

# The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification

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In the last twenty-five years, environmentalists have sought recognition for the right to a safe environment (RSE) in national and international fora.<sup>1</sup> As a result, some countries have recognized RSE in their constitutions.<sup>2</sup> Nevertheless, much skepticism exists about whether RSE is a genuine human right, and advocates of RSE still need to persuade critics that this right merits national and international recognition.<sup>3</sup> This paper presents a normative

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1. On the history of proposals for such a right, see Melissa Thorne, *Establishing Environment as a Human Right*, 19 DENV. J. INT'L L. & POL'Y 301, 303-05 (1991).

2. See EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS 297-327 (1989) (listing provisions from constitutions of Albania, Australia, Austria, Bahrain, Belgium, Brazil, Bulgaria, Burma, Canada, Chile, People's Republic of China, Costa Rica, Czechoslovakia, Ecuador, El Salvador, Equatorial Guinea, Ethiopia, Federal Republic of Germany, German Democratic Republic, Greece, Guatemala, Guyana, Haiti, Honduras, Hungary, India, Indonesia, Iran, Italy, Japan, Korea, Malta, Mexico, Netherlands, Nicaragua, Panama, Papua New Guinea, Peru, Philippines, Poland, Portugal, Spain, Sri Lanka, Sweden, Switzerland, Taiwan, Thailand, Union of Soviet Socialist Republics, United Arab Emirates, Vanuatu, Vietnam, Yemen, and Yugoslavia). Efforts to introduce an amendment to the U.S. Constitution creating a right to a safe environment have failed. See, e.g., H.R.J. Res. 1205, 91st Cong., 2d Sess. (1970). However, the preamble to the U.S. National Environmental Policy Act sets the goal of assuring "for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings." National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 101(b)(2), 83 Stat. 852, 852 (1970). Richard O. Brooks has advocated the creation of a right to a healthful environment in state constitutions in the United States. Richard O. Brooks, *A Constitutional Right to a Healthful Environment*, 16 VT. L. REV. 1063 (1992).

3. The right to a safe environment has not been subjected to extended philosophical examination and debate in the way that economic and social rights have. W. Paul Gormley provided an early case for

defense of RSE. It argues that a right to a safe environment — defined narrowly — is a genuine human right because it passes appropriate justificatory tests. Part I defends the modest use of the language of rights in expressing environmental norms. Part II offers a narrow account of the scope of RSE. Part III provides a justification for RSE as conceived in part II.<sup>4</sup>

### I. SHOULD ENVIRONMENTALISTS USE RIGHTS LANGUAGE?

Considerable controversy exists at present about how widely the language of rights should be used in expressing environmental values and norms. Enthusiasts are willing to use rights language in virtually all areas of environmentalism, including biotic rights, rights of species, and animal rights. By contrast, deep ecologists and non-anthropocentrists often hold that discussion in the environmental area should totally avoid the language of rights and the legalisms that allegedly accompany it.<sup>5</sup>

This paper supports neither of these extreme positions. Rights should not be the dominant normative concept of environmentalism. It is better to phrase most environmental discourse in terms of environmental *goods*, of *respect* for and *responsibilities* towards nature, and of *obligations* to future generations. However, speaking of rights is plausible and useful for dealing with some of the most serious human consequences of environmental degradation. In particular, the right to a safe environment can play a useful and justifiable role in protecting human interests in a safe environment and in providing a link between the environmental and human rights movements.

If the language of rights is used loosely in environmental discourse, people may begin to claim rights that are excessively metaphorical and rhetorical. Conversely, if the language of rights is used strictly, people may develop environmental prescriptions that are excessively rigid and that preclude tradeoffs necessary for providing for human needs while trying to work out

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environmental rights in W. PAUL GORMLEY, *HUMAN RIGHTS AND THE ENVIRONMENT* (1976). More recently, Joseph L. Sax offered a cogent defense of RSE in Joseph L. Sax, *The Search for Environmental Rights*, 6 J. LAND USE & ENVTL. L. 93 (1990). Melissa Thorne surveyed a variety of possible grounds for environmental rights. Thorne, *supra* note 1, at 317-31. Edith Brown Weiss briefly reviewed views on RSE in WEISS, *supra* note 2, at 114 (1989). I know of no systematic criticism of RSE as a human right, although Philip Alston cautions against creating new rights in Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607 (1984). P.H. Kooijmans criticizes the "third generation" of human rights, with a few references to RSE, in P.H. Kooijmans, *Human Rights — Universal Panacea?*, 37 NETH. INT'L L. REV. 315 (1990). Holmes Rolston, III, offers a qualified endorsement of a "right to a quality environment" in Holmes Rolston, III, *Rights and Responsibilities on the Home Planet*, in *this issue* 251, 262.

4. This justification relies substantially on the framework for justifying human rights developed in this author's earlier works. See, e.g., JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS* (1987).

5. For non-anthropocentric approaches to environmental ethics, see, e.g., J. BAIRD CALLICOTT, *IN DEFENSE OF THE LAND ETHIC: ESSAYS IN ENVIRONMENTAL PHILOSOPHY* (1989); HOLMES ROLSTON, III, *PHILOSOPHY GONE WILD* (1986); CHRISTOPHER D. STONE, *EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM* (1987); and PAUL W. TAYLOR, *RESPECT FOR NATURE* (1986).

today's environmental and population crises. Rights claims are not completely immune to tradeoffs, but the language of rights does imply the restriction of tradeoffs; thus, rights language should be used sparingly in a field in which tradeoffs are a necessary part of progress.

On the other hand, entirely avoiding the language of rights in the environmental area would needlessly abandon a valuable normative asset. When used to claim a safe environment for humans, the language of rights can be used without being either too metaphorical or engendering worries of excessive rigidity.

RSE is human oriented. It does not speak directly to issues such as biodiversity, the claims of animals, conservation, or sustainable development. However, the fact that a norm does not apply to all subfields is not a significant objection if it can be supplemented by other norms that will address other issues. Nor does the premise that humanity should protect valuable things other than humans imply that human ethics should neglect to protect humans. The approach in this paper is accommodationist: RSE is presented as one useful part of the normative repertory of environmentalism. It can play a central role in justifying and guiding a wide range of environmental programs and regulations, but it should do this in concert with other environmental norms.

RSE is particularly useful because it links the environmental movement to the international human rights movement; thus, RSE allows environmentalists to appeal to traditional human rights norms and to use the institutions and mechanisms developed to promote and implement human rights at the international level.<sup>6</sup> The human rights movement has strong international recognition, support, and institutions and thus has valuable resources to offer environmentalism. Therefore, it is worthwhile to associate at least one norm pertaining to environmental protection with internationally recognized human rights standards. This is not to say, however, that RSE is justified solely on the instrumental grounds that it will be useful to environmentalists. In fact RSE will only prove useful to environmentalists if people find plausible the claim that it is a genuine human right. As a norm that satisfies the tests appropriate to human rights,<sup>7</sup> RSE should be recognized both as a general human right and as an important footing for environmental claims.

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6. This is not meant to suggest that traditional human rights have no relevance to environmental concerns. They obviously do. Rights to life and property clearly protect people against some kinds of environmental abuses. Rights of political participation empower people who would take political action on behalf of the environment. Rights against murder, torture, and arbitrary arrest protect environmental activists. For a more general treatment of the contributions that the human rights and environmental movements can make to each other, see James W. Nickel & Eduardo Viola, *Integrating Environmentalism and Human Rights: Lessons from Brazil* (Oct. 13, 1992) (unpublished essay, on file with author).

7. See *infra* text at note 21. On the distinctive features of the concept of a right, see NICKEL, *supra* note 4, at 15-26.

## II. THE SCOPE OF THE RIGHT TO A SAFE ENVIRONMENT

There are many possible formulations of environmental rights. For example, Melissa Thorne writes of "environment as a human right," but makes clear that she means a right to "a safe, healthy, and ecologically-balanced environment."<sup>8</sup> Many national constitutions use similar language. The Constitution of Honduras speaks of maintaining "a satisfactory environment for the protection of everyone's health."<sup>9</sup> The Constitution of South Korea declares a right "to a healthy and pleasant environment."<sup>10</sup> The Constitution of Portugal speaks of a "healthy and ecologically balanced environment."<sup>11</sup> The current buzzword, "sustainable," might also be added to these formulations. If one puts all these phrases together one would end up with a right to a safe, healthy, pleasant, ecologically balanced, and sustainable environment.

Although such a broad formulation of RSE sets out an attractive goal, a narrow formulation focusing exclusively on human health and safety has the best chance of gaining acceptance as a genuine human right. This paper therefore concentrates exclusively on just such a narrow formulation. This paper will speak of a right to a *safe* environment, meaning an environment that is not destructive of human health. Defining the scope of this right is best done in two steps. The first step describes the state of affairs that would exist if RSE were fully realized. The second step describes the duties that individuals, governments, corporations and international organizations must bear in order to realize this state of affairs.

A. *The State of Affairs that the Right to a Safe Environment Prescribes*

The meaning of "safe environment" is ambiguous, since this term may refer to freedom from threats of crime or from threats of pollution. For example, children have a right to a safe environment in school, meaning that schools should be free from crime and violence. Because RSE does not address crime or violence, it is important to realize that RSE is concerned only with a particular set of threats to human safety, namely those which stem from technological and industrial processes and the disposal of sewage and wastes. Broadly speaking, RSE is concerned with safety from contamination and pollution.

Threats to health are the primary focus of RSE because the most severe effects of pollution, toxic wastes, and inadequately processed sewage are

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8. Thorne, *supra* note 1, at 310.

9. The full text of these clauses appears in WEISS, *supra* note 2, at 297.

10. *Id.*

11. *Id.*

sickness and death. Threats to health include ones that kill, shorten a person's life, make a person permanently incapable of normal functioning, and make a person temporarily (and perhaps recurrently) sick. Threats to some non-health aspects of well-being should also be included in RSE as a secondary focus. For present purposes, this paper will include only very basic aspects of well-being in RSE, those that pertain to avoiding extreme misery and to preserving the possibility of a minimally good life. For example, having to live with constant loud, screeching noise from a nearby factory might not destroy one's health, but it would make most people quite miserable. In sum, RSE should address forms of contamination and pollution that create significant risks of killing people, making them sick or seriously miserable, or depriving them of the possibility of a minimally good life.

To define the scope of RSE we must define acceptable levels of risk. This is a difficult matter. How safe must the environment be? The total elimination of risks is impossible, and using all available means to diminish risk is not affordable, given other important claims on resources, such as education, medical care, employment opportunities, and security against crime. A better approach is to specify that the environment, or the level of safety from environmental risks, should be satisfactory or adequate for health. These phrases, although vague, clearly set the level of acceptable risk at an intermediate level, and thus make it more likely that RSE can pass the feasibility test discussed below. On the other hand, they do not set the risk standard so low as to make RSE meaningless.

The fact that terms such as "satisfactory" and "adequate" are vague is not a significant problem in this context. Even if it were possible to give a more precise description of the level of acceptable risk, it probably would be inappropriate for international institutions to prescribe a single, precise standard worldwide. International human rights typically set broad normative standards that can be interpreted and applied by appropriate legislative, judicial, or administrative bodies at the national level. Consider, for example the broad normative standards set forth by the rights regarding *inhumane or degrading punishment*, *effective* remedy and *arbitrary* arrest or detention. The proposed standard of "*adequate* for health and well-being" fits this pattern. It provides a general, imprecise description of the level of protections against environmental risks that States should guarantee. Risk standards should be specified further at the national level through democratic legislative and regulatory processes, in light of current scientific knowledge and fiscal realities.<sup>12</sup>

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12. See NICKEL, *supra* note 4, at 61-81 (addressing issue of adapting international standards to the cultures and institutions of particular countries); Sax, *supra* note 3, at 96, (discussing democratic values in relation to environmental rights and arguing that acceptable level of environmental risk should be decided through open process of democratic decision-making).

## B. *Duties Generated by the Right to a Safe Environment*

A right is not merely a claim to some freedom or benefit; it is also a claim against certain parties to act so as to make that freedom or benefit available. The following sections consider the duties generated by RSE.

### 1. *Duties of Individuals and Corporations*

Persons, organizations, and corporations have a duty to refrain from activities that generate unacceptable levels of environmental risk. For example, individuals have a duty to refrain from pouring dangerous chemicals into sewers or waterways, to refrain from deactivating pollution control devices on their cars, and to refrain from avoidable car use on days when pollution alerts are in effect. Hospitals have a duty to dispose of medical wastes in ways that avoid risks of contamination and other injuries. Companies that transport oil and other hazardous material have a duty to take strong precautions against spills and other accidents. When environmental damage occurs, individuals, organizations, and corporations have a duty to restore the environment and compensate victims.<sup>13</sup>

### 2. *Duties of Governments*

Like individuals and corporations, governments have negative duties to refrain from actions that generate large risks of damage to human life and health. For example, governments have a duty not to operate nuclear power plants without taking adequate measures to ensure safe design, construction, maintenance, operations, and waste disposal. Beyond these negative duties, governments also have a duty to protect the inhabitants of their territories against environmental risks generated by either governmental or private agencies. In our technologically advanced civilization, an effective system of environmental protection requires a governmentally-enacted system of environmental regulation that sets safety standards for thousands of processes and substances. This system must encourage or pressure those using these processes and substances to comply with its regulations, and impose significant penalties on those who fail to comply. An adequate system of environmental regulation also requires that citizens, environmental organiza-

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13. Participation in an activity such as driving an automobile may imply that one has assumed the risks of that activity, including risks from automobile-created air pollution, and hence that one is not entitled to compensation, or full compensation, for harms resulting from this pollution. Accepting this proposition does not, however, make RSE meaningless in the area of air pollution because many people — particularly children — have not chosen to use automobiles, and because others do so only for lack of other alternatives.

tions, and government agencies have the power to sue polluters, whether public or private, for compensatory damages.

Contemporary human rights documents require that governments be elected in periodic, free elections, and that all citizens be free to participate in politics by expressing their opinions, by voting, by campaigning, and by running for office. These rights to political participation reinforce the scope of RSE by requiring democratic participation in decisions about environmental risks. For such participation to be meaningful, the public must have access to information about the risks posed by the actions of governmental and private enterprises.

### *3. Duties of International Organizations*

International agencies such as the United Nations and the Organization of American States have negative duties to refrain from generating large environmental risks. For example, the United Nations has a duty to ensure environmental safety when using military forces to conduct peacekeeping operations. The World Bank has a negative duty to refrain from loaning money to development projects that will generate major risks to human health and safety. These international organizations also have positive duties to promote and protect RSE through declarations, regulations, and enforcement measures. RSE should be added to international human rights conventions such as the European Convention on Human Rights<sup>14</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>15</sup> RSE is already included in the African Charter on Human and Peoples' Rights,<sup>16</sup> and will be included in the American Convention on Human Rights<sup>17</sup> when the Protocol of San Salvador comes into force.<sup>18</sup> These conventions are implemented at the international level through periodic government reports on their progress to human rights agencies; complaints brought by individuals and States against violating States in human rights tribunals; mediation of complaints by standing human rights commissions; adjudication of disputes over the interpretation of key clauses by international judicial bodies; the publication of reports of violations; and the use of diplomatic, political, and economic pressure to coerce violators to comply.<sup>19</sup>

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14. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

15. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force Jan. 3, 1976).

16. OAU Doc. CAB/LEG/67/3/rev.5, 21 I.L.M. 58 (entered into force Oct. 21, 1986).

17. O.A.S. Off. Rec. OEA/Ser.L./V/ii.23, doc. 21, rev. 6 (1979) (entered into force July 18, 1978).

18. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, Nov. 14, 1988, O.A.S. T.S. No. 69, 28 I.L.M. 156 (1989) (Protocol of San Salvador).

19. Not all of these measures are used by each of the conventions mentioned. For a thorough

## III. THE JUSTIFICATION OF THE RIGHT TO A SAFE ENVIRONMENT

Human rights are fundamental international moral and legal norms which protect people — simply as people, and not in virtue of citizenship or allegiance — from severe but common social, political, and legal abuses. These rights may not effectively prevent these abuses until the rights are both widely accepted and legally implemented at the international and national levels. Nevertheless, rights exist independently of such acceptance.

To qualify as a human right, RSE must satisfy at least four criteria.<sup>20</sup> First, proponents must demonstrate that the proposed rightholders have a strong claim to the liberty, protection, or benefit in question by showing that this liberty, protection, or benefit is of great value to individuals and society, and by showing that these values are frequently threatened by social and political abuses. Second, they must show that this claim cannot be adequately satisfied unless we grant people rights rather than weaker forms of protection. Rights are powerful and demanding norms that should only be used to formulate moral claims when weaker norms are inadequate. Third, proponents must demonstrate that the proposed addressees, the parties that bear duties under the right, can legitimately be subjected to the negative and positive duties required for compliance with and implementation of the right. Finally, the proposed right must be feasible given current institutional and economic resources.<sup>21</sup> RSE satisfies each of these four criteria.

A. *Are Fundamental Interests Threatened?*

The specific rights included in the historic bills of rights were chosen in response to perceived abuses by governments. Indeed, the texts of some bills of rights actually begin with a list of complaints against the previous government.<sup>22</sup> The right to a fair trial, for example, is a response to the fact that governments have often used the legal system to disadvantage, imprison, and

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discussion of how environmental rights could be implemented internationally, see Thorne, *supra* note 1, at 335-41.

20. The steps for justifying a specific right presented here are the second stage of the justification of rights. The first stage provides broad normative foundations for human rights. In NICKEL, *supra* note 4, at 82-100, this author suggests that rights are justified for prudential reasons (rights protect one's fundamental interests), and moral reasons (rights secure claims to life, liberty, and fairness).

21. *See id.* at 107-19 for a discussion of how to evaluate the feasibility of a specific right.

22. A long list of abuses is implicit in the Magna Carta (1215) (for example, item 38: "No bailiff for the future shall put any man to his 'law' upon his own mere words of mouth, without credible witnesses brought for this purpose."). The English Bill of Rights (1689) begins with an explicit list of twelve complaints against King James II (for example, item 9: "partial, corrupt, and unqualified persons have been returned and served on juries in trials"). The U.S. Constitution and Bill of Rights respond to a list of complaints against the British King enumerated in the Declaration of Independence (1776). These documents are reprinted in THE HUMAN RIGHTS READER (Walter Laqueur & Barry Rubin eds., rev. ed. 1989).



kill political opponents. This linkage between abuses and specific rights suggests that rights can be selected partially on the basis of the specific kinds of abuses occurring at a particular time and place. This general idea can be applied to environmental issues by asking which environmental abuses frequently lead to substantial human harm.

Technological development and population growth have both contributed to the creation of major environmental threats to human health and well-being. Imagine a town and surrounding region that have become the location of a large, dirty, toxic industry governed by no significant pollution controls.<sup>23</sup> Imagine that air, water, and noise pollution are severe, that few measures are taken to insulate residents of the town from pollutants, and that these pollutants have significant toxicity.

The costs to the health and welfare of people in this town will be large. Rates of miscarriage and birth defects will be substantially higher than normal; children's growth and intelligence will be stunted. People will suffer from higher than normal rates of allergies, respiratory problems, skin diseases, cancer, and premature death. Contamination of foodstuffs and reduced plant growth will hinder food production. Fishing and animal husbandry production will decrease as animals suffer the same health problems as humans. Nearby areas of natural beauty will be destroyed and made useless for recreation. Cases of this sort are likely to have an equity dimension as well because the poorest members of the population will live closest to the pollution source and will have the least ability to escape its effects.

When environmental problems reach this level of severity — as they have in many parts of the world — the health and welfare of many people clearly are suffering substantial damage. Few human rights violations other than programs of mass extermination cause such widespread and large scale damage to the health and welfare of a community.

Consider next a milder case with less severe air and water pollution. Air pollution of the sort one finds in cities such as Sao Paulo, Mexico City,<sup>24</sup> and Los Angeles causes substantial damage to people's health. This is not to say, of course, that every person living in these cities is injured, or suffers a shortened lifespan. Nevertheless, elevated rates of cancer seem to be present

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23. Prior to recent clean-up efforts, Cubatao, Brazil had similar environmental problems. On Cubatao, see Dahlia M. Spektor et al., *Effects of Heavy Industrial Pollution in Respiratory Function in the Children of Cubatao, Brazil*, 94 ENVTL. HEALTH PERSP. 51 (1991). Many more towns with such problems are found in Eastern Europe and the former Soviet Union. On the severity of contamination in Eastern Europe, see Hilary F. French, *Industrial Wasteland*, WORLD WATCH, Nov.-Dec. 1988, at 21.

24. On Sao Paulo and Mexico City, see Isabelle Romieu et al., *Urban Air Pollution in Latin America and the Caribbean*, 41 J. AIR & WASTE MGMT. ASS'N 1166 (1991) (stating that inhabitants of these cities are exposed to air pollution levels that exceed World Health Organization guidelines for adequate health protection).

in cities such as Los Angeles,<sup>25</sup> and greater than normal numbers of people in such cities suffer from asthma and allergies. Estimates of the consequences of air pollution on life and health in the Los Angeles basin have produced astoundingly high figures. A recent study suggested that attaining the national clean air standard for particulate matter in the Los Angeles Basin would prevent approximately 1600 premature deaths each year.<sup>26</sup> The risk of premature death due to elevated particulate matter levels is 1 in 10,000 per year greater than if the federal standard were reached, and is equivalent to half the annual risk of death in a car accident.<sup>27</sup> This study also estimated the annual mortality and morbidity costs of exceeding the federal standards for ozone and particulate matter as nearly \$10 billion.<sup>28</sup> These significant health risks and costs, imposed on those who are not profiting from the generation of pollution, justify imposing RSE in order to help achieve a safer environment.

The justification of a human right not only needs to identify abuses, but also needs to show that these abuses frustrate fundamental human interests. As Maurice Cranston observed, a human right protects an interest or value that is of "paramount importance."<sup>29</sup> Thus, the critical question about severe pollution is whether it threatens interests of paramount importance. If the only effect of severe air pollution were a slight dullness in the color of some people's hair, the interest at stake — having glossy hair — would be too slight to provide the foundation for a human right. Obviously, however, the effects of severe pollution are not trivial. Severe air pollution kills some people, shortens the lives of others, and makes still others recurrently sick. These interests in life, health, and a minimal level of welfare are already protected by a number of human rights, such as rights against murder, torture, or physical injury. Severe pollution is a significant and frequent threat to the fundamental interests that human rights protect; the right to a safe environment aims to protect people against severe pollution and its consequences, and should therefore be accorded a position equal to other human rights that seek to prevent these consequences.

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25. See Paul K. Mills et al., *Ambient Air Pollution and Cancer in California Seventh-day Adventists*, 46 ARCHIVES OF ENVTL. HEALTH, Sept.-Oct. 1991, at 271.

26. Jane V. Hall et al., *Valuing the Health Benefits of Clean Air*, 255 SCIENCE 812, 812 (1992); see also Robert Read & Cathy Read, *Breathing Can Be Hazardous to Your Health*, NEW SCIENTIST, Feb. 1991, at 34 (urban air poses deadly dangers in spite of environmental regulations).

27. Hall, *supra* note 26, at 812.

28. *Id.*

29. MAURICE CRANSTON, *WHAT ARE HUMAN RIGHTS?* 67 (1973). For example, justification of the right against torture emphasizes that torture imposes severe pain and suffering, threatens physical and mental health, and is an extreme form of coercion. See NICKEL, *supra* note 4, at 110; see also Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124 (1978).

**B. Does Environmental Safety Require Environmental Rights?**

After a proposed right passes the test described above, there is clearly a claim to some sort of social action. However, the interests in question might be adequately protected by norms weaker than rights. For example, charitable assistance or structural changes might eliminate the threats.<sup>30</sup> In order to justify a right such as the right to a fair trial, proponents must articulate why the danger of unfairness in criminal trials cannot be eliminated by general improvements in legal processes, by self-help on the part of the accused, or by charitable assistance from the community. Proponents must demonstrate that only high-priority, effectively enforced and administered legal rights to a fair trial can provide adequate protection. Analogously, RSE can only be justified as a human right if measures weaker than declaring a right to a safe environment will not provide adequate protection against pollution and contamination.

If large parts of the population could be drawn into a "deep" rather than "shallow" environmental movement, a major re-evaluation of industrial, consumer society might occur. A successful re-evaluation might make it unnecessary to formulate and seek enactment of environmental rights. Giagnocavo and Goldstein argue against articulating environmental rights because such rights are "predicated on violence and separation" from the environment and "shatter" the appropriate relation to it. They advocate "developing an ecological consciousness" rather than perpetuating the status quo "in the guise of environmental rights and environmental 'legal' reform."<sup>31</sup>

Although this author strongly endorses the development of widespread ecological consciousness, he doubts that this development — if it occurred — would make environmental rights unnecessary. The hope that ecological consciousness can make environmental rights and law unnecessary is an example of the threat-elimination strategy.<sup>32</sup> This suggests that if people had the right sort of ecological consciousness, they would not willingly pollute and contaminate the environment, and that if threats of pollution were eliminated or greatly reduced, there would be no need for environmental rights.

The human population, or even a significant part of it, will not soon develop a worldwide environmental consciousness. Even if a worldwide revolution in environmental attitudes did occur and people were reasonably well motivated to act on those new attitudes, many environmental problems

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30. On weaker alternatives to rights such as self-help, social aid, abundance strategy, and threat-elimination strategy, see NICKEL, *supra* note 4, at 113-17.

31. Cynthia Giagnocavo & Howard Goldstein, *Law Reform or World Re-form: The Problem of Environmental Rights*, 35 MCGILL L.J. 345, 373-74 (1990).

32. See NICKEL, *supra* note 4, at 116-17.

would remain because of the need to use dangerous industrial and agricultural processes to support the large populations that now exist. The approach represented by Giagnocavo and Goldstein overemphasizes the importance of good motivation and underestimates the importance of population size and the extent of the world's dependence on hazardous technological processes.

Many people who have tried to live a more environmentally sound lifestyle have found that they cannot avoid engaging in activities that cause significant pollution. They need an automobile to get to work in a reasonable amount of time. They rely on advanced technologies that create numerous environmental risks. They are part of a large, concentrated human population that requires large amounts of water and energy and generates large amounts of sewage and wastes. Furthermore, powerful economic interests, including people's interests in having jobs for themselves and their children, often work against requiring polluters to reform their practices. Consequently, although policy-makers should support strategies to promote environmental threat-elimination or reduction, society will continue to benefit from RSE until such threat-elimination strategies have been totally successful.<sup>33</sup>

### C. *The Duties of Addressees*

Effective rights protect or empower rightholders by imposing moral or legal burdens on other parties, the addressees. Proponents of RSE must show not only that the rightholders have a strong case for desiring some freedom, protection, or benefit, but also that the burden of providing this freedom, protection, or benefit can be legitimately imposed on the addressees.<sup>34</sup>

As noted above, individuals, organizations, and corporations have negative duties to refrain from activities that create substantial threats to a safe environment. Governments and international organizations may also have positive duties to promote and protect a safe environment. Those who engage in and profit from activities which damage the environment should bear the burden of regulations which demand restraint and compensation.

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33. In addition, RSE can play a useful role in the consciousness-raising process itself. A consciousness-raising approach involves putting forward an attractive perspective or agenda and supporting reasons for its adoption; encouraging people to examine their attitudes, habits, stereotypes, and actions; persuading political figures and celebrities to promote the perspective or agenda domestically and internationally; getting domestic and foreign press to cover the issues identified in the agenda; creating organizations to promote the perspective and agenda through discussions, lobbying, and publicity; and implementing educational programs at all levels. See IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 153-54 (1990). Adding the resources of the human rights movement to a consciousness-raising process requires incorporating key elements of the environmental agenda in human rights documents and norms in order to promote the agenda and give it credibility; having access to the resources of human rights organizations to promote the agenda; and using the enforcement mechanisms developed to promote human rights at the international level and constitutional rights at the national level.

34. For a fuller discussion of the topics in this section and the next, see James W. Nickel, *How Human Rights Generate Duties to Protect and Provide*, 15 *HUM. RTS. Q.* 77 (1993).

One interesting aspect of environmental risks and harms is that they often result from activities engaged in by many people, such as driving on Los Angeles freeways. These activities produce risks or harms as a result of the cumulative effect of individual decisions made by thousands or millions of people, but would not produce risks or harms if done by only a few people. Most human rights violations do not result from the combined actions of thousands or millions of persons, but violations of RSE sometimes take this form. Because putting a small amount of automobile exhaust into the air would be permissible if nobody else did so, and because no malice is involved, it may seem strange to regard driving a car as a human rights violation. Consider, however, that collective action may inadvertently bring on a variety of human deprivations (rights violations without a direct actor), including starvation and malnutrition.<sup>35</sup> Moreover, not all violations of traditional human rights are intentional and malicious; for example, a person's right to a fair trial can be violated by a judge's negligence or incompetence rather than his malice.

In order to prevent the widespread violation of RSE, each individual must change his behavior. In regard to automobile pollution, each person has a duty not to deactivate pollution control devices on her car and to comply with collective measures to diminish pollution, such as abiding by no drive days and using alternative transportation systems. Beyond this, each citizen has a duty to promote and support measures to improve pollution controls on automobiles, to create effective schemes to diminish automobile use, and to limit her own driving, particularly during periods of high pollution.

#### D. *Feasibility*

Although RSE is supported by important moral considerations, RSE could fail to be a fully-justified human right if its costs were excessively burdensome. Costs play this powerful normative role in the justification of RSE and other rights for two reasons.<sup>36</sup> First, there are limits to the moral and legal duties that we can legitimately impose on each other,<sup>37</sup> and costs help us decide whether these limits are being exceeded. Second, given limited resources, the cost of complying with and implementing one right may make it impossible to comply with and implement other important rights. Rights are not magical sources of supply. Their normative power is insufficient to automatically call into being the human, institutional, and financial resources

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35. See HENRY SHUE, BASIC RIGHTS 42-46 (1980).

36. For a more complete discussion of costs in relation to human rights, see NICKEL, *supra* note 4, at 120-30.

37. See generally JAMES S. FISHKIN, THE LIMITS OF OBLIGATION (1982); SHELLY KAGAN, THE LIMITS OF MORALITY 386-403 (1989) (countenancing heavier moral burdens than does Fishkin).

needed for implementation. The obligations flowing from rights will be without effect if addressees are genuinely unable to comply with them, or if they are unable to comply while meeting other obligations.

This is not to say that human rights stand or fall with their cost-benefit ratios. The underlying moral claim does not stand or fall with its affordability, but the policy choice of recognizing this claim as one that must be fully satisfied here and now does depend on whether doing so is affordable. To illustrate this test, consider once more the right to a fair trial. Trials, and particularly fair ones, are an expensive way to administer the criminal law. They require a standing system of courts, judges, prosecutors, defense attorneys, and other legal officials. Nevertheless, the costs of creating, using, and maintaining this system are not so high as to make it unfeasible for countries to comply with this right. Countries around the globe at varying levels of economic development manage to run criminal justice systems that mostly comply with the right to a fair trial. Consider another example. One important, if not conclusive, objection to a right to medical care is that meeting all legitimate medical needs with an adequate quality of care is unaffordable, even for rich countries. Medical needs, this objection alleges, are a bottomless pit. The question therefore arises of whether RSE more closely resembles the attainable right to a fair trial or an unqualified right to the satisfaction of medical needs.

Effectively regulating pollution and contamination, like meeting all medical needs, may seem like a bottomless pit. Regulation requires standard setting, promulgation, and enforcement. These activities require expensive, highly-educated personnel, such as scientists and lawyers. Pollution control often requires complicated technological systems and elaborate disposal processes. Nevertheless, numerous countries already have extensive experience with implementing constitutional or legislatively enacted RSEs; thus far, these programs have not proven so costly as to undermine economies or bankrupt governments because the standards they are designed to enforce were chosen with an eye toward costs. As these experiences suggest, one reason for setting the standard of protection prescribed by RSE at an adequate rather than optimal level is to keep pollution control affordable.<sup>38</sup> Furthermore, the resources saved by preventing losses to health, life, property, and agricultural production can help finance RSE.<sup>39</sup>

Some third world countries may find it difficult to marshal the human,

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38. On the relations between standard setting, costs, and enforcement, see Mark Sagoff, *The Principles of Federal Pollution Control Law*, 71 MINN. L. REV. 19, 80-90 (1986).

39. It is possible, of course, that some global environmental problems such as ozone depletion or climate change will require enormously expensive programs to overcome their threat to human survival and health. The scope and costs of these problems are subject to considerable debate. Thus, the affordability of and scope of RSE may have to be reconsidered when these matters are better understood.

institutional, and financial resources needed to create a meaningful system of environmental protection. However, three factors lessen the burden which RSE imposes on less-developed countries. First, poor countries have considerable discretion to give less demanding definitions to the notion of an adequate level of environmental safety through their own legislative and judicial processes. Less demanding definitions of adequacy will make RSE less expensive to implement. This discretion is not unique to RSE; most human rights contain vague key phrases that give countries discretion to interpret the right in ways that make it less costly to enforce. Discretion therefore provides a way of indexing the cost of human rights to a country's level of development. Scrutiny by international organizations makes this discretion less dangerous. Second, the amount of technology and industry in a society and the size of its pollution problems are roughly proportional. The countries with the greatest potential for pollution and contamination are also the most highly industrialized, and hence are better able to pay the costs of regulation and control. Brazil, for example, is generally much more polluted than Bolivia, but it also has an immensely greater ability to pay for pollution control. Finally, rich countries have a responsibility to assist poor countries in controlling serious pollution problems through measures such as technology transfer, technical assistance, loans, and grants.

#### IV. CONCLUSION

A strong case exists for RSE. When defined narrowly, it has an intelligible scope. If a right with this scope were effectively implemented at the international and national levels, it would protect human beings against substantial and recurrent threats. Weaker forms of promoting pollution control are inadequate. Therefore, a strong, enforceable right is needed. RSE has identifiable addressees who can legitimately bear the normative burdens associated with this right. Finally, RSE is feasible to implement in most parts of the world. The costs of effectively regulating pollution are substantial, and many countries will face difficulties in marshalling the resources needed for this task. In this respect, however, RSE is no different from other human rights.

