

RETHINKING SUSTAINABILITY TO MEET THE CLIMATE CHANGE CHALLENGE

by

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Editors

ENVIRONMENTAL LAW INSTITUTE
Washington, D.C.

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Environmental Law Institute
1730 M Street, NW, Washington, DC 20036

Published May 2015.

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Printed in the United States of America.
ISBN 978-1-58576-173-9

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Preface

Jessica Owley and Keith Hirokawa

In Summer 2011, four upstart junior environmental law professors (Michael Burger, Elizabeth Burleson, Keith Hirokawa, and Jessica Owley) gathered on the bank of a Connecticut River to talk about their new careers and what they viewed as important and exciting elements of being part of legal academia. The excitement and focus of our own research projects felt incomplete. Accordingly, we discussed ways to bring together academics to not only share their research with one another, but to collaborate on important environmental issues of the day. We sought to engage our scholarship with contemporary problems.

The vision that emerged—and has been articulated in the events that followed—was to confront today’s challenges, including those dressed as scholarship, in an effective manner that would make research accountable and connect policy examination with policy formulation. The vision led to the founding of the Environmental Law Collaborative or ELC. Inspired by early conferences at Airlie House (particularly the 1969 conference that gave birth to the Environmental Law Institute), the group created a forum to bring together our fellow researchers to discuss and make progress on pressing environmental concerns. The ELC seeks to foster progress toward an adaptive, conscious, and equitable governance of actions that impact local and global ecologies by engaging the contemporary discourse. To advance society and secure welfare, locally and globally, we must be prepared to face divisive issues that confront our environment. Assuming our strength lies in the democratic development and confirmation of values and priorities, our citizenry must be willing and capable of understanding the circumstances and alternatives that face our natural surroundings. It has become increasingly apparent that although environmental policy is benefited by a robust drive for the dissemination of information, environmental policy is also influenced by strategic misinformation and effective use of persuasive communication.

The ELC facilitates dialog among thought leaders on sustainable policy priorities, practical implementation strategies, assessment mechanisms, and cooperative analysis of science, economics, and ethics. The core functions served by this group are: (1) collaborative research and analysis of law and policy questions that implicate the integrity of ecosystems; (2) production

of literature that reflects the insights from the collaboration and makes law and policy recommendations that may be targeted to specific entities or for broad-based consideration; and (3) effective dissemination of work product when and where it may produce meaningful and considered action.

The first gathering of the ELC convened in Chester, Connecticut, in the summer of 2012, where environmental law researchers gathered to consider the meaning of sustainability in response to climate change. Climate change is forcing developments in the norms of political, social, economic, and technological standards. As climate change continues to dominate many fields of research, sustainability is at a critical moment that challenges its conceptual coherence. Sustainability has never been free from disputes over its meaning and has long struggled with the difficulties of simultaneously implementing the “triple-bottom line” components of environmental, economic, and social well-being. Climate change, however, suggests that the context for sustainable decisionmaking is shifting. Accordingly, the Workshop focused on examining the re-conceptualization of sustainability in the age of climate change, including (but not limited to) framing the term in climate change discussions; reaching sustainable practices across disciplines such as law, economics, ethics, and the hard sciences; and conceptualizing the role of sustainability in adaptation and resiliency preparation.

The project was ambitious: the concept of sustainability has driven governmental and private conservation programs for several decades, and has arguably produced the most progressive and forward-thinking social programs that have come out of the environmental movement. Sustainability demands that we consider the resource needs of future generations: that our allocation programs distribute natural resource opportunities in an equitable manner; and that our decisions to harvest goods from ecosystems serve a variety of long- and short-term needs. Sustainability is intergenerational, pragmatic, and pluralistic. Yet, for all of its strengths, sustainability did not avoid climate change, and perhaps more importantly, the notion of sustainability has encountered challenges in helping formulate policies that confront climate changes. Through dialogue, this group explored those challenges and considered whether the concept of sustainability had outlasted its useful life.

Not surprisingly, the group capitalized on its intergenerational and cooperative nature. The discussion drew on law, history, geography, ecology, and economics. The group debated challenges of scale associated with governance and identity, public/private domains and efficient resource allocations, climate change winners and losers, ecosystem services, urbanization, wilderness commitments, and ocean acidification. The group explored examples of

sustainability implementation programs, questioning the relevancy of context in climate and development. The group discarded and reconstructed definitions of sustainability, diverging on whether the term was necessarily substantive or process-based. The group considered frameworks for thinking about sustainability and climate change to identify points of convergence. The dialogue was demanding and sophisticated, and unanimity was difficult to achieve, but the participants pushed hard and, in our view, illustrated the best of what collaborative work can offer.

The event produced an intensive and collaborative assessment of sustainability in the age of climate change. The chapters herein memorialize the proceedings of this collaboration. Although the essays in this book reflect a diverse array of thinking on the questions presented, a few principles emerged from the assembly of the chapters of this book:

Principle One:

To the extent that the sustainability movement required information-gathering on the impacts of our decisions, informational concerns remain a central focus in the climate change era. However, the character of the information that we need, as well as the best methodology for acquiring information and the framework in which we understand it, are much more demanding as we prepare for climate change than they were to satisfy the vague demands of sustainability.

Principle Two:

It may be the case that conflicts of scale drive a wedge between dialogue about sustainability and climate change preparedness. As applications of sustainability have become more local (such as local food, local resources, and local custom), conceptualization of the scale of climate change (and, in particular, the manner in which we consider responsibility for climate change impacts) has become more global, including the integration of responsibility for climate change winners and losers. Bridging the gap requires serious consideration on the problems of scaling up and down to help identify relevant lessons that can be gleaned from specific implementation strategies and the goals they seek to achieve.

Principle Three:

There remains a concern that micromanagement of the definition of sustainability prevents productive use of the concept. As the evolution of environmental protection illustrates, principled action does not need to be action that has certain and defined consequences. Uncertainty should not be an obstruction to progress.

Principle Four:

A framework is needed that will assist in the allocation of and entitlement to scarce resources. The impacts of climate change will rest our concepts of justice and community in ways previously unseen. Whether this framework occurs under the guise of sustainability more specifically in response to impending climate change impacts, it will have to address environmental, economic, and equitable needs.

It is not the intention here to have the last word on sustainability in an age of climate change, and it is not the point of this collaboration to adjudicate among the ideas offered to resolve the conflicts and competition among sustainable alternatives. Although we collectively consider the convergence of climate change and sustainability to cover important ground, the driving force for this collaborative publication has been a matter of professional function. It has become increasingly apparent that although environmental policy benefits from a robust drive for the dissemination of information, environmental policy is also influenced by strategic misinformation and effective use of persuasive communication. To advance society and secure welfare at local and global scales, our professional activities must contribute to resolution of the divisive issues that confront our environment. Here, the ELC explores the means of progressing toward an adaptive, conscious, and equitable governance of actions that impact local and global ecologies.

About the Authors

Jessica Owley joined the SUNY Buffalo Law School in 2010 after serving as an assistant professor at Pace Law School. She received her Ph.D. in environmental science, policy, and management from the University of California-Berkeley in 2005, shortly after completing her J.D. at Berkeley Law in 2004. Owley's teaching interests are in the areas of property, environmental law, administrative law, and Indian law. Though her general research is on land conservation and property rights, her current scholarship focuses on using property tools for conservation in the context of climate change.

Before entering academia, Owley practiced in the Land Use and Environment Law group at Morrison & Foerster in San Francisco. Prior to private practice, Owley clerked for Hon. Harry Pregerson of the U.S. Court of Appeals for the Ninth Circuit and Hon. Dean D. Pregerson of the Central District of California. Owley is a member of the California bar and admitted to practice in the Northern, Southern, and Eastern districts of California and the Ninth Circuit.

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Prior to joining the faculty at Albany Law, Professor Hirokawa was an Associate Professor at Texas Wesleyan University School of Law and an Adjunct Professor at the University of Oregon School of Law. Professor Hirokawa practiced land use and environmental law in Oregon and Washington and was heavily involved with community groups and nonprofit organizations. Professor Hirokawa studied philosophy and law at the University of Connecticut, where he earned his J.D. and M.A. degrees. He earned his LL.M. in Environmental and Natural Resources Law from Lewis & Clark Law School.

* * *

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Professor Dernbach coauthored an amicus brief to the U.S. Supreme Court on behalf of 18 prominent climate scientists in *Massachusetts v. Environmental Protection Agency*. He was a member of the National Research Council Committee that, in *SUSTAINABILITY AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY* (2011), made recommendations on how to institutionalize sustainability at EPA. His writings were extensively cited by the Pennsylvania Supreme Court in its landmark 2013 decision in *Robinson Township v. Commonwealth of Pennsylvania*, which has reinvigorated the Environmental Rights Amendment to the state constitution. Before taking his teaching position at Widener, Professor Dernbach worked in a variety of positions at the Pennsylvania Department of Environmental Protection, and served most recently as that agency's policy director.

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Before coming to Colorado, Professor Krakoff was awarded an Equal Justice Works Fellowship to work on the Navajo Nation as Director of the Youth Law Project for DNA-People's Legal Services. Professor Krakoff clerked on the U.S. Court of Appeals for the Ninth Circuit for Judge Warren J. Ferguson from 1992-93, and received her J.D. from Boalt Hall, University of California-Berkeley, in 1991, and her B.A. from Yale University in 1986.

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