to challenge the inherent conflict-of-interest of a provincial Crown regulator that is itself dependent on huge forestry revenues and exports. As everywhere, by placing our faith in incremental regulation of the major landowner and rent collector, our laws are held hostage to a particular vision of economic growth and political power, the results of which are increasing cut levels, reductions in employment and hidden public subsidies.<sup>17</sup> At the other end of the spectrum, we have made minimal progress in developing new forms of forest stewardship and economic development that might sustain new

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Tollefson, ed., *The Wealth of Forests* (Vancouver, B.C: UBC Press, 1998) at 102. [Hereinafter “Sustainable Instruments”].

<sup>16</sup> See, for example, J. Clogg, “British Columbia at a Crossroads: A Path to Sustainability or the Enclosure of the Commons?” (2004) JELP Conference Paper. [Hereinafter “Enclosure of the Commons”] See also J. Clogg, W. Horter & C. Stainsby, “Selling Out Our Public Forests” *New from West Coast Environmental Law* (14 April 2003). Online: <<http://www.wcel.org/4976/28/03/02.asp>>

<sup>17</sup> See “Sustainable Instruments”, *supra* note 15 at 106. On subsidies, see T. Green & L. Matthaues, *Cutting Subsidies or Subsidized Cutting? Subsidies to the B.C. Forest Industry and the B.C. Liberals Commitment to End Them* (B.C. Coalition for Sustainable Forest Solutions, 2003).

“communities of place.”<sup>18</sup>

Finally, take the promising new field of “consumption and the law.” Its very existence indicates an effort to escape from the limited, sectoral vision of environmental law. To date, this field rests on twin premises. First is the recognition that environmental laws “have largely ignored the ultimate cause of... pollution and waste—the unsustainable consumption of goods and resources.”<sup>19</sup> Second, to the extent that the law addresses production and consumption at all, it focuses more on “patterns of consumption (e.g. mandating catalytic converters on cars) than levels of consumption (e.g. regulation how many cars are sold).”<sup>20</sup> Consuming better, not consuming less! Indeed, it is difficult to even imagine a legal regime aimed at enforcing strict fuel efficiency standards, and it is well nigh impossible to imagine rules to cap car ownership! As Bradley Harsch notes, “environmental policy has accepted consumers’ desires as being immutable even though the destructive consequences of fulfilling them have become undeniable.”<sup>21</sup> In fact, the problem is far deeper than mere “consumerism” which is itself a manifestation of an entire structure of *production* and consumption that is systemic in nature, rather than merely the fault of greedy individuals.

### 3. A BROADER CONTEXT FOR LAW AND NATURE

Each of these areas, from climate change to forestry to water law, represents a distinct

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<sup>18</sup> On community forestry in general, see, for example, D. Curran & M. M'Gonigle, “Aboriginal Forestry: Community Management as Opportunity and Imperative” (1999) 37 Osgoode Hall L.J. 711. British Columbia has begun a very modest community forest pilot program, for information see British Columbia, *Community Forest Pilot Project* (2003) Online: <<http://www.for.gov.bc.ca/hth/community/index.htm>> (Last accessed 28 May 2004). This issue is, of course, relevant to continuing aboriginal frustration over unresolved issues of land title.

<sup>19</sup> J. Salzman, “Sustainable Consumption and the Law” (1997) 27 *Envtl. L.* 1243 at 1243.

<sup>20</sup> *Ibid* at 1253.

<sup>21</sup> B.A. Harsch, “Consumerism and Environmental Policy: Moving Past Consumer Culture” (1999) 26 *Ecology L. Q.* 543 at 545.



sector of environmental law, which is in itself treated as a distinct specialization within law as a whole discipline. It is trite to say that environmental issues overlap, both with each other and with social and economic practices far removed from each environmental sector. Yet this understanding has yet to permeate our legal approaches to sustainability. Instead, environmental law implicitly adheres to the assumption that the route to sustainability is through laws that target that mysterious sub-sector of “the environment.” As Jane Holder notes, “...the term ‘environmental law’ assumes that the environment can be identified as a discipline, and that problems with the environment, ‘out there’, can be addressed by applying a law to some fraction of human activity.”<sup>22</sup>

Other fields long ago acknowledged that we cannot achieve sustainability without examining broader aspects of social organization. Philosophy long ago turned its attention to “environmental ethics” while, in recent years, critical geography has begun to explicate the meaning of “space and place” in shaping relations with the natural world, and law’s role in constructing these relations.<sup>23</sup> Similarly, political ecology has a long tradition of cultural and social analysis that extends today into sophisticated ecologically-based approaches to the established field of political economy.<sup>24</sup> In other fields, a considerable body of literature has

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<sup>22</sup> Holder, *supra* note 4 at 167. Holder describes the history of law’s entrenchment of the view of man as separate from nature. At the same time, she is suspicious of the notion that we should re-create our society according to “natural law” or ecological principles, insofar as these principles are inherently unknowable, and can be interpreted in socially dangerous ways. Instead, she would prefer that we “open up” environmental law, making it more receptive to the views and values of others, as well as the writings and findings in other fields, such as geography.

<sup>23</sup> See, as examples of a huge body of literature, D. Harvey, *Justice, Nature, and the Geography of Difference* (Cambridge, MA: Blackwell, 1996), N. Blomley, *Law, Space, and the Geographies of Power* (New York, NY: Guilford Press, 1994) and G. Benko & U. Strohmayr, eds., *Space & Social Theory: Interpreting Modernity and Postmodernity* (Malden, MA: Blackwell Publishers Ltd., 1997).

<sup>24</sup> See, for example, M. M’Gonigle and F. Gale, eds., *Nature, Production and Power: Towards an Ecological Political Economy* (Cheltenham: Edward Elgar, 2000); R. Keil, L.

developed that critically examines the sustainability of our social, political and economic systems, and the role of nature or the environment within those systems. However, in law, only a handful of writings examine the sustainability of the legally constituted “system” as a whole, or even just environmental law as a field of practice. By proceeding under the assumption that we can achieve environmental protection and sustainability without engaging in deeper analysis, or even deeper struggles, law itself remains confined in an outdated vision, and offers a false promise. In this regard, a clear gap exists between environmental legal scholarship as an intellectual discipline and other social sciences.

Nevertheless, a few legal academics have begun to debate the merits of an environmental law “paradigm”<sup>25</sup> that treats sustainability as a technical rather than systemic problem. Bradley Harsch writes that most modern environmental laws implicitly embrace the “modern, liberal, market based norms that drive the global economy” and that generate most modern environmental problems.<sup>26</sup> Jane Holder also argues that environmental law’s “anthropocentric foundation and technocentric methods contain ecological disruption and harm within a framework of social and economic rules which maintain the status quo.”<sup>27</sup> Everyone pokes holes in the notion of “sustainable development” because it typifies a marginally modified business-as-usual approach—but does environmental law really work differently? As Cynthia Giagnocavo and Howard Goldstein note, environmental law and policy are “...not so much concerned with changing the ends which we as a culture pursue, as with changing the environmentally insensitive means by which we intend to attain those ends.”<sup>28</sup> Accommodating environmental

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Fawcett, P. Penz & D. Bell, eds., *Political Ecology: Global and Local* (New York: Routledge, 1998); A. Dobson, *Green Political Thought* (3rd edition) (London: Routledge, 2000).

<sup>25</sup> For a recent analysis in terms of competing paradigms, see K. Hirokawa, “Some Pragmatic Observations About Radical Critique in Environmental Law” (2002) 21 *Stan. Env. L.J.* 225.

<sup>26</sup> Harsh, *supra* note 21 at 545-6, 577.

<sup>27</sup> Holder, *supra* note 4 at 167.

<sup>28</sup> C. Giagnocavo & H. Goldstein, “Law Reform or World Re-Form: The Problem of Environmental Rights” (1989-1990) 35 *McGill L.J.* 345 at 375.

regulations to these unchanged ends is problematic, for example, leading to the sort of (unworkable?) regulatory complexity so well described by Kennett and Lucas.<sup>29</sup>

Amongst environmental lawyers, a broad consensus exists that environmental law has not fulfilled its promise. For many, the field has failed. If so, it is important to make this understanding *explicit* so that we can begin to address that failure. Yet, as a discipline, environmental law is shy of both the critical self-examination and broader contextual analysis that might inform this failure. This situation explains environmental law's virtual exclusion from the decades-old movement of Critical Legal Studies,<sup>30</sup> the discipline being neither "critical" nor rooted in explicit social theorizing. Ironically, environmentalists and environmental lawyers are, in their daily lives, amongst the most critical of corporate and bureaucratic power yet rarely follow these criticisms to a systemic understanding of what they *actually do*.<sup>31</sup> One explanation is the field's largely technical self-identity, to be practiced by non-governmental organizations and corporate law firms alike. This orientation separates the field from the growing interdisciplinary literature in "green theory" that asks critically where wealth comes from, and how it is accumulated and maintained by legally-constituted political and economic institutions of an exploitative and hierarchical character. This lack of engagement was the basis for the famous

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<sup>29</sup> Kennett & Lucas, "Transaction Costs and Other Issues for Carbon Sequestration on Agricultural Lands: Defining the Legal and Policy Agenda", 2004 JELP Conference Paper.

<sup>30</sup> See, for example, R.W. Bauman, *Critical Legal Studies: A Guide to the Literature* (Boulder, Colorado: Westview Press, 1996) at 125. This roughly 270 page bibliography of Critical Legal Studies includes just over one page of sources on environmental law. The references from just over twenty years (pre 1996) amount to only 14 references that address more critical issues in environmental law (including environmental justice and deep ecology) as well as the usual detailed examination of specific environmental policies.

<sup>31</sup> For an environmental law organisation taking an unusually systemic approach to corporate power see Community Environmental Legal Defence Fund, *Corporations and Democracy Program* Online: <<http://www.celdf.org/cdp/cdpdesc.asp>> (Last accessed 28 May 2004).

comment by James O’Conner, the renowned political economist, that environmentalists were “sub-theoretical.”<sup>32</sup> Thus are so many environmental lawyers caught in the continuing tension between a personal frustration with the real world and a professional orientation to an “unreal” environmental law.

Thus does the sustainable development conundrum also trap the field of environmental law. It is at once both naïve in the belief that governments will legislate in ways that restrict its economic lifeblood, and utopian in the hope that our social economy can both change significantly and yet remain essentially the same. As Neil Craik demonstrates in his study of *Trail Smelter*, the field straddles the contradiction of its two foundational rights to develop the environment and be free of the harmful consequences of that development, the effect of which is to lead the field into the refuge of an excessive proceduralism.<sup>33</sup> Annie Rochette could as well have been speaking about environmental law when she wrote that “[t]he main flaw of sustainable development lies in its failure to challenge the fundamental assumptions of the dominant development model that it seeks to replace...”<sup>34</sup> As a result, environmental law is an especially ironic form of *self*-regulation that asks a benevolent state to regulate against its own long history of economic growth and expansion, and its own (self-conceived) self-interest. As Giagnocavo and Goldstein conclude, although one of the most far-reaching approaches yet developed, the

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<sup>32</sup> O’Connor argued that, by failing to consider how capitalism actually operates, the success of environmental lawyers in the United States in the 1970s and 1980s drove polluting industries to the developing world, where the damage they caused was more severe, both locally and globally. Thus, by failing to attack the capitalist substructure, the legal successes of the environmental movement actually made matters worse. See “Capitalism, Nature, Socialism: A Theoretical Introduction” (1988) 1 *Capitalism, Nature and Socialism* 11.

<sup>33</sup> N. Craik, *Trail Smelter Redux: Transboundary Pollution and Extraterritorial Jurisdiction*, 2004 JELP Conference Paper. On these principles, see also D.P. Emond, “Co-operation in Nature: A New Foundation for Environmental Law” (1984) 22 *Osgoode Hall L.J.* 323 at 336.

<sup>34</sup> A. Rochette, “Stop the Rape of the World: An Ecofeminist Critique of Sustainable Development” (2002) 51 *U.N.B.L.J.* 145 at 150.

creation of “environmental rights” cannot achieve sustainability:

A system such as law, whose primary objective is to maintain prosperity-producing relations in society, cannot involve itself in wide-ranging teleological deliberation, for the legal system itself is premised on a specific teleology of material growth and the maintenance of the institutional status quo.<sup>35</sup>

Does this mean that the massive outpouring of social energy that comprises environmental law is being cast into a form that is fated to fail? As Michel Serres asks, are we really just distracted by the many struggles at hand while, unwittingly, underfoot the quicksand consumes us all, protagonist, antagonist and observer alike?<sup>36</sup>

Whatever the answer to these questions, one thing is clear: sustainability will demand a broader approach that sets its framework more broadly, *outside* the current framework not just of environmental law but of law in general.<sup>37</sup> As Sally Bullen puts it, “An ecological [epistemological] understanding must become the basis of environmental legal work if such work is to have any meaningful place in our future.”<sup>38</sup> This is the starting point of a green legal theory that situates law itself within the broader, essentially “constitutional”, context of *how humans collectively self-organize the relations between themselves and their physical contexts*. That is, GLT attempts to step outside environmental law’s *internal* focus on state-based regulation to take a stance that is *external* to the state legal system in order to understand that

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<sup>35</sup> Giagnocavo & Goldstein, *supra* note 28 at 347. For a more optimistic discussion of the potential for environmental rights to transform law and society, see S. Emmenegger & A. Tschentscher “Taking Nature’s Rights Seriously: the Long Way to Biocentrism in Environmental Law” (1994) 6 *Geo. Int’l Env. L. Rev.* 545.

<sup>36</sup> Serres, *The Natural Contract*, *supra* note 2.

<sup>37</sup> This paper will not address the nature of this “outsidedness” in detail. For an interesting treatment of this “antimonian” approach to social organization, see Mick Smith, *An Ethics of Place: Radical Ecology, Postmodernity, and Social Theory* (Albany: State University of New York, 2002).

<sup>38</sup> S. Bullen, “Lessons from Feminist Epistemology: Toward an Environmental Jurisprudence” (1993) 23 *Victoria U. of Wellington L. Rev.* 155 at 164.

system as both an historical construction and a future problematic. In this way, the goal of GLT is to shift from environmental reform to ecological re-formation,<sup>39</sup> from sustainable development to developing sustainability.<sup>40</sup>

#### 4. GREEN LEGAL THEORY AS EXTERNAL CRITIQUE

In thinking about green legal theory and its relevance to environmental law, much can be learned from the thinking and experiences of feminist legal theorists. For example, unlike early liberal assumptions that women's values and needs could merely be added into the dominant economic and political systems with better programs in child care and maternity leave, later critical feminists have addressed the structural (patriarchal) nature of economic and legal institutions as *whole systems*. In other words, one cannot simply "add women and stir."<sup>41</sup> Just as feminists and critical race theorists examine the legal system as a whole for its complex of embedded assumptions, biases and power relations, a green legal critique addresses the law's pervasive anthropocentric biases.<sup>42</sup> One cannot simply "add environment and stir."

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<sup>39</sup> This echoes the title of Giagnocavo & Goldstein—"Law Reform or World Re-form", *supra* note 28.

<sup>40</sup> The distinction is between marginal reform to an otherwise unchallenged process of economic development ("They got the noun; we got the adjective.") to a fundamentally redirected process of economic growth to a future state of non-growth ("They get the verb; we get the noun."). See M. M'Gonigle, "Developing Sustainability: A Native/Environmentalist Prescription for Third-Level Government" (1989/90) 84 B.C. Studies 65. In a similar vein, Taylor advocates a shift from "the law of nations with respect to the biosphere" to "the law of the biosphere with respect to nations". Taylor, *supra* note 9, at 272.

<sup>41</sup> See, for example, Bullen, *supra* note 38 at 156.

<sup>42</sup> Two early classics that begin to treat this issue are C. Stone, "Should Trees Have Standing?—Towards Legal Rights for Natural Objects" (1972) 45 S. Cal. L. Rev. 450 and L. Tribe, "Ways Not to Think About Plastic Trees: New Foundations for Environmental Law" (1974) 83 Yale L.J. 1315.

Such an approach entails both historical critique and structural analysis. From the historical perspective, GLT examines the processes and patterns that have shaped today's legal systems, and doing so in a way that other jurisprudential theorists have not *by finally taking seriously the contribution of "nature" to this evolution*. This historical analysis seeks to uncover the ways in which the form and methods of social regulation have themselves both shaped and been shaped by the evolving character of human relations with the physical world. This is no linear cause-and-effect relationship but one that is mutually constitutive. This analysis moves beyond the largely a-historical concerns of environmental law to focus attention on the many historical vagaries that now exist as unacknowledged determinants of, and limitations on, legal action.

Of particular concern for our analysis is the relationship between the "spatial" colonization of territorial "place" (including both "natural" environments and local communities) and the growth of centralist regulatory structures.<sup>43</sup> This orientation is certainly of relevance to Jessica Clogg's treatment in this volume of BC forest policy as an "enclosure" of the forest "commons", a characterization that has significant implications for both social organization and environmental regulation.<sup>44</sup> Such an approach is not merely of academic interest, because it points to new forms of forest management and tenure that can take us beyond state-based regulation of forest practices and contractually-based forms of corporate forest licencing, to address the very nature of "title" to forest land.<sup>45</sup> Instead, as Clogg notes, while historically the tenure regime was intended to preserve a regulatory space for the public interest, the overwhelmingly productivist pressures of the BC political economy are leading to the closure of

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<sup>43</sup> For an example of this analysis applied to globalization, see M. M'Gonigle, "Between Globalism and Territoriality: The Emergence of in International Constitution and the Challenge of Ecological Legitimacy", (2002) 15 Can. J. L. & Jur. 159.

<sup>44</sup> Enclosure of the Commons, *supra* note 16.

<sup>45</sup> This orientation underlies the detailed proposal for a new form of land "title" developed by POLIS, the "community ecosystem trust." See M. M'Gonigle, B. Egan & L. Ambus, *Where There's a Way, There's a Will: Community Ecosystem Trust, A New Model for Developing Sustainability* (Victoria, B.C: Polis Project, 2001). [Hereinafter "Community Ecosystem Trust"]

that regulatory space, to the detriment of its potential contribution to ecological innovation.

On another broadly systemic level, Holder maps the emergence of classical science during the Enlightenment, and its relationship to the development of formal and centralized legal systems that adhere to a set of shared positivist assumptions about knowledge and the world. For example, just as the scientific method separates humans from nature, so too does a legal system that facilitated (and still facilitates) this separation.<sup>46</sup> Given the reliance of our “managerial” environmental law on scientific experts, this is again of more than passing interest (as Pardy critically notes in his paper in this volume<sup>47</sup>). At another level, Marcia Valiente briefly examines how the courts have historically altered common law water rights to accommodate changing environmental, economic and societal circumstances<sup>48</sup> while David Percy addresses the historical changes to the statutory water allocation regime in Western Canada.<sup>49</sup> Mapping such changes over time is an important GLT project that should extend across a range of issues, and even to the evolution of the common law itself.<sup>50</sup> The “deconstruction” that follows should allow us to appreciate, in a powerful way, the flexibility inherent within inherited, but seemingly immutable, legal concepts and processes. In the process, it provides new openings for adapting our legal inheritance to address, in radically new ways, the challenges of an over-extended political and economic system.

This rethinking clearly demonstrates the (arbitrary) social constructedness of entire sectors of economic production and regulation—from the energy industry to Ottawa-based

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<sup>46</sup> Holder, *supra* note 4 at 159-65.

<sup>47</sup> Kyoto Protocol, *supra* note 10.

<sup>48</sup> M. Valiente, “The Future of Common Law Water Rights in Ontario” (2004) JELP Conference Paper.

<sup>49</sup> D.R. Percy, “The Limits of Western Canadian Water Allocation Law” (2004) JELP Conference Paper.

<sup>50</sup> For one such treatment (but not from a GLT perspective) see G. J. Postema, “Classical Common Law Jurisprudence (Part I)” (2002) 2:2 Oxford U. Commonwealth L. J. 155, and “Classical Common Law Jurisprudence (Part II)” (2003) 3:1 Oxford U. Commonwealth L.J. 1.



fisheries management.<sup>51</sup> Indeed, it asks us to reconsider the range of geographical/jurisdictional constructions that underpin political decision-making<sup>52</sup>, from the delegated nature of urban governments to the sovereign character of the central state. Just as critical theorists have demonstrated the artificial nature of the distinction between the public and private realms<sup>53</sup>, so too environmental lawyers need to question the origin of the bundle of rights inherent in “property”, and how it might be reconfigured in a more sustainable or ecological manner.<sup>54</sup> Or, to address Holder’s concerns about science and the law, one might ask how legal structures today continue to facilitate the virtual monopoly of science-based knowledge over other forms of local or “traditional” knowledge, and what might be the significance for future sustainability of challenging (as Pardy’s paper does<sup>55</sup>) the legally and institutionally-enforced managerialism that results?

Once one starts down this road, however, one must be prepared to address the partial nature of “rationality” itself that pervades the current paradigm of environmental decision-

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<sup>51</sup> For an example of this rethinking in relation to fisheries management, see Emily Walter, M. M’Gonigle, and Celeste McKay, “Fishing around the Law: The Pacific Salmon Management Systems as a ‘Structural Infringement’ of Aboriginal Rights” (2000) 45 McGill L.J. 263.

<sup>52</sup> For example, see R.T. Ford, “Law’s Territory (A History of Jurisdiction)”, (Summer 1999) 97 Mich. L. Rev. 843.

<sup>53</sup> See, for example, A. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto, Ont: University of Toronto Press, 1995) at 123, discussing connections between our court’s manipulation of the public/private divide and the dominance of corporate power.

<sup>54</sup> See, for example, E. Freyfogle, “Ethics, Community and Private Land” (1996) 23 Ecology L.Q. 631, which subjects property law to an ecological critique, and proposes seven guiding ideas as the basis for a radical new property regime. See also Robert J. Goldstein, “Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law”, (1998) 25 B.C. Env’tl. L. Rev 347.

<sup>55</sup> Kyoto Protocol, *supra* note 10.

making.<sup>56</sup> After all, as the advocates of the precautionary principle point out, how can we know what the effects of industrial activities on the environment will be given the pervasive uncertainties. From the structural perspective, this broader critique points toward the problematic nature of the whole liberal framework that implicitly underpins most environmental law. A primary systemic concern, as noted above, is the intersection between law, nature, and the production, consumption and distribution of wealth. How do our current legal arrangements ensure the dominance of a trade-based, linear, high throughput economy? Consider Bruce Pardy's argument that the Kyoto Protocol is a dangerous instrument, in part, because it endorses the notion that in order to achieve acceptable standards of living developing nations must pursue traditional economic growth and receive allowances for the inevitable environmental costs.<sup>57</sup> A more sustainable climate change regime would examine the possibility of disconnecting "standard of living" from a form of wealth creation that causes massive damage. However, as Pardy notes, the current international environmental regime is incapable of tackling or incorporating such deeper issues. The struggle then, from a green legal theory perspective, is to understand how law sets and maintains the boundaries of "political acceptability" in systemic ways that extend beyond the specific terms of the Kyoto Protocol.

In its structural (and historical) critique, green legal theory is essentially "constitutional" in its orientation. This orientation leads the legal scholar to examine the sustainability of both the *formal* constitution (from the historically constructed nature of the "Crown", to the character of the division of powers, to the public/private distinctions embedded in the Charter) as well as the many other *informal* ways in which our society frames or "constitutes" its own organization.<sup>58</sup>

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<sup>56</sup> For an excellent critique of the rationality of environmental management, see J.M. Gillroy & J. Bowersox, eds., *The Moral Austerity of Environmental Decision Making: Sustainability, Democracy, and Normative Argument in Policy and Law* (Durham, NC: Duke University Press, 2002).

<sup>57</sup> The Kyoto Protocol, *supra* note 10.

<sup>58</sup> See Community Ecosystem Trust, *supra* note 45. On the need for a green analysis of standard legal concepts, and the outlines of a research agenda for exploring environmental visions of federalism and bureaucracy, see the insightful analysis by R.O. Brooks, "A New Agenda for Modern Environmental Law" (1991) 6 J. Envtl. Law and Litig. 1. See

For example, the structure of authority within the modern state system is fundamentally hierarchical and centralist, and has grown at the expense of more communal forms of association. This structure, in turn, “distances” decision-makers, both spatially and temporally, from the environmental consequences of their actions, and vice versa. Yet this structure of power is largely assumed to be; it is just the way it is. Disappearing from view, it effectively excludes the consideration of other potentially more sustainable forms of governance.

Consider, for example, Randy Christensen’s examination of the citizen submission process under NAFTA.<sup>59</sup> From one perspective, this process represents an innovative attempt to move away from, or at least shorten, the normal hierarchical, bureaucratic process through which environmental laws are enforced. In other words, the citizen submission process enables citizens to engage more directly in the pursuit of environmental protection. From a larger perspective, the process raises basic questions about the real limits of state-based authority, insofar as the only means for citizens, at least in Canada and Mexico, to question their own government’s enforcement decisions is through a costly, cumbersome and at best semi-effective international mechanism. Christensen’s analysis reveals that the submission process, as it is structured and implemented, frequently runs into each state’s broad opposition to ceding any power or control to bodies or processes outside of its hierarchical authority. Such authority is, through NAFTA, being directed to increase economic flows that are largely detrimental to sustainability. Thus does the law “give back” very little of what it takes away. To utilize the terminology of critical theory, the primary function of the law is to facilitate accumulation; its secondary function is to maintain legitimacy, a function that may be seen to be developed only as much as is necessary to support the primary goal. In assessing this legal system, one could problematize a legitimacy-conferring structure of authority (state-based law) that grants extensive power to (unsustainable) corporations, while divesting authority and legitimacy from sustainability-seeking intermediate associations, such as local communities, indigenous groups, and non-governmental

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also H. Doremus, “Constitutive Law and Environmental Policy” (2003) 22 *Stan. Env. L.J.* 295 on the broader constitutive nature of law.

<sup>59</sup> R.L. Christensen, “The Citizen Submission Process Under NAFTA: Observations After 10 Years” (2004) JELP Conference Paper.

organizations.<sup>60</sup>

The significance and mutability of state boundaries, both territorial and social, present a large and related area of inquiry for a green legal critique. Neil Craik's examination of the Trail Smelter saga raises the difficulty of applying the language and categories from our state-based legal system to even the most isolated cross-border pollution issue.<sup>61</sup> He describes how point source trans-boundary pollution, a relatively simple environmental problem, manages to elude various traditional legal boundaries, such as private v. public law, and national v. international law. In the historical process of constructing sovereign states, collective environmental obligations effectively stopped at the border. As cross-border impacts have increased, this historical state system has imposed a convoluted path of lengthy linkages between polluters, states and the injured parties, with recent attempts to shorten the chain of responsibility again pitting environmental interests of protection against sovereign rights to exploitation.

In a similar vein, Jamie Benidickson's article analyzes and compares two efforts at setting new boundaries, or blurring old ones, in the form of ecosystem management of the Great Lakes and the Mediterranean Sea.<sup>62</sup> In both cases, he describes the complex governance structures built around these different ecosystems, and the difficulties involved in developing new ecologically-based institutions in the face of traditional state structures and emerging free trade regimes. In their influence on traditional hierarchical state structures, both regimes have had only modest impacts. However, both regimes have apparently increased the sense of community and unity surrounding the ecosystems, thus establishing the shared values and

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<sup>60</sup> For a comparison in treatment of the two groups see, for example, C. Tollefson, "Games Without Frontiers: Investor Claims and Citizen Submissions under the NAFTA Regime" (2002) 27 *Yale J. Int'l L.* 141.

<sup>61</sup> Craik, *supra* note 33. On the problem of trying to use our old vocabulary to understand emerging discontinuities in international law, see J.G. Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations" (1993) 47 *International Organization* 139.

<sup>62</sup> J. Benidickson, "The Great Lakes and the Mediterranean Sea: Ecosystem-Management and Sustainability in the Context of Economic Integration" (2004) JELP Conference Paper.

interests required for a truly “bioregionally based society.” Indeed, Benidickson’s hypothesis, that the European Union’s “more adaptive constitutional arrangements” may have contributed to their ability to link water pollution institutionally with socio-economic factors, presents a good case study of the structural dynamics of different (formal) constitutional allocations of power.

## 5. EXPLORING NEW THEORETICAL AND PHILOSOPHICAL FOUNDATIONS

To date, only a few legal writers have proposed “new”, more sustainable, paradigms or foundations for environmental law. Paul Emond, for example, proposes “co-operation in nature” as a new foundation, arguing that, since environmental problems affect us all, and we are all a part of nature, mutual aid and co-operation should be the founding principles for environmental law.<sup>63</sup> These principles should, in turn, push us to re-examine our pre-occupation with development and exploitation, and with adversarial, hierarchical approaches to society and law.<sup>64</sup> Similarly, Prue Taylor argues that we must re-construct international environmental law around an eco-centric ethic, which recognizes the biotic reality of interdependence, the inherent value of nature, intergenerational equity and humanity’s special relationship with nature.<sup>65</sup> From a different perspective, Elaine Hughes advocates the incorporation of eco-feminist ideas into environmental law, suggesting a “re-visioned” environmental law based on kinship, recognizing connection, adapting to cyclical processes, and seeing nature as an object of love or respect, rather than just a commodity.<sup>66</sup>

A few others have begun to explore new theoretical foundations for law more generally, in the belief that even the most far-reaching and progressive forms of environmental law will be

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<sup>63</sup> Emond, *supra* note 33. See also J.B. Ruhl, “Thinking of Environmental law as Complex Adaptive System: How to Clean up the Environment by Making a Mess of Environmental Law” (1997) 34 *Houston L. Rev.* 933 which argues for the re-working environmental law in accordance with the principles of complex systems theory.

<sup>64</sup> *Ibid.* at 346.

<sup>65</sup> Taylor, *supra* note 6 at 272.

<sup>66</sup> E.L. Hughes, “Fishwives and Other Tails: Ecofeminism and Environmental Law” (1995) 8 *C.J.W.L.* 502.

unlikely to resolve the sustainability problem. In a classic article, Lawrence Tribe<sup>67</sup> proposed a synthesis of “transcendence”, roughly, the acknowledgement of our separation from nature as reasoning beings, and “immanence”, the acknowledgement of the sacred within nature, as a new foundation for law. This synthesis comprised the sanctification of a process of interaction and change, which, in its initial path, recognized the sacred within nature, and demoted humans from our assumed position of superiority, but also required humans to continually re-evaluate and re-vision this path, using our special ability to reason. More recently, Giagnocavo and Goldstein argue that “environmental rights legislation might buy technocrats some time... but it cannot sufficiently change our consciousness.”<sup>68</sup> Instead, they take the perspective of deep ecologists and argue that successfully addressing environmental issues will require cultural “re-form”, through introspection and the “re-writing of our stories of being and value...”<sup>69</sup> Delgado similarly rejects the American public trust doctrine because of the problematic assumptions and culture embedded within it, insofar as the trustee is just as likely to misunderstand the environment, and exploit it, as the rest of us.<sup>70</sup> Instead, he proposes a re-invigorated examination of Leopold’s land ethic, Native American thought, and eco-feminism, as feasible alternatives to the dominant approach to environmental protection.<sup>71</sup>

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<sup>67</sup> Tribe, *supra* note 42.

<sup>68</sup> Giagnocavo & Goldstein, *supra* note 28 at 381.

<sup>69</sup> *Ibid* at 385.

<sup>70</sup> R. Delgado, “Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform.” (1991) 44 Vand. L.R. 1209 at 1212-1218.

<sup>71</sup> *Ibid* at 1218. See also D. Wilkinson, “Using Environmental Ethics to Create Ecological Law” in J. Holder & D. McGillivray, eds., *Locality and Identity: Environmental Issues in Law and Society* (Brookfield, Vermont: Ashgate Publishing, 1999) at 17. Wilkinson argues in favour of “ecological law”, which reflects principles of Deep Ecology and ecocentric ethics and “would deal with the fundamental or institutional aspects of human-nature relations, and regulate areas of life usually considered to be outside law’s proper domain.” Wilkinson at 37. For contrast, see “Community Ecosystem Trust”, *supra* note 45.

Each of these papers brings valuable insights to an emerging, if inchoate, new field of enquiry and way of thinking. However, much work lies ahead in the task of building the necessary new green theoretical context for a law. In contrast to the ad hoc liberal foundations of environmental law, green legal theory must build on the extensive body of critical social theory that exists in other fields. In particular, it will draw upon four disciplines, namely legal theory/critical legal studies, ecological political economy, which examines political and economic structures of power from an ecological perspective, environmental philosophy, which examines the ethical relationships between humans and nature, and critical geography, which addresses theories of “space” and “place” as an important emerging context for the study of law and social organisation. Together these four disciplines place green legal theory within a larger transdisciplinary body of scholarship of “green theory.”

## 6. FROM CRITIQUE TO PRESCRIPTION

In contrast to the disciplinary incoherence of an environmental law in a deeply unsustainable society, green legal theory offers a new starting point for understanding society and law. This shift in focus is itself of major importance if we are to elevate the place of “nature” in institutional thinking. But translating theoretical understanding into practical action is not easy. It is one thing to characterize state sovereignty in novel ways; it is quite another thing to remake it. Indeed, when it turns to prescription, GLT runs the risk of becoming another variant of environmental law—wanting a lot more, but “asking” for it all the same. As Keith Hirokawa rightly notes, any radical critique “...may ask for more than the law can give.”<sup>72</sup> Thus a critical challenge for a green theory of law is to make prescriptions without becoming even more naïve and utopian than environmental law. If hierarchical structures are a key problem for

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<sup>72</sup> Hirokawa, *supra* note 25. Hirokawa questions the worth of radical critique or the presentation of new environmental paradigms for law, insofar as these approaches remains inherently incapable of engaging the current paradigm and realizing change. Instead, he promotes the method of pragmatism, which rejects the notion of a correct or true paradigm, and instead draws upon a variety of theories as sources for practical solutions.

sustainability, how can we move to more sustainable forms of social organization that do not depend on state structures and corporate powers benevolently dissolving themselves?

In Canada, the most advanced forms of green legal theory today are visible in aboriginal title struggles, where participants explicitly problematize the state system and assert, not request, other forms of authority and legitimacy. And, of course, there is the growing challenge of social movement activism that takes its struggles directly into the street and the tree-sit, where environmental lawyers have a central role. In this regard, Randy Christianson's conclusion that a decade of citizen suits under NAFTA points to the importance of "strategic" public mobilization is important. Similarly, Clogg's paper suggests that environmental reform should put emphasis on innovations that can themselves "leverage" continuing and expanding changes in the future.

In more directly "reformist" initiatives, the major bulk of legal scholarship largely falls within the rubric of what is termed "ecological modernization."<sup>73</sup> This approach to economic and political change argues that there need be no conflict—at least in the short term—between economic and ecological goals, thus offering essentially painless ("win/win") solutions that will improve the compatibility of institutions with ecological imperatives. Common legal themes here include the polluter pays and precautionary principles, full cost accounting, and extended producer responsibility. New forms of and approaches to regulation that emerge from this include preventative design and prior justification procedures, tax shifting, fair trade and so on.<sup>74</sup> In this vein, Nathalie Chalifour explores the potential for using fiscal reform, through select tax incentives and subsidies, to allow environmentally progressive forestry companies to maintain

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<sup>73</sup> See, for example, A. Weale, "The Politics of Ecological Modernization" in J. Dryzek & D. Schlosberg, eds. *Debating the Earth: The Environmental Politics Reader* (New York, NY: Oxford University Press, 1998) at 301. See also A.P.J. Mol, *Globalization and Environmental Reform: The Ecological Modernization of the Global Economy*.. (Cambridge, MA: MIT Press, 2001).

<sup>74</sup> See, for example, M'Gonigle, T.L. Jamieson, M.K. McAllister & R.M. Peterman, "Taking Uncertainty Seriously: From Permissive Regulation to Preventive Design in Environmental Decision Making" (1994) 32 *Osgoode Hall L.J.* 99.



their competitive edge.<sup>75</sup> Through her proposals, she begins to investigate the sustainability of a whole area of law—tax—that heavily influences social development, but that has long been overlooked by environmental law.

With roots in a similar tradition, David Boyd’s proposal for “sustainability law” suggests that Canadian environmental law can directly address root causes (such as consumption and pollution) and systemic obstacles (such as the dominance of economic interests and the concentration of power in the executive) by shifting to a more proactive focus.<sup>76</sup> Much like the green legal critique, David Boyd asserts that environmental law seeks to mitigate problems with the system, rather than transform it, takes an illogically short-term approach, and generally proceeds in a reactive and crisis-driven mode, rather than taking a more proactive, and systemic approach. To comply with the “system conditions” required for sustainability, which derive from physical concepts such as the laws of thermodynamics, Canadian law must adopt more systemic laws and policies. To do this, he proposes a new field of “sustainability law” that can redefine social progress through fuller measures of economic value, restructure the economy through tax shifting, eliminate economic distortions by repealing perverse subsidies, and curb population growth by forgiving third world debt.<sup>77</sup>

These prescriptions clearly accord with the spirit of green legal theory, to the extent that they unpack the hidden ways in which law underpins unsustainability. Like green legal theory, they acknowledge that sustainability requires looking outside of “environmental law”, and exploring connections between law, political economy, culture and sustainability. At the same time, these prescriptions point to the inherent contradictions of “law reform” when cast within the same structures of political, economic and bureaucratic power that have so far proven

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<sup>75</sup> N. Chalifour, “Ecological Fiscal Reform as a Tool for Promoting Sustainable Forestry in Canada - Potential and Pitfalls” (2004) JELP Conference Paper.

<sup>76</sup> D. Boyd, “Sustainability Law: (R)Evolutionary Directions for the Future of Environmental Law” (2004) JELP Conference Paper. See also Boyd, *supra* note 5 for a fuller treatment of these themes.

<sup>77</sup> In addressing consumption, Harsch takes a similar approach, arguing that environmental law must tackle our consumer culture head on, by limiting advertising and tailoring regulations towards the end use of various products. Harsch, *supra* note 21.

resistant to acting on the net social benefits of environmental laws that would produce Chalifour's sustainable forest management, Boyd's enhanced materials efficiency, or Clogg's environmental justice. In contrast, one of the lessons of green legal theory must be that such specific prescriptions must pay careful attention to their theoretical justifications, in contrast to the a-theoretical stance of environmental law. Meinhard Doelle's paper on the links between the climate change and biodiversity regimes provides an excellent illustration of why this tension between practice and theory must be maintained.<sup>78</sup> His examination of the inter-relationships between the regimes, both legal and physical, reveals that many of the more innovative tools on the climate change side could seriously undermine efforts to preserve biodiversity. Thus, by making prescriptions without taking a larger perspective, we risk making matters worse.

Of course, the need to take a larger perspective goes beyond connecting the various sectors of environmental law, to looking outside of our legal system entirely. This is, for example, relevant to the growing concern for protecting, and utilizing, "traditional ecological knowledge," a concern that risks turning such knowledge systems (and the communities that hold them) into just more "data" for intrusive bureaucratic decision-makers.<sup>79</sup> Similarly, beyond a primary concern for regulatory processes, GLT necessarily addresses expanded visions of "discursive democracy" as well as expanded conceptions of law itself (as in the movement for "institutional experimentalism").<sup>80</sup> On a "constitutional" level, we need prescriptions that reshape our economic and political scaffolding that will allow the sorts of tools and instruments advanced by David Boyd and Nathalie Chalifour actually to happen. How can we rethink the state or bureaucratic management or the regulatory paradigm such that the historical obsession

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<sup>78</sup> M. Doelle, "Linking the Kyoto Protocol and other Multilateral Environmental Agreements: From Competition to Integration", 2004 JELP Conference Paper.

<sup>79</sup> See, for example, the trenchant analysis on exactly this point by P. Nadasdy, "The Politics of Traditional Ecological Knowledge: Power and the "Integration" of Knowledge" (1999) 36 *Arctic Anthropology* 1. More generally, see T. Forsyth, *Critical Political Ecology: The Politics of Environmental Science* (New York, NY: Routledge, 2003).

<sup>80</sup> See, for example, J.S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (New York, NY: Oxford UP, 2000), and R.M. Unger, *Democracy Realized: The Progressive Alternative* (New York, NY: Verso Books, 1998).

with sovereignty, central control, and micro-management can make room for new forms of political power and legitimacy? In Bullen's words, "If the search for solutions starts *within* the constraints of law, the range is limited by the environmental philosophy it is grounded in; there is a risk of legitimising the situation even in the attempt to change it."<sup>81</sup>

## 7. CONCLUSION

In its concern for "the environment", and in its frustration with the state of environmental law, green legal theory grows out of, not *against*, environmental law. Indeed neo-liberal states, in collaboration with corporate interests, often strive to dismantle existing environmental laws, in order to remove barriers to corporate growth. At the same time, the field of environmental law is an obstacle to larger changes to the extent that it occupies the intellectual "space" of environment/law so as to discourage, however unintentionally, stepping outside of the traditional regulatory box. For example, in Delgado's opinion, the "oversimplified answer" of the American public trust doctrine "...forestalled more searching reconsideration of our environmental predicament and postponed, perhaps indefinitely, the moment when society would come to terms with environmental problems in a serious and far-reaching way."<sup>82</sup> Or, as Laurence Tribe put it in the early days of environmental law, the "domination of environmental law requires any truly innovative or original approaches to be couched in its discourse, which in turn legitimates the assumptions of the system, and undermines the original innovation."<sup>83</sup> To the extent that it continues to dominate legal thinking about the "environment" and, in so doing, pre-occupies most scholars and practitioners, environmental law risks hindering the intellectual leap and practical redirection that is necessary for our emergence into a new world of sustainability.

Green legal theory is, in many ways, a "meta-perspective." That is, it is not an all-explaining, or totalizing, "meta-theory", rather, it pervades our understanding of "law" generally, demanding that any analysis of social organization must incorporate a green component. In law, how can one *not* have a green analysis of corporate law? Securities regulation? Contracts?

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<sup>81</sup> Bullen, *supra* note 38 at 164.

<sup>82</sup> Delgado, *supra* note 70 at 1211. See also Giagnocavo & Goldstein, *supra* note 28 at 385.

<sup>83</sup> Tribe, *supra* note 42 at 1331.

Property? Constitutional law? But this is the problem—it IS being left out everywhere. Instead, we marginalize this crucial analysis into that limited discipline called “environmental law.”

Green legal theory opens up an intellectual space for exploring the role and nature of law in relation to the construction and maintenance of sustainable societies. Each paper at this conference raises fascinating questions about the ways in which law underpins unsustainable societies. But it is time to take a broader perspective. It is time, for example, to ask how that instrument of “law” allows the state in the first place to set territorial and social boundaries that are oriented towards resource accumulation and destruction, rather than on an ecosystem basis? How does law contribute to the bureaucratization of everyday life, and distance individuals from their connections with each other and with place? How does law support a culture of individualism and entitlement, rather than communalism and responsibility? How does law position humans as separate and dominant over nature, rather than dependent and integrated within it? Lawyers and legal academics have a unique knowledge of social regulation and organization, which would be particularly useful for more fully uncovering the ways in which law constitutes the world around us.<sup>84</sup>

Rather than abandoning environmental law, green legal theory provides it with a context, a new framework through which we can understand “law” itself, and how to approach it. Without this larger vision, we will remain mired in specific battles as we sink collectively deeper and deeper into the quicksand. Instead, as he argues, we must extricate ourselves in order to negotiate a new “natural contract” between Earth and its inhabitants.<sup>85</sup>

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<sup>84</sup> See Doremus, *supra* note 58 at 299-318.

<sup>85</sup> Serres, *supra* note 2.

Countries such as the US, France and Thailand have all made new environmental laws to help battle the climate crisis we are currently facing. This includes a tax on gas use, reducing plastic waste and reducing plastic bag use. We use cookies to improve your experience on our website. By using our website you consent to all cookies in accordance with our updated Cookie Notice . I accept.

Agenda. Information on the environment for those involved in developing, adopting, implementing and evaluating environmental policy, and also the general public. The concept of green growth stresses the importance of integrating economic and environmental policies in a way that highlights the opportunities for new sources of economic growth while avoiding unsustainable pressure on the quality and quantity of natural assets (OECD, 2011a and 2011b). The transition towards a green economy involves a mixture of measures ranging from economic instruments such as taxes, subsidies and trading schemes, through regulatory policies including the setting of standards to non-economic measures such as voluntary approaches and information provision. Restructuring industrial systems needs a diverse, cross-sector approach. By moving beyond traditional industrial policies to a framework that encompasses environmental and energy policies, the authors explore how this could accelerate structural transformation and enhance productivity. In fact, through research and case studies, it shows how green industrial policy frameworks can be a valuable tool for all economies. For example, Morocco used to import 95 per cent of its energy via coal, gas and electricity in 2011. In with the good, out with the bad: Phasing out polluting sectors as green industrial policy. Aaron Cosbey, Peter Wooders, Richard Bridle, Liesbeth Casier. 87 Chapter 6 Developing green technologies and phasing them in Babette Never, Ren© Kemp. Environment & Climate Change Laws and Regulations covering issues in Brazil of Environmental Policy and its Enforcement, Environmental Permits, Waste, General. This law also creates the National Environment System (SISNAMA), which is constituted by: (i) the Environmental National Council (CONAMA), an advisory and deliberative body to assess and propose policy guidelines; (ii) the Environmental Ministry, responsible for controlling and coordinating environmental national policy; (iii) executive bodies, including the Brazilian Institute for the Environment and Natural Renewable Resources (IBAMA) and the Biodiversity Conservation Institute (ICMbio); and (iv) State and local agencies, responsible for policy implementation in respective jurisdictions.