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## Law, Media, & Environmental Policy: A Fundamental Linkage in Sustainable Democratic Governance

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# LAW, MEDIA, & ENVIRONMENTAL POLICY: A FUNDAMENTAL LINKAGE IN SUSTAINABLE DEMOCRATIC GOVERNANCE

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**Abstract:** The functional linkages between law and media have long been significant in shaping American democratic governance. Over the past thirty-five years, environmental analysis has similarly become essential to shaping international and domestic governmental policy. Environmentalism—focusing as it does on realistic interconnected accounting of the full potential negative consequences as well as benefits of proposed actions, policies, and programs, over the long term as well as the short term, with careful consideration of all realistic alternatives—provides a legal perspective important for societal sustainability. Because environmental values and norms are often in tension with established industrial interests that resist public interest accountability, they are inevitably forced to play on political battlefields dominated by lobbyists’ spin and corporate stratagems for manipulating public perceptions. The press, to which Thomas Jefferson entrusted the critical task of “informing the discretion” of the populace, is a crucially important and often disappointing resource of democratic governance, not least in the area of environmental law. This Essay surveys these problems and explores the potential for environmental lawyers to improve the relationships among environmental analysis, media, and societal governance at both the “micro” level of daily practice and “macro” level of national policy and law-making.

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*The free press is an absolute value not only because the unfettered flow of information is essential to the republican system, nor only because the fourth estate serves as a check on the power of the other three, but because public expression is necessary for the communal self-awareness that keeps the body politic alive. . . . The news media do for democracy what liturgy does for religion; what poetry does for experience; what gesture does for feeling. With words out of silence, the press tells you who you are.<sup>1</sup>*

## INTRODUCTION

In all modern industrial democracies, and perhaps especially today in this country, law and media are inextricably joined as two fundamental elements of the structure and process of societal governance. The volatility of decisional processes in the legislative and administrative spheres, the systemic role of public opinion polls, and the use of spin in modern governmental decisionmaking, all reflect the significance of perceived public opinion in shaping outcomes in the governance process.

Environmental analysis has also been defining for itself a fundamentally linked role in societal governance, whether or not that role is so recognized. Environmentalism is a strategically rational way of analyzing the changing and interrelated complexities of world conditions, with the hope of navigating our society—through science, law, and government—toward sustainable, long-term survival. Environmentalism is not a narrow, marginalized niche of tree-hugging hippy Luddites.<sup>2</sup> One need only think of global warming and hurricanes, escalating flood hazards caused by wetland destruction and unwise land-use patterns, increases in latent genetic and developmental health hazards, chemical reactions in human hormonal and immune systems, and the far-ranging effects of environmental pollution. For years, these and many other environmental concerns were dismissed

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<sup>1</sup> James Carroll, *The Fall of Bob Woodward*, BOSTON GLOBE, Nov. 21, 2005, at A15.

<sup>2</sup> Beginning in the 1970s, an industry-led political initiative to “take America back” from the perceived progressive excesses of the 1960s successfully constructed a movement of coalitions, think tanks, strategic alliances with evangelicals and others distressed by social disruptions, and media specialists to create the potent political force that took over national power in 2000. See THOMAS FRANK, WHAT’S THE MATTER WITH KANSAS: HOW CONSERVATIVES WON THE HEART OF AMERICA (2004); JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE RIGHT NATION (2004); Zygmunt J. B. Plater, *Dealing with Dumb and Dumber: The Continuing Mission of Citizen Environmentalism*, 20 J. ENVTL. & LITIG. 9 (2005). At the core of this resurgent political movement has been an insistent antiregulatory agenda, reflected in unprecedentedly broad initiatives to undercut environmental and other progressive regulatory protections that prior to the turn of the century had been consolidated into our legal system through forty or more years of bipartisan efforts.

by industry lobbyists and public relations agents as Chicken Little alarmism.<sup>3</sup> Now an avalanche of environmental science is receiving belated public recognition, signaling an inescapably broad, society-wide emphasis on the integration of environmental principles and analysis into public policy.

This Essay examines the relationships among law, media, and environmental analysis, analyzed from a generally public-interest *pro*-environmental protection perspective, at both the *macro* level of national and international concern—such as global warming and endocrine disruptors in national food supplies—and the *micro* level of on-the-ground lawyering in litigation and local governance.

### I. AT THE MICRO LEVEL: LAW, MEDIA, AND ENVIRONMENTALISM IN LOCAL PRACTICE

Consider *Escamilla v. ASARCO*, a classic but unreported law-of-neighbors-type 1993 pollution case from Colorado.<sup>4</sup> *Escamilla* arose in Globeville, a run-down, low-income, minority neighborhood in the northern fringes of Denver.<sup>5</sup> A number of polluting industries existed

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<sup>3</sup> Global warming is a good example. Environmentalists first began to analyze the greenhouse effect of carbon dioxide in 1978. One day in October 1978, Rafe Pomerance, then the young President of Friends of the Earth, burst into the organization's small Washington D.C. office after an informal briefing with RAND Corporation scientists, and shouted, "Hold onto your hats: Do you know what really's going to get us all? I've just learned: It's carbon dioxide!" Through Pomerance's efforts, reporter Phil Shabecoff of the *New York Times* was the first national journalist to research the story. But, as Chris Mooney notes, the oil, gas, and electric utility industries soon launched a climate change denial campaign which has persevered into the twenty-first century, characterizing the analyses linking global warming with carbon emissions as scientifically unsound radical extremism. See Chris Mooney, *Some Like It Hot*, MOTHER JONES, May-June 2005, at 36, 36 (noting how Exxon-Mobil funded more than forty advocacy groups and media task forces to discredit the science of global warming). For several weeks, even the *New York Times* hesitated about running Shabecoff's world scoop on global warming, finally printing it with no fanfare in the back pages of the paper. Interview with Philip Shabecoff, Reporter, N.Y. TIMES, at the Boston College Environmental Affairs Law Review Symposium, in Newton, Mass. (Oct. 6, 2005); see Philip Shabecoff, *Scientists Warn U.S. of Carbon Dioxide Peril*, N.Y. TIMES, July 10, 1979, at D7.

<sup>4</sup> See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW & POLICY: NATURE, LAW, & SOCIETY 169–70 (3d ed. 2004) (quoting *Escamilla v. ASARCO, Inc.*, No. 91-CV-5716 (D. Colo. Apr. 23, 1993)).

<sup>5</sup> PLATER ET AL., *supra* note 4, at 169; Deborah Houy, *Trial by Fire: Court Case Against Mining Company*, BUZZWORM, Jan.-Feb. 1994, at 24, 24. Globeville's population was comprised of 64% Hispanic, 9% Native American, 5% African American residents, and the remainder was largely Slavic in origin, comprised of low-income workers whose families had come to this country to work in the mines and smelters. Robin Chotzinoff, *Globeville Warming: Despite Recent Turf War, Residents Are Deeply Rooted in This Neighborhood*, DENVER WESTWORD, Dec. 6, 1995, at 17.

in and around the neighborhood, but the ASARCO smelter was the most notorious. Over the past seventy years it had been emitting arsenic, lead, electrolytic acids, cadmium, and other heavy metals into the air and soils surrounding the plant.<sup>6</sup> Each of these substances is toxic to human beings and other living things, and each substance is physically detrimental to real and personal property. The Globeville neighborhood was heavily polluted, particularly with toxic cadmium in dust form entering plaintiffs' homes and penetrating deep into the soils of their gardens and yards.<sup>7</sup> The contamination fostered a sense of stigma and powerlessness among the citizens of Globeville.<sup>8</sup>

The opposing parties in the Globeville contamination controversy were so disproportionately situated in terms of resources and political clout that it was likely that the plaintiffs would get little or no satisfaction from the official legal process.<sup>9</sup> The citizens were poor and under-represented.<sup>10</sup> The company was a major transnational corporation producing materials for the modern industrial economy.<sup>11</sup> The state and federal agencies regulating pollution were seemingly beset with inertia.

In their courtroom effort to halt and clean up ASARCO's pollution, the citizens were represented by a firm of public interest lawyers who not only had similarly limited resources and political clout, but also had a serious contextual litigation problem: although many community inhabitants exhibited fair to poor health profiles, there was a serious proof-of-causation problem. No clear cases of sicknesses could be readily attributed to ASARCO's pollution without impossibly expensive epidemiological studies.<sup>12</sup> Additionally, because Globeville

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<sup>6</sup> See PLATER ET AL., *supra* note 4, at 169; Jennifer L. Johnson, Comment, *Empowerment Lawyering: The Role of Trial Publicity in Environmental Justice*, 23 B.C. ENVTL. AFF. L. REV. 567, 590 (1996).

<sup>7</sup> See Chotzinoff, *supra* note 5, at 17.

<sup>8</sup> See Johnson, *supra* note 6, at 590–91.

<sup>9</sup> See *id.* at 590–91, 596.

<sup>10</sup> See *id.* at 590.

<sup>11</sup> See Chotzinoff, *supra* note 5, at 17. Cadmium has a wide variety of industrial uses, from paints to exotic alloys used in scientific and high technology applications. See Webelements, Cadmium, <http://www.webelements.com/webelements/elements/print/Cd/uses.html> (last visited Apr. 22, 2006).

<sup>12</sup> See PLATER ET AL., *supra* note 4, at 227. In this regard the Globeville case is typical of many localized toxic contamination cases, including the Woburn well-pollution litigation chronicled in Jonathan Harr's *A Civil Action* and the movie by the same name. In the Woburn litigation, because the trial judge polyfurcated the case, the plaintiffs never got to try their case on probable causation of leukemia and other health effects. See Albert P. Bedecarré, Comment, *Rule 42(b) Bifurcation at an Extreme: Polyfurcation of Liability Issues in Environmental Tort Cases*, 17 B.C. ENVTL. AFF. L. REV. 123, 145–47 (1989).

was a very poor community to begin with, the provable losses of property values attributable to the toxic pollution from ASARCO were relatively trivial.<sup>13</sup> The Globeville community suffered from exposure to potentially dangerous substances, and endured the stigma resulting from such exposure, due to its inability—both politically and economically—to assert effective claims for a clean environment.<sup>14</sup> The prospects for injunctive relief or substantial damage awards, however, appeared poor indeed.

The plaintiffs' attorneys adopted a novel legal approach by focusing on property contamination, and seeking a restoration remedy.<sup>15</sup> In addition to the small diminution of property values caused by contamination, the attorneys also sought actual cleanup costs—restoration of homes and lands in the neighborhood to an uncontaminated level.<sup>16</sup> Actual restoration of the neighborhood to its physical condition prior to contamination, including thorough sanitation of homes and replacement of all polluted soils, was a hugely expensive judicial remedy not at all justified by the relative market values—at least not in cost-benefit terms, or under normative principles of tort law.<sup>17</sup> In light of the social injustice befalling the Globeville residents, however, the attorneys sought to apply section 929 of the Restatement of Torts.<sup>18</sup> Sec-

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<sup>13</sup> See PLATER ET AL., *supra* note 4, at 170. The chances of shutting down ASARCO because of unproven health consequences and lowered property values in a community that was already at the bottom of the property value spectrum were low. The value of a contaminated home might be reduced from \$30,000 to \$25,000 in terms of comparative resale values. This kind of diminution was insignificant in comparison to the multimillion-dollar industrial complex, and was unlikely to result in an award of substantial damages, much less to persuade a court to shut down a contaminating operation. See *id.* To avoid the accusation that plaintiffs would enjoy a windfall with no real intent to remediate their property once restoration damages were paid, the *Escamilla* plaintiffs stipulated that members of the litigation who did not contract to remediate would receive damage awards discounted by forty percent. Ultimately, the parties agreed that ASARCO itself would do the neighborhood's physical remediation, resulting in an effective and faster restoration process that was much less costly to defendant. See ZYGMUNT J.B. PLATER ET AL., *TEACHER'S MANUAL FOR ENVIRONMENTAL LAW & POLICY* 65–67 (Supplementary Materials, 2d ed. 1998).

<sup>14</sup> See PLATER ET AL., *supra* note 4, at 169–70.

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See *id.* at 170.

<sup>18</sup> RESTATEMENT (SECOND) OF TORTS § 929(1)(a) prescribes, as to measure of damages:

[F]or harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for (a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, *the cost of restoration that has been or may be reasonably incurred . . .*

tion 929 could address the social realities of the case far better than standard tort law, and could achieve an expanded internalization of social costs—one of the fundamental strategies of modern environmental law.<sup>19</sup>

The Globeville plaintiffs' attorneys realized that media coverage would be strategically helpful, if not absolutely indispensable, for their innovative approach to be taken seriously.<sup>20</sup> Lacking significant funds to do scientific investigations and technological proofs, they had to leverage the dramatic victimization of a helpless, low-income community, in order to draw serious attention to their novel legal claims.<sup>21</sup> The plaintiffs' attorneys consciously shaped a constructive media strategy.<sup>22</sup> The goal was to project into public opinion an appreciation of the contrast between a huge transnational company, and the abject vulnerability of a low-income community of color, which was being forced to absorb the corporation's externalized pollution.<sup>23</sup> Drawing upon increasing public recognition that toxic emissions and toxic waste repositories were generally located in low-income communities of color, the attorneys emphasized the economic deprivations and racial characteristics of the plaintiffs' neighborhood to the media using the rhetoric of "environmental justice" and "environmental racism."<sup>24</sup>

ASARCO, the corporate defendant, reacted quickly to this media strategy.<sup>25</sup> On motion of defendant's counsel, the trial judge issued a gag order: plaintiffs' attorneys were not to mention that this was an environmental justice case with overtones of race and poverty.<sup>26</sup> In response, the plaintiffs' attorneys arranged for at least a dozen neighborhood residents to be present each day in the courtroom, sitting together in a highly visible group, naturally representing the minority

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• *Id.* (emphasis added).

<sup>19</sup> *See id.*

<sup>20</sup> *See Johnson, supra* note 6, at 596.

<sup>21</sup> *See id.* at 596–97.

<sup>22</sup> *See id.* at 590. The lead attorney was Macon Cowles, Jr., who has litigated a number of significant environmental cases involving air and water pollution and endangered wildlife.

<sup>23</sup> Telephone Interview with Macon Cowles, Jr., Globeville plaintiffs' lead attorney (Oct. 4, 2005); Telephone Interview with Susan Reardon O'Neal, Globeville plaintiffs' attorney (Jan. 1992).

<sup>24</sup> Telephone Interview with Macon Cowles, Jr., *supra* note 23; Telephone Interview with Susan Reardon O'Neal, *supra* note 23.

<sup>25</sup> *See Johnson, supra* note 6, at 591.

<sup>26</sup> Telephone Interview with Macon Cowles, Jr., *supra* note 23; Telephone Interview with Susan Reardon O'Neal, *supra* note 23.

and socioeconomic profile of the town.<sup>27</sup> Neither the jury nor the reporters watching the trial could fail to see the juxtaposition represented by the plaintiffs' confrontation with the smelter.

The *Escamilla* attorneys further recognized that exposure on the local evening news would help raise an atmosphere of criticism of the defendant's smelter.<sup>28</sup> The lead attorney, Macon Cowles, gave an interview to a local television reporter summarizing the case: "we are trying to potty-train a Fortune 500 company."<sup>29</sup>

This vivid and effective media quote immediately caught the attention of important editors and producers. The defendant corporation's attorneys, however, immediately filed a grievance in response to the quote.<sup>30</sup> According to ASARCO, the plaintiffs' attorneys were being unprofessional and defamatory.<sup>31</sup> Cowles's comments went beyond matters on the court record, which presumably had mentioned nothing about potties.<sup>32</sup> Such statements were prejudicial to the jury's consideration of the matter. If the neighborhood plaintiffs could find the means, defendant implied, they were welcome to hire a public relations staff to manage press coverage, as the industrial defendant had done. The plaintiffs' attorneys, however, could not in good practice act as press agents for the neighborhood by being spokespersons to the media.<sup>33</sup> The grievance was ultimately rejected, and the trial progressed, with the Globeville contamination becoming a long-running local media story.<sup>34</sup> Ultimately, the jury got the message, delivering a pioneering "restoration damages" award of approximately \$28 million, far in excess of the plaintiffs' actual market-value losses.<sup>35</sup>

## II. SOME OBSERVATIONS ON ENVIRONMENTAL LAW AND MEDIA AT THE MICRO LEVEL

Media coverage is almost always an affirmative element—and is sometimes an indispensable determinant—for public interest envi-

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<sup>27</sup> Telephone Interview with Macon Cowles, Jr., *supra* note 23; Telephone Interview with Susan Reardon O'Neal, *supra* note 23.

<sup>28</sup> See Johnson, *supra* note 6, at 596–97.

<sup>29</sup> Telephone Interview with Macon Cowles, Jr., *supra* note 23.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> In fact the costs awarded for restoration exceeded the total value of plaintiffs' property; however, the court nevertheless held that, in these circumstances, the sum was not excessive. PLATER ET AL., *supra* note 4, at 170.

ronmental attorneys in litigation, as well as for those doing legislative, administrative, and political work. This is as true at the local level as at the national level. Surveying a host of local environmental law cases in all three branches of government and in public education political initiatives,<sup>36</sup> in virtually every case there has been a sense of traction—of being taken seriously and building momentum—when press coverage gave these projects intelligent and timely coverage. Conversely, experience also shows that when environmental lawyers cannot persuade the press to examine their issues, or cannot persuade editors to stay with a story, they are often unable to build credibility and hold off the usually better-financed, more-established opponents of state and local environmental protection.

How can environmental attorneys maximize the likelihood of getting useful media treatment? They can prepare and communicate explanations of environmental cases and controversies with graphics and vivid explanations, in terms that will frame the issues for all audiences—ranging from reporters and aldermen to corporate officials, legislators, agency staffers, and the participants encountered in negotiations, judicial proceedings, and political settings. A well-made chart or strategically enlarged photograph hanging on an easel or wall can focus attention, frame issues, and shape the alternative outcomes under consideration. A clearly written exegesis of a controversy can draw attention to the core issue and to the weaknesses of opposing positions. The explanation should always be consolidated on paper in a form that can be handed out and carried away. Particularly effective graphic exhibits should not be presented only in the official forum, but should subsequently be made available in regular page-sized format for reporters as well as members of committees and juries. At one of the earliest state rulemaking hearings at which my students testified, a reporter angrily commented after the excellent testimony that “in the future you should tell them never to come to one of these hearings without a one-page handout that sets out some of the quotations they plan to say, and spells their names right.”<sup>37</sup> All media-based strategies for public interest causes should adopt this advice, and

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<sup>36</sup> My students and I have worked on issues including billboard removal, erosion and sedimentation controls, regulation of conflicts between fishermen and canoeists on congested rivers, industrial pollution, returnable bottles and beverage cans, land-use conflicts, mining and irrigation problems, state fisheries regulation, wetlands protections, park and recreation issues, among others.

<sup>37</sup> Interview with Glen Sheppard, Reporter, North Woods Call, in Lansing, Mich. (May 1974).

should also include at least one map, chart, or photo in the printed handout. Additionally, every complaint in a public interest environmental case should be drafted so that the first three or four paragraphs of the statement of the case would look suitable at the start of the Associated Press story on the case.<sup>38</sup>

At both the local and national level, the ability to frame the public image and context of each issue for the press—and, through the press, the legal process and the public—is an essential element of effective interaction with the media.<sup>39</sup> If, for instance, an environmental issue can be framed as “tree-hugging” by its opponents, the effect will be to undercut its credibility. If it can be framed as a matter of public health risk, it is likely to gain traction. If the story of the Globeville residents had been framed as “a group of plaintiffs with no provable health conditions and trivial property losses seek to extort unconscionable damages from a major local employer,” the public reaction would have been far different from the story as it was in fact framed: poor citizens of color, suffering decades of government neglect and overt, acknowledged, toxic pollution from a big company that refuses to take responsibility for its emissions.<sup>40</sup>

This use of framing issues to explain media and public reactions to civic issues reflects the realistic perceptions most recently explored by Professor George Lakoff and the Rockridge Institute.<sup>41</sup> Lakoff sug-

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<sup>38</sup> In arguing a case involving a small endangered fish against a purportedly significant federal agency dam, I supplied the clerk of the U.S. Supreme Court with several page-sized reproductions of a lithographed exhibit at trial, which depicted the fish as quite alive and attractive in its natural habitat. When the exhibit was mentioned during oral argument before the Court, the clerk jumped up and distributed a copy of the colored print to each Justice. For a judge to look into the eyes of this creature and sign its death warrant seemed much more difficult than if the case had been presented only in a context of verbal abstractions. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

<sup>39</sup> See George Lakoff, *Simple Framing: An Introduction to Framing and Its Use in Politics*, ROCKRIDGE INST., [http://www.rockridgeinstitute.org/projects/strategic/simple\\_framing/](http://www.rockridgeinstitute.org/projects/strategic/simple_framing/) (last visited Apr. 23, 2006).

<sup>40</sup> Had the issue been framed differently, the ultimate judgment likely would have been quite different as well. See PLATER ET AL., *supra* note 4, at 169–70.

<sup>41</sup> GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT! KNOW YOUR VALUES AND FRAME THE DEBATE: THE ESSENTIAL GUIDE FOR PROGRESSIVES (2004); see also Lakoff, *supra* note 39. Professor Lakoff studies how the industrial coalition that organized in the early 1970s with an agenda of building a conservative movement to take power in national politics consistently employed sophisticated techniques of word-spinning so as to make regressive policies seem quite progressive or benign. See generally LAKOFF, *supra*. He follows this framing technique through examples from the current administration's misleading labels for its regressive policies under monikers such as “Healthy Forests Initiative,” “No Child Left Behind,” “Clear Skies Initiative,” “Endangered Species Recovery,” and “tax relief” efforts. *Id.*

gests that the way issues in public forums are framed may ultimately be the most important element in determining the resolution.<sup>42</sup> Awareness and conscious planning of media communication is therefore a frequent necessity in shaping both local practice and national policy. A phone call to a reporter may often yield a fast response and resolution for what otherwise may have taken months to achieve under ordinary procedures.<sup>43</sup> Legal professionals working for the public interest must learn how to manage the broad spectrum of the media with greater sophistication.<sup>44</sup>

Some basic principles about the relationship between law and media apply equally well at the local level and the macro stage of national policy. For example, the process of daily governance at any level—local, state, national, or international—tends to be a process of contending forces.<sup>45</sup> Anyone who has practiced law in a political capital and has seen the process of lawmaking—for anything from agriculture to the tax code—has witnessed how the actual political players and true outcomes rarely resemble the fact-based, deliberative form of republican governance portrayed in eighth-grade civics books. The United States theoretically has a “di-polar” system. On the one hand, there are marketplace forces that produce dynamic economic activity and growth but also threaten public welfare.<sup>46</sup> On the other hand, government agencies and official structures are supposed to protect civic values and the public interest by maintaining vigilant monitoring and regulation of market failure situations.<sup>47</sup> Political scientists, however, note that over time, a “capture” phenomenon often occurs, in which the official players in the public agencies and the private marketplace structures they are supposed to regulate come together.<sup>48</sup>

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<sup>42</sup> See Lakoff, *supra* note 39.

<sup>43</sup> In working on a project to protect a valley, my students and I learned from an internal leak that the development agency we opposed was starting discussions on siting a regional toxic waste treatment facility in the project area, in order to stimulate revenues. Just one call to the local United Press International reporter, however, was sufficient to generate an avalanche of criticism that ended the ill-conceived proposal within a day. See Steve Holland, *Trading Away an Eagle Just to Get an Old Crow*, UNITED PRESS INT’L, Sept. 28, 1982.

<sup>44</sup> Professor Charlotte Ryan and John Stanton’s contributions to this Symposium detail some of the pathways for lawyers to develop media effectiveness. Charlotte Ryan & Samuel Alexander, “Reframing” the Presentation of Environmental Law and Policy, 33 B.C. ENVTL. AFF. L. REV. 563 (2006); John M. Stanton, *Environmental Attorneys and the Media: Guidelines for Effectiveness*, 33 B.C. ENVTL. AFF. L. REV. 593 (2006).

<sup>45</sup> See PLATER ET AL., *supra* note 4, at 80 (discussing how major policy issues are contested between blocs of established “insiders” and outsiders).

<sup>46</sup> *Id.* at 80–81.

<sup>47</sup> *Id.*

<sup>48</sup> See *id.* at 81, 401–02.

Left to their own devices, the public and private “official” players in the di-polar rubric are unlikely to sufficiently enforce the public interest, unless outsiders—members of the public—can effectively force counterpressures and counterarguments into the governing system.<sup>49</sup>

Since 1970, active citizen environmentalists have helped create a “multi-centric” governance process and have been a dominant contending force, pushing the creation and enforcement of environmental laws across a wide spectrum of legal processes.<sup>50</sup> The heady media eruption that greeted Rachel Carson’s *Silent Spring* and the early celebrations of Earth Day demonstrate how important media relations have been in this process.<sup>51</sup> These citizen environmentalists, whether individually or in public interest law firms, have almost always been outsiders with relatively few resources, but have nonetheless played a significant role, shifting America toward a more pluralistic democratic model.<sup>52</sup>

The environmental law evolution in the American legal process generally began very much at the micro level, with lawsuits at the community level, often based on public nuisance actions addressing local pollution issues as in *Escamilla v. ASARCO*.<sup>53</sup> From the very beginning, media coverage at the local as well as the national level was a critically important part of the development of environmental law, bringing a sense of legitimacy and practicality to efforts that a decade earlier would have been regarded as quixotic and illegitimate.<sup>54</sup> In modern governance generally, facts are vital to progressive outcomes, and if full public interest facts are widely perceived, it generally changes and improves the process of determining what will occur in the legal process of governance.

Questions of legal ethics, as well as issues of democratic governance, are raised by attorneys’ interactions with the media, particularly in the courtroom setting. As was the case in *Escamilla v. ASARCO*,<sup>55</sup> environmental attorneys’ use of the media in pollution litigation can indeed raise challenging questions of ethics and professional conduct.

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<sup>49</sup> See *id.* at 377–78.

<sup>50</sup> *Id.*

<sup>51</sup> See RACHEL CARSON, *SILENT SPRING* (1962). This book galvanized a strong media reaction that helped build a mass popular constituency for environmental protection, memorialized in the first Earth Day. See THEO COLBORN ET AL., *OUR STOLEN FUTURE* 51 (1997); PLATER ET AL., *supra* note 4, at 12–13.

<sup>52</sup> See PLATER ET AL., *supra* note 4, at 376–78.

<sup>53</sup> See *id.* at 104–07, 169–70.

<sup>54</sup> See PLATER ET AL., *supra* note 4, at 41–48.

<sup>55</sup> No. 91-CV-5716 (D. Colo. Apr. 23, 1993)

Under the then-current Colorado Rules of Professional Conduct, for example, it was not clear to what extent the Globeville plaintiffs' public interest attorneys could speak to the press on behalf of unempowered clients, beyond matters directly on the public record.

To what extent is it legitimate for attorneys to make conscious use of the media in the course of a trial? Litigation in modern American society is a function of public debate on a larger scale. Therefore, it can be argued that using media techniques to raise public awareness, so as to educate the public,<sup>56</sup> is both acceptable and inevitable. The media's marketplace of ideas, moreover, can indeed usefully function as a two-way street. For example, on several occasions media coverage of a contested issue encouraged members of the public to bring facts to the attention of the parties and the court that might never otherwise have been known; generally, such functions of media coverage are benign.<sup>57</sup>

But what about an attorney's use of media to "raise the consciousness" of the judge and jury? In cases of great public controversy, judges often order the sequestration of juries to insulate them from gaining information or slanted analysis from press coverage.<sup>58</sup> In most cases, however, the judge and jury are subjected to the full barrage of media coverage generated by a case, almost inevitably affecting their judgment, no matter how much the judge adjures all to reach decisions solely on the basis of the courtroom record.<sup>59</sup>

It is not considered improper for the press to convey voluminous coverage of a case, provided that the information is derived from listening to the official proceedings or from the media's own investigation. To what extent, however, is it improper for attorneys to feed this information and analysis, seeking to frame the facts and issues outside the courtroom, to encourage press coverage in one direction? The answer provided under the currently-prevailing codes and rules of professional ethics appears to be that environmental attorneys, acting on behalf of their clients and under the protections of the First Amendment, may comment on cases in a variety of situations beyond the official record—responding to contrary statements or offering information useful to public awareness of risks and other important concerns—provided that they do not pass an indistinct boundary of unprofessional conduct in

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<sup>56</sup> See MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 1 (2002).

<sup>57</sup> See *id.* R. 3.6(b).

<sup>58</sup> Gerald T. Wetherington et al., *Preparing for the High Profile Case: An Omnibus Treatment for Judges and Lawyers*, 51 FLA. L. REV. 425, 430, 478-79 (1999).

<sup>59</sup> See generally *id.*

“materially prejudicing” the court proceedings.<sup>60</sup> This is an unsatisfactory definition of boundaries, but it recognizes the reality that attorneys inevitably operate in a broader forum than the courtroom alone; reverberations of public opinion and public debate are an inevitable part of the process. Moreover, for attorneys representing public interest plaintiffs who lack economic resources, the option of hiring a public relations organization to present the plaintiffs’ case to the public is out of the question.<sup>61</sup> If the public interest attorney cannot present the complexities of the case to the media, in many cases no one in the community of plaintiffs will be able to do so effectively.<sup>62</sup>

Finally, it is important to note that throughout the history of environmental law, much of the media coverage that helped shape judicial decisions was generated by public interest environmental law groups. Whatever the ethics of shaping media coverage to affect a trial directly may be, it is clear that efforts of attorneys to shape a national atmosphere of reaction against environmental pollution is appropriate, inevitable, and quite effective.

### III. THE MACRO LEVEL: LAW, MEDIA, AND ENVIRONMENTALISM AT THE NATIONAL LEVEL AND BEYOND

The dynamic interplay between law, media, and environmental analysis seen in environmental cases at the local level similarly occurs at the national and international level. The early years of environmental protection law provide some dramatic examples.

The Allied Chemical Kepone disaster in the 1970s was a local story from Hopewell, Virginia that broke during a slow news week for the national press, and thus found a strategic moment for attracting media attention.<sup>63</sup> Allied Chemical had set up a small production fa-

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<sup>60</sup> See MODEL RULES OF PROF’L CONDUCT R. 3.6 & cmts. 1, 4, 6, 7.

<sup>61</sup> As in *Escamilla v. ASARCO, Inc.*, many public interest environmental controversies are characterized by a vast disparity in resources available to the parties. See *Escamilla v. ASARCO, Inc.*, No. 91-CV-5716 (Colo. Dist. Ct. Apr. 23, 1993).

<sup>62</sup> See Johnson, *supra* note 6, at 598–600.

<sup>63</sup> See PLATER ET AL., *supra* note 4, at 48–65; see also William Goldfarb, *Kepone: A Case Study*, 8 ENVTL. L. 645 (1978). The Kepone incident is scarcely visible in reported caselaw.

Within the limited case law reported, some details about the case can be gleaned from a Tax Court decision rejecting Allied’s attempt to write off an in-lieu-of-penalties contribution to an environmental trust fund. Personal injury cases such as *Gilbert v. Allied Chem.*, . . . never resulted in a reported decision. A federal criminal prosecution resulted in a court-ordered criminal settlement. A lawsuit filed by fishermen and seafood processors hurt by closure of the James River and Chesapeake Bay has interesting remedy issues, . . .

cility for processing its feed-stock chemicals to create an exportable pesticide, Kepone, a highly effective neurotoxin designed to kill potato beetles, but so dangerous to humans that it could not be licensed in the United States, even under the minimal standards prevailing prior to the 1970s.<sup>64</sup> In the Kepone facility, workers were regularly covered with toxic dust, carrying it home in their clothes to their families, where the dust could blow throughout the neighborhood, exposing children waiting at school bus stops and playing in the schoolyard.<sup>65</sup> Eventually, a foreign-born doctor, who was not part of the local medical establishment—which had been ignoring the health effects of Kepone for years—blew the whistle on Allied Chemical to the Centers for Disease Control in Atlanta.<sup>66</sup> The workers' blood samples showed higher Kepone toxicity levels than had ever been recorded in humans, along with evidence of sterility, organ failure, neurological damage, and acute breathing difficulties.<sup>67</sup>

As in *Escamilla v. ASARCO, Inc.*, the defendant chemical giant, a major employer in a part of the state that proudly called itself the “chemical capital of the South,” normally might not have responded to the workers' conditions.<sup>68</sup> Allied reassured all of the local politicians and the public that none of the workers' injuries had been scientifically traced to Kepone.<sup>69</sup> But then an army of reporters from New York showed America the intense exposures suffered by the workers and their families, the employer's casual disregard for safety, and company spokespersons' evasive interviews.<sup>70</sup> Video feeds of Kepone workers weeping at their kitchen tables as their bodies suffered involuntary

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but gives little background on the case. An OSHA administrative penalty case focuses primarily on whether Moore and Hundtofte were personally liable for penalties. A major retrospective symposium on the *Kepone* incident appears in [the University of Richmond Law Review] 29 U. Rich. L.Rev. 493 (1995).

PLATER ET AL., *supra* note 4, at 48 n.11 (citations omitted).

<sup>64</sup> PLATER ET AL., *supra* note 4, at 49–50. The satellite production facility was an uncanny precursor to the *maquiladora* industrial facilities that have sprung up just across the Mexican border since the passage of NAFTA, where American companies can save on labor costs and environmental compliance by moving their production into a much less stringent setting. *See id.* at 58.

<sup>65</sup> *Id.* at 54–55.

<sup>66</sup> *Id.* at 54.

<sup>67</sup> *Id.* at 54–55.

<sup>68</sup> *Id.* at 48, 57.

<sup>69</sup> *See* Goldfarb, *supra* note 63, at 645.

<sup>70</sup> In one famous incident, Allied complained that a CBS *60 Minutes* reporter had “entrapped” the company spokesman into revealing that Allied had long known of the poisonings and had done nothing to stop it. Telephone Interview with Robert Sand, Esq. (Feb. 1995).

convulsions touched a deep national nerve. Shortly after the media blitz began, the corporation decided to settle all claims without proceeding to trial.<sup>71</sup> In Congress, the Allied Kepone story played a critical role in the hearings that led to the passage of the federal Clean Water Act Amendments of 1977.<sup>72</sup>

Love Canal is another famous example of an early, national media occurrence that produced a direct and decisive effect on the framing of national environmental law.<sup>73</sup> A small group of neighbors was horrified to discover what was happening to their low-income community outside of Buffalo, New York.<sup>74</sup> An industrial waste dump filled with Hooker Chemical toxins was given to the city, which decided to re-use it as a schoolyard.<sup>75</sup> Toxic leachate began to seep up to the surface, burning children's skin, while plumes of subsurface contamination leached through the ground into basements throughout the community.<sup>76</sup> A neighborhood group, led by homemaker Lois Gibbs, managed to instigate national coverage for the story, and eventually even the White House was forced to take note.<sup>77</sup> Hooker Chemical was put on the defensive, and the entire chemical industry was tarred with the revelation that disposal practices over dozens of years had been reckless and sloppy, with an "out of sight, out of mind" approach.<sup>78</sup> Regardless of what the technical details of the arguments might have been,<sup>79</sup> Love Canal became a media magnet, drawing congressional attention and

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<sup>71</sup> PLATER ET AL., *supra* note 4, at 59.

<sup>72</sup> *Id.* at 57. In 1972, the Federal Water Pollution Control Act Amendments were passed with conspicuous gaps in coverage that were filled by the 1977 amendments creating the Clean Water Act. See William Goldfarb, *Changes in the Clean Water Act Since Kepone: Would They Have Made a Difference?*, 29 U. RICH. L. REV. 603, 612 (1995).

<sup>73</sup> See generally ADELINE GORDON LEVINE, *LOVE CANAL: SCIENCE, POLITICS, AND PEOPLE* (1982).

<sup>74</sup> *Id.* at 27–38.

<sup>75</sup> *Id.* at 11–13.

<sup>76</sup> See generally *id.*

<sup>77</sup> See *id.* at 30, 36–37, 61, 175.

<sup>78</sup> See *id.* at 10–11.

<sup>79</sup> Hooker Chemical argued that much of the waste had come from a U.S. Army military facility, not from their plant, and declared repeatedly that it had warned the local government of potential exposure hazards before it turned over the filled-in waste canal to the city. Associated Press, *Court to Examine Role of Army at Love Canal*, N.Y. TIMES, May 19, 1991, at 27. The local government's negligence led to putting a schoolyard atop the filled-in Love Canal. Cathy Trost, *Trading-Off at Hooker Chemical*, APF REPORTER, 1981, available at <http://www.aliciapatterson.org/APF0402/Trost/Trost.html>.

prompting the passage of several highly significant pieces of federal toxic control legislation.<sup>80</sup>

Starting in the early 1970s, the major federal development agencies faced significant public constraints upon their close business-as-usual relationships with industrial coalitions in fields such as timber, ranching, mining, irrigation, agriculture, highway construction, and oil and gas. Media coverage played an important role in applying those constraints. One particularly dramatic example on the national stage was the Bureau of Land Management's 1967 plan to dam the Colorado River within Grand Canyon National Park—a plan that would back the impounded waters of two reservoirs up through the Canyon.<sup>81</sup> By focusing on the imminent desecration of a national monument being driven by narrow commercial gain, environmentalists were successfully able to rally public opinion and political opposition. The public's dramatically negative reaction to the story led not only to the quashing of the federal agency plans, but also to strengthened public support for protecting wild places in their undeveloped condition.<sup>82</sup>

These examples and others like them show the underlying reality: media coverage is a behemoth. If the media covers a dramatic factual reality, the government process will be forced to respond.<sup>83</sup> In the three examples above, the official players—corporations, organized industry associations, and the federal agencies involved—start out with substantial advantages. Public interest environmental attorneys' ability to mobilize the media, with coverage that is vivid and persuasive, lev-

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<sup>80</sup> Leonard O. Townsend, Note, *Love Lies Bleeding: Brownfields in the New Millennium*, 11 FORDHAM ENVTL. L.J. 873, 874–77 (2000). The Love Canal fracas helped promote the passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1981. *See id.* at 875–76. In testimony before the Senate Finance Committee in 1980, EPA Administrator Douglas M. Costle specifically referenced “the continuing tragedy of Love Canal” as an example of the type of disaster that CERCLA might help prevent in the future. *See* Press Release, EPA, Costle Presses for Immediate Passage of Superfund (Sept. 11, 1980), available at <http://www.epa.gov/history/topics/cercla/03.htm>.

<sup>81</sup> *See generally* Scott K. Miller, *Undamming Glen Canyon: Lunacy, Rationality, or Prophecy*, 19 STAN. ENVTL. L.J. 121 (2000).

<sup>82</sup> Media played a crucial role in saving the Grand Canyon Plan impoundment. Full page ads ran in the *New York Times*. *Now Only You Can Save Grand Canyon from Being Flooded . . . for Profit*, N.Y. TIMES, June 9, 1966, at L35. The ad also ran on July 25, 1966. It is remarkable how the early era of populist environmentalism was not compartmentalized into single-issue categories, such as air, water, toxics, wildlife, and resource exploitation; rather, these issues were generally viewed as multiple manifestations of the same systemic syndrome. Popular reactions against one environmental problem often spilled over into activism on other environmental issues.

<sup>83</sup> *See supra* notes 64–82 and accompanying text.

els the playing field and allows the public debate to take place on more equal terms, despite the parties' dramatic disparity in resources.

The linkages among law, media, and environmentalism at the macro level is most readily seen in the legislative and administrative fora, but the media posture of an issue also likely impacts major judicial decisions. For example, early in the development of environmental law, milestone cases came before district court federal judges who had no prior exposure to the field, and had an inherent skepticism towards citizens challenging established federal and state agencies.<sup>84</sup> When the National Environmental Policy Act (NEPA) came into effect in 1970, for example, very few judges, not to mention President Richard Nixon who signed it, realized that it contained actionable legal requirements.<sup>85</sup>

To understand NEPA in this context, consider the case of *National Resources Defense Council v. Grant (Chicod Creek)*,<sup>86</sup> which arose from a standard situation of collusion between the Weyerhaeuser Corporation and the federal Soil Conservation Service (SCS)—a division within the Department of Agriculture, now called the Natural Resources Conservation Service—to drain ecologically valuable marshes and channelize a serpentine river, in order to produce more acreage for corporate yellow pine plantations.<sup>87</sup> Under Public Law 566, federal taxpayer dollars were regularly channeled into many such projects so marginal that no private owners would ever have spent their own money to construct them.<sup>88</sup> As in many cases, however, despite the protests of local sportsmen and farmers against the Chicod Creek channelization, the federal agency certified the project for funding.<sup>89</sup> The effect on wildlife would have been drastic, and many local farmers would have found their water tables lowered to such an extent, especially in the month of August, that they could not cultivate crops effectively without artificial irrigation.<sup>90</sup> Without environmental law intervention, moreover, there would have been no practical prospect for stopping such a project, despite the fact that it made neither economic nor ecological sense.<sup>91</sup>

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<sup>84</sup> See, e.g., *Natural Res. Def. Council v. Grant (Chicod Creek)*, 341 F. Supp. 356 (E.D.N.C. 1972); Confidential Interview with North Carolina Natural Resources Agency (1991).

<sup>85</sup> See PLATER ET AL., *supra* note 4, at 476–77.

<sup>86</sup> 341 F. Supp. at 356; see PLATER ET AL., *supra* note 4, at 479.

<sup>87</sup> See *Chicod Creek*, 341 F. Supp. at 362; see also PLATER ET AL., *supra* note 4, at 479–80.

<sup>88</sup> See PLATER ET AL., *supra* note 4, at 479.

<sup>89</sup> See *id.* at 506.

<sup>90</sup> Confidential Interview with North Carolina Natural Resources Agency, *supra* note 84.

<sup>91</sup> See PLATER ET AL., *supra* note 4, at 492–93 (discussing how NEPA enables litigation).

The *Chicod Creek* case was brought before Judge John Larkins, a senior member of the North Carolina federal judiciary.<sup>92</sup> Given his previous record, it may have been expected that he would defer to the official decision of the federal agency that is so closely linked to the state's agribusiness lobby. With environmentalism being heavily covered in the newspapers and on television, however, Judge Larkins—like judges all over the United States—had increased incentive to take this environmental confrontation seriously.<sup>93</sup> The operative provision of law—requiring an environmental impact statement for major federal action significantly affecting the environment—could well have been interpreted by courts all over the country as a mere technicality to be satisfied by whatever minimal “statement” a federal agency involved in a challenged program or project might wish to present to the court.<sup>94</sup> NEPA's legislative history clearly shows that Congress had not generally thought or wished that its provisions could be used to block ongoing pork barrel projects, which have been the lifeblood of legislative log-rolling since the 1820s.<sup>95</sup> Given the media's attention to the environment in the early 1970s, however, Judge Larkins was instead prompted and emboldened to treat the statutory provision as a meaningful formal requirement with which the federal agency had to comply, requiring sufficient detail to achieve the environmental analysis objective.<sup>96</sup> Despite protest from the SCS, Judge Larkins directed the agency to do an environmental impact statement, and then when it produced a conclusory, self-justifying statement long on reassurance and short on de-

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<sup>92</sup> See *Chicod Creek*, 341 F. Supp. at 359.

<sup>93</sup> See PLATER ET AL., *supra* note 4, at 483, 492, 503–04.

<sup>94</sup> National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(2)(c) (2000). For example, an early Bureau of Reclamation statement for a major project in Galveston, Texas merely said:

Palmetto Bend Project, Jackson County, Tex. Proposed construction of a 12.3-mile long, 64-foot high earthfill dam on the Navidad River. The purpose of the project is the supply of industrial and municipal water. Approximately 18,400 acres (11,300 of which will be inundated) will be committed to the project; 40 miles of free-flowing stream will be inundated; nine families will be displaced; fresh water inflow to the Matagorda estuary will be altered; fish and shellfish nursery areas will be impaired; habitat for such endangered species as the Texas red wolf, the American alligator, the Southern bald eagle, the Peregrine falcon, and the Attwater prairie chicken will be lost.

• PLATER ET AL., *supra* note 4, at 487–88. The Bureau subsequently realized that more was required, and the project was ultimately subjected to the formal environmental impact statement process. *Id.*

<sup>95</sup> See PLATER ET AL., *supra* note 4, at 476–78.

<sup>96</sup> See *Chicod Creek*, 341 F. Supp. at 368–69.

tails, Larkins rejected the impact statement and enjoined the channelization project, helping to establish a corpus of federal NEPA caselaw that made it one of the most effective environmental protection statutes in the world.<sup>97</sup>

A. *Counter-Reformation in the Politics of Environment, and  
Dissipation in Media Coverage*

Since the early days of the development of environmental law, the interest groups attempting to blunt environmental protection law have become far more successful in the media and public opinion realm than public interest representatives. Starting with the corporate strategy memorandum written by Judge Lewis Powell shortly before he was appointed to the Supreme Court in 1972, industrial coalitions in the United States have crafted a comprehensive and coherent media strategy to reverse the public perceptions of themselves and of their environmental critics.<sup>98</sup> In his memorandum to the U.S. Chamber of Commerce Judge Powell argued:

. . . [M]uch of the media—for varying motives and in varying degrees—either voluntarily accords unique publicity to these “attackers [of business]” or at least allows them to exploit the media for their purposes. This is especially true of television, which now plays such a predominant role in shaping the thinking, attitudes and emotions of our people. . . .

. . . .

Most of the media, including the national TV systems, are owned and theoretically controlled by corporations which depend upon profits, and the enterprise system to survive.

. . . .

[T]he time has come—indeed, it is long overdue—for the wisdom, ingenuity and resources of American business to be marshaled against those who would destroy it.

. . . .

. . . [I]ndependent and uncoordinated activity by individual corporations, as important as this is, will not be sufficient. Strength lies in organization, in careful long-range planning and implementation, in consistency of action over an

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<sup>97</sup> See *id.* at 369–70; PLATER ET AL., *supra* note 4, at 506–07.

<sup>98</sup> See Memorandum from Lewis Powell to Eugene B. Sydnor, Jr., Chairman, Education Committee, U.S. Chamber of Commerce (Aug. 23, 1971), *available at* <http://www2.bc.edu/%7Eplater/Newpublicsite05/02.5.pdf>.

indefinite period of years, in the scale of financing available only through joint effort, and in the political power available only through united action and national organizations.

....

[Business interests should develop a strategy to take back the media, including monitoring of] the national television networks . . . in the same way that textbooks should be kept under constant surveillance. This applies . . . to the daily “news analysis” which so often includes the most insidious type of criticism of the enterprise system. [This has caused] the gradual erosion of confidence in “business” and free enterprise.

This monitoring, to be effective, would require constant examination of the texts . . . of programs. Complaints—to the media and to the Federal Communications Commission—should be made promptly and strongly when programs are unfair or inaccurate.

Equal time should be demanded when appropriate. Effort should be made to see that the forum-type programs (the Today Show, Meet the Press, etc.) afford at least as much opportunity for supporters of the American system to participate as these programs do for those who attack it.

....

If American business devoted only 10% of its total annual advertising budget to this overall purpose, it would be a statesman-like expenditure.

....

[B]usiness and the [free] enterprise system are in deep trouble, and the hour is late.<sup>99</sup>

Spurred and guided by this 1972 memorandum, the corporate opponents of progressive civic regulations have monitored and complained of “liberal media bias,” and have developed a sophisticated two-pronged strategy to recapture media momentum in their areas of interest. On the one hand, they have sought to marginalize public interest groups as groups of hippy extremists, rather than representatives of what was perceived in the 1960s and 1970s as a very broad-based, public recognition of deficiencies in official structures of government and corporate America.

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<sup>99</sup> *Id.* at 1–12.

On the other hand, the regressive movement learned how to shape and target media coverage so as to blunt the arguments of public interest critics. They used the same media that shaped the progressive 1960s to blunt the next generation's progressive inclinations on contested issues. Today, according to some observers, up to eighty percent of the public policy-oriented news in the popular media comes from conservative spokespersons, many of them from corporate "think tanks" and other adversarial institutions created by regulated industry.<sup>100</sup> Citizen public interest initiatives have to deal with a media battleground where the insiders lobbying against environmental protection have limitless resources and know how to play the game.

Led by the oil and gas industries, and receiving additional money from mining, ranching, homebuilding, and corporate agriculture groups, conservative foundations have developed sophisticated media operations and now operate highly-coordinated campaigns over long periods of time, including the payment of large stipends to conservative authors for the production of pro-industry "news" columns and books.<sup>101</sup> The big, industry-oriented think tanks have fully-equipped television studios on premises, so that their "experts" can provide reporters on a deadline with sound bites that echo their sponsors' point of view.<sup>102</sup> Meanwhile, the consolidation of media has taken its toll on the press's public information role.<sup>103</sup> Coupled with the business-efficiency marketing model imposed on news departments, which never before had been required to be profit-generating divisions, the effect is to make the press far less aggressive in pursuing public interest cases. Led by Reed Irvine, ultraconservative activists successfully nurtured the cliché of a supposed "liberal media" bias to induce reporters to back off from vigilance and adversarial investigations of public interest issues. Whereas in the 1980s and 1990s many media outlets had environmental reporters as regular members of their staffs, environmental journalism today has been eroded dramatically in both print and electronic media.

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<sup>100</sup> LAKOFF, *supra* note 41, at 107.

<sup>101</sup> *Id.*; see Cathy Young, *Cleaning House on Opinions for Hire*, BOSTON GLOBE, Feb. 20, 2006, at A15 (discussing several disgraced columnists, including one who was paid \$60,000 by Monsanto Chemical for writing laudatory appraisals in a book on biotechnology).

<sup>102</sup> *Id.*

<sup>103</sup> Laurence Zuckerman, *Questions Abound as Media Influence Grows for a Handful*, N.Y. TIMES, Jan. 13, 2000, at C6 (noting that in 1983 more than fifty companies owned most of the nation's media outlets, but by 2000, this number was reduced to just six).

### B. *The Current Environmental Journalism Approach*

A number of examples from recent environmental stories demonstrate the drastic change in the media's approach of environmental journalism.

At four minutes after midnight, Friday, March 24, 1989, the M/S Exxon-Valdez grounded hard onto the granite spine of Bligh Reef in the Gulf of Alaska's Prince William Sound.<sup>104</sup> Over the next weeks, at least eleven million gallons of oil from the wrecked single-hulled tanker blew westward, fouling more than one thousand miles of the Alaska coast, destroying stocks of fish and other wildlife, and hitting the economy of the state with a major recession.<sup>105</sup>

Working with my students for the state of Alaska's oil spill investigative commission, it became clear that the cause of the oil spill disaster was far more than a captain with a drinking problem. The records from the years prior to the wreck indicated that the Alyeska oil consortium<sup>106</sup> and the Coast Guard—the federal agency with primary authority to regulate the safety and environmental compliance of the maritime oil trade—were constantly cutting back on safety measures and response capabilities to allow industry participants to save on operating costs.<sup>107</sup> In its report two years after the wreck, the state oil spill commission established that, owing to corporate and governmental “complacency,” the Exxon-Valdez spill had been an accident waiting to happen.<sup>108</sup>

With respect to this oil spill, however, the industry carefully manipulated the media coverage so that, despite hundreds of images of bedraggled birds and sealife, very few members of the public ever heard the moderated but highly critical conclusions of the official investigators.<sup>109</sup> Alyeska and Exxon rented virtually all the local seaworthy

<sup>104</sup> RIKI OTT, SOUND TRUTH AND CORPORATE MYTH\$: THE LEGACY OF THE EXXON VALDEZ OIL SPILL 6 (2005).

<sup>105</sup> *Id.* at 6–9.

<sup>106</sup> The Alaska Pipeline and the Port of Valdez tanker terminal are operated by a “consortium” of seven oil companies that avoid official partnership or conjoint corporate status. The consortium's dominant participant is British Petroleum (BP). See Gregory Palast, *Ten Years After but Who Was to Blame?*, GUARDIAN UNLIMITED, Mar. 21, 1999, available at <http://www.guardian.co.uk/Columnists/Column/0,,305529,00.html> (“Alaska's oil is BP oil. The company owns and controls a majority of the Alaska Pipeline system, the consortium called ‘Alyeska.’ Exxon is a junior partner, and four others are just along for the ride.”).

<sup>107</sup> See Zygmunt J.B. Plater, *Facing a Time of Counter-Revolution—The Kepone Incident and a Review of First Principles*, 29 U. RICH. L. REV. 657, 672–73 (1995).

<sup>108</sup> See *id.* at 672.

<sup>109</sup> See OTT, *supra* note 104, at 8–9; Palast, *supra* note 106.

boats so that reporters could not make independent, on-site inspections of the oiled areas in the sound.<sup>110</sup> The media had to rely on officially sanctioned tours, which were careful to show conscientious cleanup operations, and provided interviews with people who would not talk about the systemic failures that produced the accident in the first place.<sup>111</sup> The cleanup of beaches with hot water and chemical emulsifiers was designed to make the visible oil go away, even though scientists desperately urged that the harsh surfactants were far more likely than the oil to damage the subsurface ecology of the beaches and the water column.<sup>112</sup> Public attention instead was directed to a running series of revelations about Captain Hazelwood's drinking problems over the years and in the hours prior to the tanker's departure from Port Valdez.<sup>113</sup>

The clear implications of the oil spill story, as it was framed, were that the spill was the fault of this captain, but that when the oil was no longer visible the disaster would be resolved and America could move on. The facts and the scientific realities—that the Exxon-Valdez spill resulted from systemic problems linked to corporate and agency cupidity, and that the oil and cleanup chemicals released into the environment would have severe, longterm effects on natural ecosystems and on closely affected human beings<sup>114</sup>—have been lost in the smog of spin. In the minds of most of the American public, and thus in the responses of government at both state and federal levels, the Exxon-Valdez oil spill is a story of a drunken captain, and nothing more.<sup>115</sup>

As another example, in many parts of the country, and particularly in the Pacific Northwest, forest clearcutting is one of the most drastic technologies for exploiting natural resources.<sup>116</sup> Particularly

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<sup>110</sup> See Plater, *supra* note 107, at 671 n.31 (referencing the fact that the consortium limited reporter access to the oil spill disaster sites).

<sup>111</sup> See OTT, *supra* note 104, at 8.

<sup>112</sup> For a comprehensive account of the Exxon-Valdez Oil Spill and its consequences, see generally OTT, *supra* note 104.

<sup>113</sup> See, e.g., Carol Agus, *And Speaking of Drinking*, NEWSDAY, Sept. 4, 1991, at 4.

<sup>114</sup> On one of my flights back from Alaska, I sat next to a worker who had been forced, as he said many others had, to leave the cleanup area because the chemicals they were spraying were causing them to start peeing blood. See also OTT, *supra* note 104, at 52. The harm to humans working to clean up the visible oil on the rocky beaches has been vociferously denied by the oil industry, but is chronicled in Ott's book. *Id.* at 21–181.

<sup>115</sup> See Agus, *supra* note 113; Reuters Media, *supra* note 113.

<sup>116</sup> Clearcutting has recently increased in the hills of the southeastern United States and many parts of the Mississippi and Atlantic drainages, which may be related to increased flooding conditions in these areas, though the correlation is at present only conjecture.

on publicly owned lands, timber companies cut all the living trees in a strand of forest, and, after removing all usable wood, burn the “slash” that remains.<sup>117</sup> The consequence is an ecological nightmare. The number and diversity of native species—an accurate measure of the health of a natural environment—drop dramatically.<sup>118</sup> There are many consequences beyond the clearcut acreage as well, with one of the most drastic being rapid erosive runoff, causing river valleys to fill with silt, sand, and stones, increasing the speed, height, and severity of later downstream flooding.<sup>119</sup> In February 1996, the states of Oregon and Washington experienced extremely severe flooding, with whole villages inundated and homes swept downstream, resulting in a number of fatalities.<sup>120</sup> Flood coverage saturated the media. Yet despite the efforts of environmentalists to link the floods to upstream clearcutting practices that had turned many fragile mountain ecosystems of the Northwest into eroded moonscapes, the national media consistently reported the floods as acts of God. The media failed to consider the contribution to flooding from the widespread upstream forestry practices that, in hydrological terms, were clearly responsible for a substantial portion of the disasters.<sup>121</sup>

The Bush Administration too has repeatedly offered paradigmatic examples of how media can be carefully stewarded to project public messages that are the antithesis of the underlying reality. A leaked copy of the memorandum prepared by GOP consultant Frank Luntz, released in 2003, makes clear how consciously the agenda of cutting back on environmental protection was to be portrayed to the public in the form of opposite illusions.<sup>122</sup> Thus, the administration presents

<sup>117</sup> Zygmunt J.B. Plater, *From the Beginning, a Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981, 985 n.10 (1994).

<sup>118</sup> *Id.*; see also COMM. ON ENVTL. ISSUES IN PACIFIC NW. FOREST MGMT., NAT’L RESEARCH COUNCIL, ENVIRONMENTAL ISSUES IN PACIFIC NORTHWEST FOREST MANAGEMENT 63 (2000); T.D. Schowalter, *Canopy Arthropod Community Structure and Herbivory in Old-Growth and Regenerating Forests in Western Oregon*, 19 CANADIAN J. FOREST RES. 318–22 (1989); T.D. Schowalter, *Canopy Arthropod Communities in Relation to Forest Age and Alternative Harvest Practices in Western Oregon*, 78 FOREST ECOLOGY & MGMT. 115–25 (1995).

<sup>119</sup> Plater, *supra* note 117, at 985–86.

<sup>120</sup> Associated Press, *Oregon Awash in Water World Flooding Brings Death, Destruction*, ST. LOUIS POST-DISPATCH, Feb. 9, 1996, at 3A, available at 1996 WNLR 805316 (Westlaw).

<sup>121</sup> See, e.g., Jennifer Bjorhus et al., *Four Dead in Two States River Rage—But Forecast Calls for Sun*, SEATTLE TIMES, Feb. 9, 1996, at A1, available at <http://archives.seattletimes.nwsourc.com/cgi-bin/texis.cgi/web/vortex/display?slug=2313316&date=19960209&query=bjorhus>.

<sup>122</sup> See Memorandum from Frank Luntz (2002), available at [http://www.ewg.org/briefings/luntzmemo/pdf/LuntzResearch\\_environment.pdf](http://www.ewg.org/briefings/luntzmemo/pdf/LuntzResearch_environment.pdf). The pages available from the leaked memorandum were only 16 of at least 140 pages, but contained dramatic examples of how

the “Clear Skies Initiative,” the “Healthy Forest Initiative,” the “Endangered Species Recovery” bill, and the like. Faced with the avalanche of technical changes undercutting federal environmental protections, and uncertain about the facts, the press tends to report the administration’s explanations for its anti-environmental actions with limited critical analysis, and often with merely a perfunctory quote from an environmental spokesperson saying that the initiative may be environmentally harmful.<sup>123</sup>

The media’s inertia and general failure to focus on the current unprecedented initiatives against environmental protection has been accomplished in part by the current administration’s conscious decision to do most of its anti-environmental work outside the legislative forum, in the less-visible realms of out-of-court settlements and manipulative tinkering with administrative rules definitions and enforcement procedures.<sup>124</sup>

The current administration has learned the lessons of history.<sup>125</sup> In its assault on environmental statutes in the 1980s, the Reagan Administration tried to undercut existing laws primarily on the floor of Congress, and largely failed because of insistent media coverage and the legislative opposition it rallied.<sup>126</sup> In Newt Gingrich’s 104th Congress under the “Contract with America,” the massive corporate initiatives against environmental law were again mostly legislative, and again were repulsed by strong leadership, particularly in the Senate by Republican John Chafee.<sup>127</sup>

Now, however, in the ongoing third and most comprehensive assault against environmental protection laws,<sup>128</sup> the current admini-

Mr. Luntz, the consultant who came up with the idea for the “Contract with America,” advised how to blunt public reactions to the Bush Administration’s weakening of protections against toxics, and undermined public confidence in the science of global warming. *See id.* at 137.

<sup>123</sup> *See, e.g.,* Katharine Q. Seelye, *Bush Proposes Change to Allow More Thinning of Forests*, N.Y. TIMES, Dec. 12, 2002, at A32 (“They make no bones about their attempt to exempt from environmental review whatever they say is going to be beneficial.” (quoting Niel Lawrence, Natural Resources Defense Council)).

<sup>124</sup> The 104th Congress’ “Contract with America” focused on the legislative forum, and was substantially blocked by media criticism, as well as a courageous stand in the Senate by Senators such as the late Rhode Island Republican Senator John Chafee.

<sup>125</sup> For an analytical history of assaults on federal environmental protection, see generally Plater, *supra* note 2; *see also supra* notes 89–98 and accompanying text.

<sup>126</sup> Richard J. Lazarus, *A Different Kind of “Republican Moment” in Environmental Law*, 87 MINN. L. REV. 999, 1027–30 (2003).

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

<sup>128</sup> The Natural Resources Defense Council (NRDC) continually updates its website cataloging the current Bush Administration’s ongoing initiatives against environmental

stration has acted largely through low-visibility shifts in regulatory definitions and procedures, as well as through litigation settlement strategies.<sup>129</sup> Consider, for example, the administration's undercutting of the standards and enforcement of the Clean Air Act's retrofitting requirements by defining the terms "maintenance" and "modification" to exempt major factory reconstructions from being held to the more stringent requirements of new sources.<sup>130</sup> In the realm of litigation, the administration welcomes erosive courtroom attacks on preexisting federal regulations by regulated industries, and then fails to defend the regulations against claims that they were illegal, unconstitutional, or lacking in factual support.<sup>131</sup>

For example, the Boise Cascade timber and paper corporation attacked a Clinton Administration regulation protecting the wilderness status of forests in Utah and in the Northern Rockies by arguing that the designations were invalid because they had not been accompanied by environmental impact statements.<sup>132</sup> When the case was called for trial, the Bush Administration attorney in the courtroom refused to even enter an appearance in defense of the federal regulation, at which point an environmental attorney successfully requested intervention to present arguments defending the federal government's own regulation against invalidation.<sup>133</sup> In most stories involving such collusive capitulations by the federal authorities, however, environmental attorneys were not in a position to intervene. In a number of these cases, regulations have been struck down by district courts and have been subsequently tabled on a nationwide basis by the administration.<sup>134</sup> An extraordinary

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protection laws. Natural Resources Defense Council, *The Bush Record*, <http://www.nrdc.org/bushrecord> (last visited Apr. 23, 2006).

<sup>129</sup> See *id.*

<sup>130</sup> NRDC documents the assault. See, e.g., Natural Resources Defense Council, *The EPA's Changes to New Source Review: The Bush Administration's Proposal to Weaken the Clean Air Act Threatens Public Health, Undermines State Authority, and Caves to Polluters*, <http://www.nrdc.org/air/pollution/pnsr.asp> (last visited Apr. 23, 2006).

<sup>131</sup> Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 14 DUKE ENVTL. L. & POL'Y F. 363, 394-401 (2004).

<sup>132</sup> See *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1106, 1116-17 (9th Cir. 2002); see also Parenteau, *supra* note 131, at 395.

<sup>133</sup> *Kootenai Tribe*, 313 F.3d at 1108; Parenteau, *supra* note 131, at 395-97.

<sup>134</sup> Alternatively, the federal government and the challenging entity enter into an out-of-court agreement that the regulation will no longer be enforced. Parenteau, *supra* note 131, at 394-401. In *Kootenai Tribe*, the environmental attorney, Professor Patrick Parenteau, took the case to the Ninth Circuit Court of Appeals and successfully defended the federal regulation, despite the federal government's desire not to defend it. In other cases, however, long-established regulations have been neutered by the administration's strategy. See *Kootenai Tribe*, 313 F.3d at 1108.

aspect of this occurrence of widespread “collusive capitulation” is the almost complete failure of the media to note this dramatic phenomenon, and how it has undercut environmental law.

More recent examples come from the climatic disasters of 2005. Hurricanes Katrina and Rita focused the attention of the public through intense media coverage of terrible scenes of storm damage in the deep and middle South. Criticism of the administration’s federal emergency management procedures began even before the hurricanes hit.<sup>135</sup> In the storms’ aftermath, realizing the power of public shock and empathy, the administration quickly attempted to deflect media attention onto the environmental movement, seeking both to deflect criticism of its own performance and to accomplish further erosions of environmental regulations. A request went out from the White House through the Department of Justice to U.S. Attorney Offices around the country, asking them to find examples where environmental litigation might have blocked flood-control projects.<sup>136</sup> Soon, the White House-guided media, and the Fox network in particular, was blaming the “Green Left” for the depredations of Hurricane Katrina.<sup>137</sup> It was argued that, in 1976, an environmental group had successfully gone to court to block a levee-building project in a stretch of Louisiana waterfront that could have saved New Orleans.<sup>138</sup> The media reported those

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<sup>135</sup> A CNN interview is representative of this criticism:

CNN Reporter: Are your teams, is FEMA ready for this? . . .

FEMA’s Michael Brown: Well, we have been taxed. . . . But let me say to a whole bunch of critics. We are ready. We’re going to respond and we’re going to do exactly what we did in Florida and Alabama and the other places. We’re going to do whatever it takes to help victims. That’s why we’ve already declared an emergency. President Bush had no reservations about doing that.

*State of Emergency Declared in Louisiana* (CNN television broadcast, August 28, 2005) available at <http://transcripts.cnn.com/TRANSCRIPTS/0508/28/bn.03.html>.

<sup>136</sup> “The Department of Justice emailed field offices asking for evidence of ‘claims brought by environmental groups’ against other Corps projects to protect New Orleans.” David Schoenbrod, *The Lawsuit that Sank New Orleans*, WALL ST. J., Sept. 26, 2005, at A18.

<sup>137</sup> See Michael Tremoglie, *New Orleans: A Green Genocide*, FRONTPAGEMAGAZINE.COM, Sept. 8, 2005, <http://frontpagemagazine.com/Articles/Printable.asp?ID=19418>.

<sup>138</sup> *Save Our Wetlands, Inc. v. Rush*, 424 F. Supp. 354 (E.D. La. 1976); see, e.g., John Berlau, *Greens vs. Levees*, NAT’L REV. ONLINE, Sept. 8, 2005, <http://www.nationalreview.com/comment/berlau200509080824.asp>; R. Emmett Tyrrell, Jr., *Eco-Catastrophe Echoes*, WASH. TIMES, Sept. 16, 2005, at A19.

As radical environmentalists continue to blame the ferocity of Hurricane Katrina’s devastation on President Bush’s ecological policies, a mainstream Louisiana media outlet inadvertently disclosed a shocking fact: Environmentalist activists were responsible for spiking a plan that may have saved New Orleans. Decades ago, the Green Left—pursuing its agenda of valuing wetlands and

press releases as if they constituted legitimate news, without investigating the particulars, despite the fact that engineers and environmental law professors quickly produced a factual analysis showing that the criticized litigation did not block control efforts in the subject area, but rather forced the choice of a preferable and more effective alternative.<sup>139</sup> The conservative media nevertheless continued to imply that environmentalists, rather than federal and state lassitude, bear significant blame for the disasters in Louisiana and Mississippi.

Even more representative of the current dysfunction of environmental media is the use of hurricane shock to justify and shield direct assaults on environmental statutes.<sup>140</sup> Several statutory exemptions were immediately implemented without any showing of emergency necessity.<sup>141</sup> Under the cover of public and media preoccupation with the hurricane disasters, moreover, Representative Richard Pombo, a long-standing foe of environmental protection laws, took advantage by advancing low-visibility efforts to undercut two of the most significant federal environmental laws, NEPA and the Endangered Species Act (ESA).<sup>142</sup> The taskforce in the House Committee on Resources had

topographical “diversity” over human life—sued to prevent the Army Corps of Engineers from building floodgates that would have prevented significant flooding . . .

Tremoglie, *supra* note 137, at 1. “Congress OK’d a project to protect New Orleans 40 years ago, but an environmentalist suit halted it.” Ralph Vartabedian & Peter Pae, *A Barrier That Could Have Been*, L.A. TIMES, Sept. 9, 2005, at A10.

A panel of environmental law experts studied the New Orleans flooding and its relationship to prior environmental cases, finding that the cause-and-effect claims were wholly unfounded. See Donald T. Hornstein, et al., *Broken Levees: Why They Failed*, available at [http://www.progressiveregulation.org/articles/CPR\\_special\\_Levee\\_Report.pdf](http://www.progressiveregulation.org/articles/CPR_special_Levee_Report.pdf) (last visited Apr. 23, 2006).

<sup>139</sup> Hornstein et al., *supra* note 138, at 3–6. However, neither of the alternatives being litigated had been designed to handle a Category 5 hurricane, which Katrina was thought to be. *Id.* at 1. Despite the environmentalists’ desire to have NEPA analysis based on “worst case analysis,” the Corps of Engineers generally designed its projects only to control a Category 3 hurricane or weaker. PLATER ET AL., *supra* note 4, at 508.

<sup>140</sup> See, e.g., Threatened and Endangered Species Recovery Act of 2005, H.R. 3824, 109th Cong. (2005) (as passed by House, Sept. 30, 2005).

<sup>141</sup> NRDC’s “Media Watch” documents attempts by Congress and the administration to use Katrina and the need to rebuild as justification for waiving environmental protections. In the aftermath of the hurricane, EPA drafted legislation that would allow it to waive provisions of the Clean Air Act, including those concerning toxic emissions and health-based air quality standards nationwide, without public notice or comment if the administration declares an emergency. See Press Release, Natural Resources Defense Council, White House, Congress Exploiting Hurricane to Weaken Health, Environmental Protections (Sept. 22, 2005), available at <http://www.nrdc.org/media/pressreleases/050922a.asp>.

<sup>142</sup> See H.R. 3824.

been accumulating industry complaints against NEPA prior to the hurricanes, with the goal of making amendments to dilute NEPA's environmental impact statement requirement. Once the hurricane struck, Representative Pombo quickly drafted a second bill to undercut significant sectors of the ESA as well.<sup>143</sup> With no prior publicity, he introduced the bill, held an afternoon hearing two days later, and within ten days brought the bill to the floor, where it passed with only desultory notice in a chamber preoccupied with hurricane disaster relief.<sup>144</sup> The media could have made quite a story out of Pombo, his bills, and the surprising speed and obscurity of the ESA bill he brought to the floor.<sup>145</sup> The media, however, barely noticed the maneuver, and despite environmentalists' dismayed criticism of the ghoulish opportunism under cover of disaster, no media outlet thought it worthy of investigation.

One final example is illustrative of these trends. Working with my students, I spent seven years in a major battle trying to secure the federal ESA and apply it to an ill-considered Tennessee Valley Authority dam project. The diminutive Tellico Dam project was a proposal to condemn more than 300 family farms for a recreational reservoir and land development, with no electric generators, eliminating the last thirty-three miles of flowing, high-quality water left in the eastern Tennessee River system.<sup>146</sup> Over the seven years, the local citizens ultimately showed not only the illegality of the project under ESA, but also demonstrated its dramatically uneconomic cost-benefit merits; they made it clear that public resources would be far better invested in a river-based program, with sixty square miles of agricultural land returned to farmers.<sup>147</sup>

The problem with the Tellico Dam controversy was not that the media failed to run stories on the conflict between the dam and a diminutive endangered snail darter fish. Rather, it was that the media sys-

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<sup>143</sup> *See id.*

<sup>144</sup> *Id.*

<sup>145</sup> Media coverage of Mr. Pombo could have been built on the record of his 1995 hearings against the ESA held around the nation, where orchestrated crowds of ranchers, irrigators, timber industry workers, and others were encouraged to vilify the law and environmentalists, in one case driving to tears a class of third-graders and their teacher. They had come to testify that, with careful and empathic planning in cooperation with ranchers, cattle could coexist with endangered fairy shrimp living in local streams. *See* Hanna Rosin, *Fern Trampling*, NEW REPUBLIC, July 3, 1995, at 12.

<sup>146</sup> *See* Zygmunt J.B. Plater, *The Snail Darter, The Tellico Dam, and Sustainable Democracy—Lessons For the President From a Classic Environmental Law Controversy*, 2001 Mercer Law School Internet Virtual Lecture Series (Feb. 12, 2001), <http://www.law.mercer.edu/elaw/zygplater.html>.

<sup>147</sup> *See id.*

tematically got the story wrong, mischaracterizing the litigation as extremism.<sup>148</sup> As covered in the press, the story was a misbegotten version of David and Goliath, a “three-inch minnow” counterpoised against a “huge federal hydroelectric dam,” with the subtext that, in this iteration, David was illegitimate.<sup>149</sup> Despite the citizens’ best efforts—a relentless series of press packets, press conferences for farmers to tell the true story, letters to editors, and calls to more than 120 reporters—the sobering, impressive facts of the snail darter’s economic case were never covered in the national media. No investigative reporter ever went to Tennessee and reported on the merits of the dam project, even though the story was one of the three most-covered environmental media stories in that decade, and despite the fact that a cabinet-level committee had unanimously concluded that the project was not worth completing in economic terms.<sup>150</sup> From the beginning, the citizen plaintiffs were unsuccessful in framing the story on its actual terms, and the prodevelopment, anti-environmental forces in Washington and nationally were able to use the miscaricature of the putatively ridiculous endangered fish to undercut the legal case in Congress, and to scare President Carter into withdrawing his promise to veto the rider that ordered the finishing of the dam and the elimination of the farmlands and the ecosystems of the Little Tennessee River Valley.<sup>151</sup>

So many of these modern stories present a common puzzle—where is the liberal media? Most often, the problem is not media bias, but rather that many important environmental stories are barely covered or are not covered at all. As Dean John Garvey noted in his introductory comments to this symposium, the modern environmental media often offers a new take on an old philosophical question “if a

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<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

<sup>150</sup> After an exhaustive review of cost-benefit calculations when the dam was almost completed, the verdict was dramatic: “The interesting phenomenon is that here is a project that is 95 percent complete, and if one takes just the cost of finishing it against the [total] benefits, and does it properly, it doesn’t pay, which says something about the original design!” Charles Schultz, Chairman, Council on Economic Advisers, Endangered Species Committee, Tellico Dam and Reservoir Project 25–26 (1979) (on file with author).

According to a journalism professor at the University of Michigan who analyzed environmental news coverage in that decade, the Tennessee Valley Authority’s Tellico Dam story was one of three top environmental stories in terms of national news coverage, along with Love Canal and the Alaska Lands congressional decisional process. Almost all the coverage, however, was superficial. See Zygmunt J.B. Plater, Essay, *Law and the Fourth Estate: Endangered Nature, the Press, and the Dickey Game of Democratic Governance*, 32 ENVTL. L. 1, 1 (2002).

<sup>151</sup> See Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences*, 19 U. MICH. J.L. REFORM 805, 813–14 (1986).

tree is cut down in a wilderness area and no one puts it on CNN, has it really happened?"<sup>152</sup>

The media in the United States has a high calling. As Thomas Jefferson wrote in 1820, "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion . . . ." <sup>153</sup>

In our democratic system as it exists today, the virtually exclusive source of material to "inform the discretion of the people" on current events is the media. The shared experience of our national media, moreover, is part of what makes our nation a democratic community.<sup>154</sup> The media is thus arguably the primary source of information for our system of democratic governance. What the media brings into focus will be taken into account in the halls of government because the governors know it is being perceived by the public. Near the end of the battles over the Tellico Dam, all the Members of Congress had a final opportunity to vote on the merits of the case, which, by then, were clear on the official record. Each Member received a letter from the Secretary of Interior as Chairman of the congressionally mandated cabinet-level review committee detailing its findings and unanimous conclusion that the flowing river was still economically preferable to the reservoir. The Senators and Representatives could uphold the law, the Supreme

<sup>152</sup> John Garvey, Dean, Boston College Law School, Introductory Remarks at the Boston College Environmental Affairs Law Review Symposium: Environmental Law's Path Through the 4th Estate: Environmental Law and the Media (Oct. 6, 2005).

<sup>153</sup> Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in 10 THE WRITINGS OF THOMAS JEFFERSON 161 (Paul Leicester Ford ed., 1899).

<sup>154</sup> See *id.*

The free press is an absolute value not only because the unfettered flow of information is essential to the republican system, nor only because the fourth estate serves as a check on the power of the other three, but because public expression is necessary for the communal self-awareness that keeps the body politic alive. You routinely turn to the newspaper each morning not only to learn what happened, but to stroke the otherwise intangible bond you share with the neighbors and strangers in whose company you will spend the day.

Reading the morning paper is like tagging up, a literal "touching wood," a dispelling of the darkness of night, all done in the knowledge that everyone else is doing the same thing, which gives you not only a place to start the day from, but a reassurance that you are not alone in your concern for the common good. The news media do for democracy what liturgy does for religion; what poetry does for experience; what gesture does for feeling. With words out of silence, the press tells you who you are.

- Carroll, *supra* note 1, at A15.

Court's injunction, and the review committee's record, or they could override the law and allow an economically dysfunctional project, pushed by the pork barrel, to roll on, unhindered. The legislators voted by a wide margin in the House and a narrower margin in the Senate to go with the pork barrel and override the law.<sup>155</sup> The problem was not that the Members of Congress did not know the economic facts, but that *they knew that the American public did not know*, and were therefore able to go along with the usual insider pork barrel process.<sup>156</sup> It is therefore not only disappointing, but also dangerous in a constitutional sense, if the media does not inform the public, in a timely fashion, of the facts and issues that are contending in the legislative forum.

#### IV. MODERN ENVIRONMENTAL MEDIA COVERAGE: WHY THE SHORTFALL?

The problem revealed by these and many other environmental law controversies is that, even though an issue has extreme public importance, the media may not cover the story, or it may cover the story and frame it in a way that hides the public interest, as when the industrial lobbies' press offices spin and frame a story so as to minimize the merits of the issue.<sup>157</sup> In some cases, the media picks up a story but drops it too soon, abandoning it before the decisive moment of an agency hearing, a committee markup, or a vote on the floor.<sup>158</sup> At

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<sup>155</sup> See Zygmunt J.B. Plater, 'Those Who Care About Laws and Sausages Shouldn't Watch Them Being Made,' L.A. TIMES, Sept. 2, 1979, § V, at 5.

<sup>156</sup> See *id.*

<sup>157</sup> See *supra* notes 41–52 and accompanying text.

<sup>158</sup> My students and I worked on an initiative to regulate advertising billboards along state highways in Michigan. The billboard lobby is typically very powerful in state capitals; in this case, to avoid meaningful regulatory constraints, the billboard lobbyists were seeking quick passage of a preemptive bill, Senate Bill 517, that, under the guise of regulation, would specifically allow high-density billboarding, and set maximum billboard sizes at more than 6000 square feet. On the day of the Senate vote, a large group of students, including volunteers from the University of Michigan School of Engineering, traveled up to Lansing and erected a 3000 square foot sign on the capitol lawn with text stating, "If Senate Bill 517 passes, billboards over TWICE this size will be allowed! Keep Michigan Beautiful—Defeat S.B. 517!" University of Michigan Billboard Protest, <http://www2.bc.edu/%7Eplater/Newpublicsite05/Billboard01Photo.jpg> (last visited Apr. 24, 2006). The sign drew the attention of legislators and staff throughout the capitol building and caused radio, television, and print reporters to make this the lead story on every local outlet. As a result, the lobby withdrew the bill for the indefinite future. Three weeks later, when students were in exams and media attention had passed on, the lobbyists had their legislators bring S.B. 517 to the floor again, and it was passed into state law, where it remains.

other times, the media may pick up the story too late to inform the policy making process.<sup>159</sup>

Why is it that so many important stories at the macro level of national policy, as well as at the micro level, receive inadequate or skewed coverage from the media, democracy's most essential information service? There are a host of potential explanations, none of them readily acceptable in a modern industrial democracy:

- **Complexity.** Environmental stories may be too complex to be summarized in a three-second quip or a twenty-second sound bite, forcing reporters or public interest advocates into unsuccessful attempts to distill a comprehensive analysis to a superficial summary, or risk a glazed-over look from an editor or producer conveying the message that "our audience will never understand that."

- **Uncertainty.** Environmental stories often involve distracting uncertainties—there may be serious risks of harm possible in a given situation, but they may be difficult to prove in terms of probability or scale. The environmental "precautionary principle" argues that a society should worry about major problems which may occur—even without proof that they are certain to occur—if there are reasonable indications that the risk is real.<sup>160</sup> Faced with industry's tendency to doubt and minimize most newly perceived technological risks, however, the press often reacts to public-interest warnings, like the global warming story, by emphasizing the uncertainties until very late in the game.

- **Acute-but-chronic.** As Phil Shabecoff has said, an inherent problem with many environmental stories is that the harms they discuss are *acute but chronic*, that is, that they have been in existence and expanding over such a long time that there is not a "milestone moment" to focus the public's immediate attention on the issue.<sup>161</sup> Love Canal, the Allied Kepone disaster, and the crash of the Exxon-Valdez each provided a focal moment.<sup>162</sup> In many environmental cases, however, it is difficult

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<sup>159</sup> For example, throughout the seven years of the snail darter-Tellico Dam controversy, we desperately tried to get the story to the national press corps. Only when the pork barrel rider bill passed and the President failed to veto it did we get a roomful of reporters to attend a press conference. At that session, environmental journalist Phil Shabecoff bitterly stated that the full story just presented "should have been presented to us years ago!" Press packets and data sheets had been repeatedly distributed to all the national news services and newsrooms in Washington over the prior years. Farmers, Cherokees, and Tennessee biologists had come to Washington and sought out press interviews. The press had just never gotten around to paying attention until the case's conclusion.

<sup>160</sup> PLATER ET AL., *supra* note 4, at 14, 1268–72.

<sup>161</sup> Telephone Interview with Philip Shabecoff, Reporter, N.Y. Times (Sept. 29, 2005).

<sup>162</sup> See PLATER ET AL., *supra* note 4, 42–66, 182.

to find strategic news moments. For example, it is difficult to bring public focus upon hormonal changes and other longterm metabolic effects caused by environmental chemical exposures, though their consequences for the sustainable future welfare of human society may be far greater than pollution.<sup>163</sup>

- **Gloom.** The media is often quick to cover vivid stories of short-term disasters—tsunamis, earthquakes, terrorist attacks, plane crashes, and famines. Environmentalists trying to gain media attention may too often succumb to the temptation to portray their issues as imminent disasters, hoping to attract the press’s fickle eye. This may be twice-disadvantageous because it both encourages hyperbole at the expense of sober factual analysis, and raises cynical doubts about environmentalism generally. It can lead to public “disaster fatigue,” and may evoke an image of environmentalism as the new “dismal science,” dragging us all into lachrymose dudgeon rather than finding bright paths for the future.<sup>164</sup>

- **Media is now a business.** “Infotainment” means that news must be packaged to sell. Lurking behind much of the disappointing reality of modern media is a fundamental contradiction. On the one hand, the exalted mandate of the media is to provide citizens and government with the essential factual raw materials—and a marketplace of opinions—that will support a full panoply of public issue debates and thus shape dynamic, reasoned, democratic government decisionmaking. On the other hand for a variety of reasons the nation’s press has come to consider local, national, and international news largely as just another revenue-generator, and therefore have reorganized the entire news-providing function as a consumer commodity competing for

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<sup>163</sup> The ignorance of Americans about processes and issues in domestic and international politics is evident in many public polls. For example, a recent Harris poll conducted for the American Bar Association released in December 2005, revealed that only 55% of the American public could correctly identify the three branches of government; 22% named the branches Democrat, Republican, and Independent, and 16% named them local, state, and federal. *See Harris Poll Reveals Governmental Knowledge of Many Americans*, DAILY RECORD (Rochester, N.Y.), Dec. 13, 2005. Additionally, 29% of the public answered that the role of the judiciary is to advise the President and Congress on the legality of future actions. *See id.*

<sup>164</sup> In the snail darter case, for example, reporters demonstrated great reluctance to acknowledge the fallen reality of the contemporary Tennessee Valley Authority, the agency that had been one of the New Deal’s brightest roses, a beacon of progressive social policy now turned to dross. In the course of my seven years of work on the snail darter case, I was repeatedly told by reporters that their previous view of the Tennessee Valley Authority, formed by schoolbooks and magazines, had been of a progressive success story, quite at variance from the reality of a utility-oriented pork barrel political establishment.

maximum market share.<sup>165</sup> Stories that are too complicated, depressing, or continuations of ongoing stories that are undramatic, are thus deemed not sufficiently attractive to the prized audience sectors. The news shows that will get on the air are those that attract the biggest product-buying audience in the format that attracts them.

• **Media as Marketing.** Is the average American Homer Simpson? One unfortunate cause of the low level of press coverage on matters of public importance may be the media's general impression that the American audience is unsophisticated scientifically and politically, and uninterested in complex issues of societal governance.<sup>166</sup> Gauging potential media audience numbers is a process of marketing analysis. For better or worse, the news business today is a business, and its marketing logic often pegs the product at the level and format deemed likely to attract the largest block of American consumers. The perception, it seems, is not necessarily that the American media audience or the American voter is stupid so much as ignorant, in the sense of uninformed and unknowing. An uninformed audience spawns a pernicious spiral: because the consumers of media are uninformed, they lack interest in getting more information about important issues of societal governance. Because the uninformed audience is uninterested, the media businesses that could supply society with important information feel little market pressure to do so.

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<sup>165</sup> Twenty years ago, many or most electronic media news departments and newspapers operated with a professional sense of responsibility as the public's source of information, despite the substantial cost of maintaining reporters around the world. In 1986, NBC's News cost the network as much as \$100 million a year. See Marc Gunther, *The Transformation of Network News*, NIEMAN REPORTS (SPECIAL ISSUE), Summer 1999, at 20, 21; see also Sarah Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promoted the Punitiveness Revolution* (Jan. 2005) (unpublished manuscript, on file with Boston College Environmental Affairs Law Review). The financial burdens were treated as the price of enjoying bandwidth monopolies on the airwaves and recompense for the privilege of operating national networks. Since the early 1980s, however, the traditional news audience has declined precipitously, and network and newspaper consolidation has led to large-scale corporations that expect revenue production from all divisions, and pressures for generating profits. General Electric bought NBC, Capital Cities Communications bought ABC, and Laurence Tisch, a hotel and theater entrepreneur, took over CBS. Subsequently Disney bought ABC and Viacom took over CBS. For a review of these moves and their consequences, see JAMES T. HAMILTON, *ALL THE NEWS THAT'S FIT TO SELL: HOW THE MARKET TRANSFORMS INFORMATION INTO NEWS* 160–89 (2004). The corps of reporters—especially expensive foreign-posted reporters—has been cut back substantially, and news formats are now dominated by less expensive “infotainment,” “soft” features, with shrunken commitments to actual news reporting. See Beale, *supra* at 20.

<sup>166</sup> See *supra* note 163 and accompanying text.

The perception of the American audience as uninformed and indiscriminate regarding issues of social policy and governance is unfortunately furthered by the way that American journalists are generally coached in how to present the news. The Fogg Index is an elaborate method by which the text of journalistic stories is scaled in terms of relative education levels.<sup>167</sup> According to several reporters, most American media target the level of their discourse at a Fogg Index of an eighth-grade reading level or lower. Only a few national newspapers target their text at a Fogg Index level of high school graduate or higher.<sup>168</sup> It is true that the complexity or reading level of a text's syntax does not necessarily equate with the reader's level of reasoning or analytical and logical ability, but observation of mass media suggests that a convincing case can be made that the material being transmitted is as low in brainpower as it is in syntax.

• **Hooks and legs.** Journalism experts often inform public interest attorneys that a successful news story first needs a "hook," and then it needs to have "legs." A hook can be a milestone moment, or a vivid occasion that makes the story immediately saleable in the newsroom. The hook can be a dramatic announcement in a public forum, or a surprising major spokesperson saying it, or a vivid photograph that captures the imagination and pulls in all who see it. In the Exxon-Valdez oil spill, photographs of oiled birds and sealife provided a hook that captured the nation's imagination.<sup>169</sup> If a hook is not accurately related to the essence of the story, however, it may pull public attention in the wrong direction. The image of a drunken sea captain, the causation hook in the Exxon-Valdez story, is a good illustration.<sup>170</sup>

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<sup>167</sup> See *Checking Out Readability: The Fogg Index*, BEST PRACTICE BRIEFS (University-Community Partnerships, Michigan State University), June 2005, at 4, 4 available at <http://outreach.msu.edu/bpbriefs/issues/brief33.pdf>.

<sup>168</sup> Consider the issue of global warming in the American media. A FoxNews.com climate change story rated a 29, making it understandable to someone between eleventh and twelfth grade. See Robert Roy Britt, *2005 Ties for 2nd Warmest Year Ever; but Cause Still Uncertain*, FOXNEWS.COM, Jan. 9, 2006, <http://www.foxnews.com/story/0,2933,180896,00.html>. A CNN.com story scored a 32, making it understandable to a high school graduate. See *2005 Was Australia's Hottest Yet*, CNN.COM, Jan. 4, 2006. A *New York Times* story scored a 35, making it understandable to someone who spent two years in college. See Nicholas D. Kristof, *A Paradise Drowning*, N.Y. TIMES, Jan. 8, 2006, at A15.

Calculations for each story were based on a test of the first 300 words of each. Stories were selected by searching the term "climate change" on each news organization's website and selecting the most recent story actually about global warming.

<sup>169</sup> See Exxon Valdez Oil Spill Trust Council, Gallery, <http://www.evostc.state.ak.us/Gallery/gallery-spill.htm#nogo> (last visited Apr. 24, 2005).

<sup>170</sup> See Palast, *supra* note 106.

Once media attention has been brought onto a story, it must also have legs to continue running as long as necessary to build momentum and to register in the ongoing legal and political process. News coverage can be a flash-in-the-pan or can peak too soon. All too often, a story that is dramatically covered one week becomes yesterday's news, leaving the inside players free to return to the standard operating procedures that caused the problem in the first place.

• **Journalists.** It may also be argued that modern media environmental coverage is poor because many reporters are ignorant about current issues of law and resources policy, vulnerable to Tobacco Institute "scientific data," and rely on public relations quotes rather than research. One wonders about the curriculum taught in journalism schools. In fact, many of the high-functioning journalists one meets never went to journalism school, and instead come to the press after learning some particular discipline or subject matter. The best journalists become, to some degree, scholars of the fields on which they report. They are quick studies at probing for underlying explanations of what is going on and what it means for society. Many ordinary journalists—and their editors and producers—are satisfied to report the latest press releases from inside players. Too often, they merely present juxtaposed sound bites from opposing sides of an issue, along the lines of this:

Dr. A., speaking for environmentalists, says "Global warming, caused in significant part by human actions, is an accepted scientific fact in the international community of climatologists, so we must do something about it."

On the other hand, Dr. B., speaking from the Heritage Foundation, says "There are serious questions whether global warming exists, and if it does, whether it isn't just a natural cycle, and in any event the hydrocarbon industry has not been proved to cause it, so we need more studies."

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The Fable of the Drunken Skipper has served the oil industry well. It transforms the most destructive oil spill in history into a tale of human frailty—a terrible, but one-time, accident. But broken radar, missing equipment, phantom spill personnel, faked tests, the profit-mad disregard of law—all these made the spill disaster not an accident but an inevitability.

The canard of the alcoholic captain has also provided effective camouflage for British Petroleum's involvement in the environmental catastrophe . . . .

*Id.*

There you have it: the news on global warming. Good night.

As Ross Gelbspan has said, if a controversy concerns arguments over policy, then of course a reporter should appropriately present quotes from both sides to let the audience follow the debate. If the controversy is over matters of fact, however, reporters have an obligation to look into those facts so as to be able to indicate to their audience which propositions are factual and which are not.<sup>171</sup> To do less is abdicating a societal responsibility, protracting informational dysfunctions, and promoting a system of governance by cynical spin. If the journalistic profession is to respond to Thomas Jefferson's clarion challenge, it is clear that the press must treat itself as more than a bunch of performers on an infotainment stage.

- **The public, too, is both part of the problem and the solution.** If some of the foregoing is accurate, some of the unfortunate shortcomings of modern media in the environmental field and beyond can be traced not only to the dysfunctional dynamics of the media industry, but also to a national population that fails to demand more from the media. At this level of generality, one can talk about a need for a better national educational system and other systemic issues, but the utility of such perceptions is limited.

- **Looking to the future.** A significant increase in environmental lawyers' media sophistication may help resolve some of the media realm's shortcomings. Environmental lawyers at the macro and micro level are not doing enough, or are not doing well enough, in conveying their issues into public opinion. Environmentalists can and should work to improve their ability to communicate important public interest facts and analysis to the public and influence the governance process. At the macro level, the relative lack of media resources for public interest groups, compared to the oppositional groups that are arguing against environmental protection initiatives, is a problem that can and should be addressed by progressive foundations. Given the current revolution in electronic information technology, it may well be time for the creation of an electronic public interest, factual-analysis cyberspace clearinghouse, which, if properly conceived and implemented, could

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<sup>171</sup> How, for instance, would a thinking public react to a news story reporting that "The UN released its climate change report on Monday afternoon. On the other hand, the White House said the UN did not release the report. There you have it, the latest news on the climate change report release-date question." The obvious logical reaction, in such cases of questions of fact, would be to expect journalists to check it out and tell the audience whether the UN report was actually issued.

change the nature of modern political discourse in our embattled public interest fields.<sup>172</sup>

At the micro level, public interest attorneys must learn the modern skills of media-savvy communication. They must master how to put together press conferences and press packets with maps, charts, and other essential information; how to conduct briefings for individual reporters; how to get coverage through op-ed features, letters to the editor, and electronic outlets around the country; and how to cultivate relationships with intelligent journalists at all levels. Environmental attorneys must be able to frame and create graphic messages relevant to their cause.

At every turn, at both the micro and macro levels of governance, citizens working in the public interest are altogether too likely to face opponents who are able to deploy far greater press resources. In fundamental terms, however, facts are facts, and ultimately society as a whole must learn how to perceive the important facts of the issues it deals with, or suffer unfortunate consequences. To make that happen is part of the environmental lawyer's job which, if done right, could usher in a far happier era, where public debate and public policy are increasingly based not on a dense fabric of agenda-driven spin, but on thoughtful consideration of important things as they really are.

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<sup>172</sup> See Plater, *supra* note 150, at 35–36.

