

Prologue

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At seven my daughter learned in school about how climate change is threatening the future existence of the majestic polar bears. She responded by writing an appeal letter to her school friends to stop burning coal and oil, refrain from buying unnecessary things, and walk to get where you're going. Some weeks later she looked at me with those big clear eyes that only a child has and asked for an honest answer: is it too late to stop this?

As an environmental lawyer and professor, I have spent countless hours discussing and debating these matters with adults. But it was this exchange with my child that brought out for me the glaring failure of environmental law's close to half century of experimentation. While laws are the fundamental infrastructure that undergirds our economic, political and social systems, environmental law is not understood as such. This shortfall starts with environmental law courses, which in the US, typically teach the primary federal environmental statutes, with a focus on the field as a set of rules that establish pollutant limits for specific waterbodies; protect identified species, ecosystems, and natural resources; or direct an industry to use a required technology. Although necessary, these rules do not address the motivating paradigm of our political economy; and as such, they don't address what we can see today as the deep drivers of environmental deterioration.

The most daunting example of failing to tackle these drivers is seen in increasing amounts of greenhouse gases (GHGs)¹ and global climate disruption. A compounding problem is that, in the main, environmental law is oblivious to racial, social and wealth inequalities. While the environmental justice movement has sprouted alongside to correct the course, this is often too little, too late. In order to develop a new economic system that is aligned to provide better results for the climate and for economic justice, we need to rethink what we consider environmental law. We need

¹ GHGs include carbon dioxide (CO₂), nitrous oxide (N₂O), methane (CH₄), Sulphur hexafluoride (SF₆), hydrofluorocarbons (HFCs), and perfluorocarbons (PFCs).

laws that facilitate a new ecologically-sustainable system. And as this book reveals, that goes well beyond just determining how many parts per billion of a pollutant are allowed in a specific water body.

This book addresses the laws and policies needed to support the emergence of a new economy across a variety of major areas – from energy to food, across common pool resources, and shifting investments to capitalize locally-connected and mission-driven businesses. This is not a book that tinkers with current mindsets, arguing about how to set the best standard to protect water, air, or even our climate. If you're looking for that, there are many other books to provide it. Instead, these authors take the approach that the challenges are much broader than setting parameters around pollution, and go to the heart of the dominant global political economy. It explores the values needed to transform our current economic system into a new economy supportive of ecological integrity, social justice, and vibrant democracy.

Many of the chapters in this book discuss ideas about bolstering participatory democracy in response to the indicators of a breakdown in democratic rule making. This is not cabined to democratic governments alone; instead it involves a greater emphasis on subsidiarity, diffusing decision-making to the broadest and lowest possible level of an entity, organization, business or government.

The new economy movement presents an alternative paradigm that the way to address social and climate needs and achieve better, more joyful lives is with an economy powered by renewables and a focus on improving our family relationships, our community and friends, our financial situation up to the point of meeting basic needs, our work, our health, our personal freedom, and our personal values. This paradigm emphasizes quality over quantity. It focuses on reducing gaps between rich and poor. It imagines a different relationship with the natural world, one based on endowing nature with inalienable, enforceable legal rights to exist, thrive and evolve. And it describes the role of government as a trustee with fiduciary duties running to the public.

In Chapter 1, I orient the reader to the need to rapidly reduce GHGs to meet the climate imperative, and the larger system changes that could help facilitate this. I discuss systems thinking and systems change, highlighting leverage points to achieve change, from paradigms to parameters. Here you'll find an overview of the new economy movement that has emerged to provide an alternative. Using a systems lens, I identify the areas where the law needs to evolve to build a more sustainable, equitable, and democratic future. The book then proceeds in two parts: paradigms for an ecological age (Chapters 2–5) followed by practical applications to demonstrate where these changes are already occurring (Chapters 6–12).

Part I begins with a chapter by James Gustave Speth explaining how environmental organizations have gone wrong, such that 46 years after the first Earth Day, we find ourselves on the path to a ruined planet, not one sustained and whole. He makes the case for a new environmentalism that offers hope of finally turning the corner before it is too late. In Chapter 3, Jedediah Purdy writes about environmentalism for the next economy. For environmental law to contribute to a more egalitarian and cooperative economy, it will have to be recast in a way that gives a central place to the organizing concerns of environmental justice: the distributive effects of environmental law and policy, and the constitutive question of which problems count as environmental, and whose conception of a good life in the natural world environmental law advances. This chapter locates that goal within two developments that have shifted the field more generally: the renewed recognition of the depth and importance of inequality and the emergence of “the Anthropocene” as a characterization of a transformed relationship between human beings and the rest of the planet.

Catherine Iorns Magallanes and Linda Sheehan’s chapter on Earth Rights reframes rights and responsibilities to prioritize nature. It focuses on three essential elements: the recognition of the intrinsic value of nature, the recognition of inherent rights of nature, and the establishment of a framework of human responsibility for nature. Such a legal framework would entail a paradigm shift; however, adoption of such elements in law can also help achieve such a shift in mindset as well as in practice. To this end, this chapter includes examples of existing and proposed laws adopting these three essential and intertwined elements, with global focus areas that include California and Aotearoa New Zealand.

Also operating at the level of paradigm change, Mary Christina Wood’s Chapter 5 focuses on the public trust doctrine. She envisions the government as a trustee with respect to crucial shared commons, such as the atmosphere and climate. Calling this Nature’s Trust, she explains that government actors have a legally-enforceable duty to protect and restore nature. Trusteeship stands in contrast to the current model of the iron triangle between corporate interests, lobbyists and legislators/regulators where the public interest and long-term management is subverted to special interests with short-term private aims. A fundamental component of democracy, the Nature’s Trust empowers citizens to hold government accountable for ecological protection.

Part II transitions from longer-term paradigm change to practical applications occurring now around the globe. The new economy paradigm influences the types of business structures that should flourish and the role of profit in corporate goal setting. As described by the Democracy Collaborative, some promising business structures for the new economy

are: cooperatives; employee stock ownership plan companies (ESOPs); community development financial institutions (CDFIs); social enterprises; municipal enterprises; and hybrid enterprises.² These more locally-rooted business structures add to the diversity and self-organizing, adaptive capacity of the economy.

In Chapter 6, Janelle Orsi describes principles for organizations to embed in their legal, financial and governance structures in order to build commons and move beyond the extractive structures of conventional business. “The commons” is emerging as a unifying framework for the creation of sustainable and equitable economies, and organizations everywhere will increasingly ask their lawyers for guidance on how to set up a “commons-based” entity structure. Land trusts, energy cooperatives, water mutuals, worker cooperatives, food cooperatives and housing cooperatives will all require that lawyers approach legal structural design with a mindset that decisively rejects business-as-usual. These principles emerge from practice and are designed to be immediately applicable in any organization.

Taking this commons theme further, David Bollier’s chapter on reinventing law for the commons provides historical roots of commoners seeking to use law to decriminalize their sharing and secure legal recognition for their self-organized management of shared wealth – “commoning”. He describes a variety of creative initiatives attempting to reinvent law for the commons in disparate settings – indigenous, subsistence, digital, urban, local and organizational, among others – which are part of an emerging effort to legitimate the commons as a generative social form.

New economy advocates look to transform the corporation from an enterprise designed primarily to provide profits for shareholders to one concerned about a broader set of values and stakeholders. Such a shift ideally would help us prioritize people, place and planet. Perhaps those who bring leadership to businesses that focus on social and environmental concerns – social entrepreneurs – can answer the call by reorienting the corporations they create. Such localized efforts to transform individual firms could inspire widespread change. Diversifying local businesses is an important counterweight to the monopolizing, homogenizing influence of Wall Street corporations. Yet, capitalization of businesses that are not traded on the stock market is a bottleneck to their expansion.

There are a variety of barriers to investors who want to direct their funds towards local businesses. However, US security law changes may

² Marjorie Kelly, Steve Dubb and Violeta Duncan, *Broad-Based Ownership Models: As Tools for Job Creation & Community Development*, The Democracy Collaborative (January 2016).

alter this dynamic. In Chapter 8, Jennifer Taub focuses on investing locally. She argues that new laws facilitate funding socially-minded enterprises. Entrepreneurs have promising new options available for broadly soliciting like-minded investors and organizing their business enterprises to include social goals. In the US, those seeking to fund an enterprise can forgo a complex, time-consuming full federal registration process with the Securities and Exchange Commission (SEC) while still reaching out to solicit a wide group of potential investors. This general solicitation can include advertising online through crowdfunding portals. Taub's chapter provides background on securities laws in the US and then details how recent legal developments at the federal and state levels can aid the startup or expansion of social, community, and environmental business enterprises.

Shifting to the two areas of the economy that hold the greatest potential to rapidly reduce GHGs and meet the climate imperative, Chapters 9 through 12 discuss energy and food systems and highlight exemplars that show how to redesign these systems to also enhance democracy and address wealth inequalities. Kevin Jones and Mark James's chapter and Shalanda Baker's chapter on community solar explain how new business forms of owning energy will speed the transition to renewables, and will open up renewable options and increase resiliency for low-income communities. These chapters focus on solar power because it is booming, as the costs fall and interest in clean and distributed energy grows. Jones and James's chapter explores trends in renewable energy development and how clean distributed energy may disrupt the current utility model. The chapter discusses US state and federal policies for solar development and how they can be used to promote meaningful community ownership: a model that supports the local economy while reducing carbon emissions. The chapter concludes by exploring strategies for scaling up Vermont's community solar model to support the goals of a new economy.

Shalanda H. Baker describes the battle over the future of net energy metering in the US, and posits that energy justice lies at the heart of the debate, but is missing from the discourse. She underscores the importance of creating authentic opportunities for participation in renewable energy generation by low-income communities to alleviate inequality and vulnerability. She argues that community energy programs can address inequality by providing communities an opportunity to generate, own and distribute renewable energy.

In Chapters 11 and 12, Diana Winters and Laurie Ristino examine the food system, taking up the tensions between centralizing and localizing food regulations and legal design to expand access to legal tools, respectively. In Winters's chapter she discusses food regulation, and

explains how a system that permits decentralized policymaking, such as the American one, can be a leverage point for change. She provides several examples of recent sub-national government's laws to address gaps in and perceived problems with federal food policy. Despite, or perhaps because of, their transformative potential, these actions on food policy raise questions about where lies the proper balance between the uniformity and predictability of a national system and the flexibility and responsiveness of local regulation.

The book ends with Laurie Ristino's chapter, in which she argues that as taught and practiced law has been made socially irrelevant, undermining its potential to generate and sustain paradigm-shifting change. Although the legal academy has adopted a more practice-ready pedagogy, the fact remains that legal education and its substance is stubbornly unchanged, divorced from other disciplines and communicated in a traditional parlance intended only for other legal professionals. The result is that most people do not understand the value of the law in their daily lives because the barrier to legal information is too high. The antidote she prescribes is legal design and transdisciplinary collaboration. Legal design requires that legal solutions are designed with the end user in mind. Moreover, legal design integrates the law into social products. She describes this as "Legal Democracy" because the law and the empowerment it represents is made broadly available. Using the food movement as an example of legal democracy in action, Ristino highlights legal products created by the Food and Agriculture Clinic of the Vermont Law School. Finally, she explains how this approach to the law has the capacity to scale healthy food systems and support vibrant local and regional economies through cataloging and disseminating innovative legal and policy solutions.

Part II's exploration of practical applications of changes to the legal rules defining incentives, punishments, and who gets to participate in ownership in the economy flow from Part I's unpacking of the upper level paradigm changes about an economy that is a tool for shared prosperity, ecological balance, and strong democracy. Taken together, the book presents options for system change aimed at speeding our transition to a new, more joyful, economy. With both clarity about the daunting challenges we face and audacious optimism about the possibilities at hand, it provides an answer: it is *not* too late.