Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

11-2006

ELR
NEWS & ANALYSIS

36 ELR 10845

Darkness, Visible: Global Warming and British Anti-Slavery

by Craig Segall

Editors' Summary: The environmental movement is just beginning to grapple with the problem of climate change and is doing so in a historical vacuum. Environmentalists would benefit from studying the last major social movement aimed at making the basic economic underpinnings of a society morally visible: British anti-slavery. That movement, too, dealt with an international economic system causing enormous human suffering; its leaders succeeded in convincing Britain to abandon the slave trade at considerable national cost. In this Article, Craig Segall analyzes the structures and goals of the two movements and suggests that developing an understanding of climate change as a moral crisis must be the ultimate goal of climate change litigation and legislative policy. It is the first paper to apply social movement theory and historical analysis to the two crises.

Millions of people and their infrastructure are concentrated near coastlines and are thus vulnerable to sea-level rise; entire countries may be submerged by a rise of a few meters.

—From *Science* (2006)[1]

Anti-slavery is worth studying . . . because it created a new way of viewing and ordering the world. It ultimately excluded one communally sanctioned institution which had uprooted, constrained and abbreviated millions of lives.

—From *Capitalism and Anti-Slavery (1986)*[2]

Some person should see these calamities to their end.

—Thomas Clarkson, chief organizer of the British anti-slavery movement (1785)[3]

I. Introduction: Two Movements

This is an Article on the blindness that underlies societies and how it may be lifted. Although it follows the course of landmark legal cases, it is not centrally concerned with the fine points of the claims in those cases. Rather, the cases are viewed as manifestations and drivers of a larger social question: What causes a society to see the moral costs of its own underlying economic structure so clearly that it chooses to radically change that structure?

These moments occur rarely; although social change movements wax and wane, it is exceedingly uncommon to see wholesale alterations on the scale which concerns us here: the complete repudiation of a formally widespread practice which was central to a nation's prosperity. A formerly dominant economic and social system becomes not merely politically visible but politically and morally unacceptable. This is not social change; it is revolution. Within nations rooted in the western liberal tradition, it has most notably occurred in the years between 1765 and 1838 as Britain, at the height of the slave trade's profitability, first ended the trade and then abolished slavery itself.[4] That process, which overturned baseline economic and moral assumptions about the place of slaves and the slave trade in British economy and society,[5] has a great deal to teach us today, as we stand at the brink of the greatest social, moral, and economic challenge that humanity has ever known.

That challenge is anthropogenic global warming. Created by the industrial revolution and exacerbated by the ever-increasing growth in consumption that has marked the last

Craig Segall is in his third year at Stanford Law School and received his degree in ecology and evolution from the University of Chicago. He has worked, during summers and school breaks, for Environmental Defense, NRDC, and Earthjustice. At Stanford, he is an advanced student in the Environmental Law Clinic with a particular interest in climate change litigation.

1. Jonathan T. Overpeck et al., *Paleoclimactic Evidence for Future Ice-Sheet Instability and Rapid Sea Level Rise*, 311 SCIENCE 1747 (2006).
2. SEYMOUR DRESCHER, CAPITALISM AND ANTI-SLAVERY 166 (1986).
3. Thomas Clarkson, *quoted in* ADAM HOCHSCHILD, BURY THE CHAINS: PROPHETS AND REBELS IN THE FIGHT TO FREE AN EMPIRE'S SLAVES 89 (2005).
4. *See generally* HOCHSCHILD, *supra* note 3.
5. This moral awakening is discussed in Chaim D. Kaufmann & Robert A. Pape, *Explaining Costly International Moral Action: Britain's Sixty-Year Campaign Against the Atlantic Slave Trade*, 53 INT'L ORG. 631, 634 (1999). For an instance of the moral rhetoric involved, see GRANVILLE SHARP, THE JUST LIMITATION OF SLAVERY IN THE LAWS OF GOD 38-39 (Negro Universities Press 1969) (1772).

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

century, it is, in many ways, the ironic coda to neoliberal economics and the society economic growth created.[6] The same engines that produced our temporary prosperity also produce the carbon dioxide (CO_2) that is already trapping heat all over the world. The future does not look like the past; we are already committed to living in a warmed world which would be alien to our parents and grandparents. If warming continues unabated we will face droughts, worsening storms, spreading disease, growing famine, and global instability.[7] But this parade of horribles, horrible though they are, in some ways masks the central truth: we are destroying the world we were given. Ecosystems will pull apart under the stress and so will societies. This change is being wrought by the wealthiest nations of the world; it will first and most deeply wound the poorest, which lack the technological capacity to adapt.[8] What does our future look like? Imagine a world economically, spiritually, and morally impoverished, many of its species, societies, and sources of comfort gone, replaced by the poor in their billions and the few rich in the fortress north, cut off from hope and looking grimly out toward the rising sea.

This does not have to be our future, any more than a 20th century of global slavery was inevitable in the 1780s. Although the combined inertia of economic and biophysical systems is large, it can be countered with a sufficient public effort; every future is a moral choice. The question is how to first make it apparent that these choices exist and then to ensure that they are made toward hope.[9] For an environmental movement dominated by technocratic solutions and uncomfortable with mass organization at a time when mass movements are needed, it is an urgent question indeed.

The model of social blindness I propose is one of a series of veils, both conscious and unconscious, that stand between societies and change. These veils are only partially—and in some ways incidentally—legal; they are rooted in consciousness and conscience, not codebooks. But their erosion can begin with legal change in an interactive process that moves back and forth from personal moral stances to public legal shifts and thence to popular mobilization. This triad of litigation, legislation, and organization is supported by a constant and consistent emphasis on the root moral and ethical obligations of our society.

There are significant structural and practical differences between the British anti-slavery movement and the modern anti-global warming movement. Perhaps chief among these is that today's global warming movement takes place in the shadow of the Kyoto Protocol, nascent international law that has begun to shape a global response.[10] The British movement was aware of and concerned with international laws and trends—the Atlantic trade was essentially global—but did not work against a background of international institutions. Also, the anti-global warming movement can ground itself on scientific fact in a way that was unavailable to anti-slavery reformers. And the anti-slavery reformers moved in a world smaller and, in some degree, less complicated than our own. I do not seek to trivialize these differences. I do, however, want to suggest that modern reformers can and should learn from those who remade Britain; the modern task is, if anything, harder, but exists in the same mold as the earlier movement. That movement, more than any other, saw the transformation of a world-spanning economic system into a moral crisis.[11] That movement, more than any other, saw darkness made visible in every aspect of daily life. And that movement, more than any other, echoes the challenges of the modern global warming crisis, where every aspect of our society is powered by a technology that is, with increasing speed, putting billions of people at risk.

Both movements found expression in the courts. In *Somerset v. Stewart*,[12] the most prominent anti-slavery case, and in its predecessor cases, the British anti-slavery movement ended the legal system's (and hence the business community's) blindness with regard to slavery. Before the *Somerset* line, slaves were things, not people under the law; afterwards, thanks to the brave organizers, lawyers, and slaves who challenged the legal instantiation of slavery, slaves were people, visible to the law and able to take advantage of its remedies.[13] In the same fashion, modern anti-global warming cases are making structural injustice visible, unearthing truths that the powerful had sought to hide from the law: most critically the link between energy production and climate destabilization. This area of litigation is growing, focusing on both statutory and common-law remedies.[14] This Article's focus is one of the most prominent common-law cases, *Connecticut v. American Electric Power*.[15] This case, brought in the summer of 2004 by a consortium of public interest groups and state Attorneys General, revives the old public nuisance doctrine, which allows recovery or injunctive relief against those who unreasonably impair the use and enjoyment of land. It is of particular

6. For a basic introduction to the connection between industrial growth and global warming, Spencer Weart's history is probably the best place to start. *See generally* Spencer R. Weart, The Discovery of Global Warming 5 (2003).

7. *See generally* Robert T. Watson et al., Climate Change 2001: Summary for Policymakers, an Assessment of the Intergovernmental Panel on Climate Change 5 (2001).

8. *See* Paul Desanker & Christopher Magadza, *Africa, in* Climate Change 2001: Impacts, Adaptation, and Vulnerability 489, 491 (McCarthy et al. eds., 2001) ("[T]he African continent is particularly vulnerable to climate change."); *see also* Joel B. Smith et al., *Vulnerability to Climate Change and Reasons for Concern: A Synthesis, in* Climate Change 2001: Impacts, Adaptation, and Vulnerability 915, 916 (McCarthy et al. eds., 2001) ("The impacts of climate change will not be evenly distributed among the peoples of the world. There is high confidence that developing countries will be more vulnerable to climate change than developed countries, and there is medium confidence that climate change would exacerbate income inequalities between and within countries.").

9. Although this Article is the first to explore the similarities between the movements in any detail, I am not the first to raise it. The anti-slavery historian Adam Hochschild references environmental issues in his recent book's conclusion: "To the British abolitionists, the challenge of ending slavery in a world that considered it fully normal was as daunting as it seems today when we consider the entrenched wrongs of our own age [including] the multiple assaults on the earth, air, and water that must support future generations." Hochschild, *supra* note 3, at 365.

10. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997. The United Nations tracks the progress of Kyoto at http://unfccc.int/2860.php.

11. *See, e.g.*, Kaufmann & Pape, *supra* note 5.

12. 98 Eng. Rep. 499 (K.B. 1772).

13. The most comprehensive history of this legal sea change can be found in Steven M. Wise, Though the Heavens May Fall: The Landmark Trial That Led to the End of Human Slavery (2005).

14. The litigation is summarized in Robert Melz, Congressional Research Service, Global Warming: The Litigation Heats Up 1 (Apr. 2006); Melz discusses both efforts to force carbon regulation through the Clean Air Act and common-law nuisance theories for liability.

15. 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

interest because, like *Somerset*, it finds the potential for radical change within the structure of the common law, striking at the root assumptions of the legal system rather than at the more superficial and easily-changed level of statutes. The Attorneys General discovered in this doctrine the potential to turn greenhouse gas (GHG) emissions from business as usual into a public nuisance and, hence, a liability. The case is presently before the U.S. Court of Appeals for the Second Circuit on appeal after oral argument in May of 2006. If it is ultimately resolved in the plaintiffs' favor, it will be a modern *Somerset*, converting business as usual into a moral act, linking the power that drives society with the power that unmakes the world.

As the wave of global warming litigation grows,[16] linking litigation to organization and legislation in a way that will power long-term and profound change becomes the crucial question for the environmental movement. In this Article, I trace the development of the two movements, separated by two centuries but linked by the fundamental scale of the problems they address and addressed. I first explore the pre-movement worlds in more detail, establishing the contexts in which the actors lived. I then turn to the question of legal blindness and its lifting, discussing *Connecticut* through the lens of *Somerset*. But I do not confine myself to this initial stage but next turn, instead, to what the conditions for success looked like in 1838 and might look like in the next five years: where does legal visibility fit into a larger strategy for social change? I conclude that law, in matters as fundamental as global warming or anti-slavery, ultimately serves, at best, in an intermediary role between social actors and moral choices. Legal change does not force social change, but laws unchanged may bar society's transformation. The sketch is of lawyers in the midst of a moral great awakening, removing some barriers to vision. Where society's eye turns depends as much or more upon the voices of moral witness that can rise as the law changes. We are left wondering: has the warming earth found its prophets? Are there those who can look across a seemingly normal economic prospect and see calamities which must be brought to their end?

II. World of Slaves/Warming World

To understand what social blindness means, we must first understand what the world looked like to those who were blind. In this section, I turn to the world just before anti-slavery succeeded and to the world today.

A. World of Slaves

Stand, for a moment, with Thomas Clarkson, the leading organizer of the post-*Somerset* anti-slavery movement, as, on his first organizing tour, he looks down upon Bristol harbor. Below, in the slaving port, ships jostle for space, masts bristling over the horizon.[17] This was a time when the economy of the empire was driven by the trade in human beings. In the 1780s, the trade was at an all-time peak; over the 1790s some 770,000 Africans would be enslaved and carried into the New World.[18] Bristol accounted for roughly 18% of the trade.[19] The 240 slave voyages that passed through its harbor between 1780 and 1807 were thus only a small fraction of those that passed through Liverpool and London.[20] In 1787, the year of Clarkson's visit, approximately 30,000 slaves would be captured and transported.[21] Clarkson was looking down on the primary economic fact of his world: its foundations lay in blood and iron.

The system was pervasive. As Adam Hochschild writes in his excellent recent history of the movement, "at the end of the eighteenth century, well over three quarters of all people alive were in bondage of one kind or another."[22] British slavery itself had been in existence since 1562 when Sir John Hawkins, who proudly decorated his family crest with a bound African, had initiated the trade.[23] The trade grew monstrously; between 1660 and 1807, total slave traffic on the Atlantic was three times greater than the ships carrying white immigrants to the New World.[24] The trade with the West Indies, which partook of slavery in all steps from production of sugar to provision of labor, was worth more than all other trade in the British empire.[25]

Just as the trade was economically dominant, so, too, did it reshape British law. Steven Wise has recently chronicled the legal background of anti-slavery.[26] Although human slavery is a very old institution, it had almost passed from Britain at the time that the African slave trade was introduced. But Britain did have legal slavery in its past. As many as a quarter of Anglo-Saxon peasants were slaves in 1086, but this practice was outlawed by the new Norman aristocracy in 1102, in a document calling the trade "that shameful trading whereby . . . men used in England to be sold like brute beasts."[27] The Normans, however, proved to be more principled in words than in practice; they soon introduced villeinage, a sort of limited serfdom system that bound peasants to their lords or their land.[28] This system had largely faded away by the 1500s, in part due to the difficulty of distinguishing villeins from ordinary peasants—race was not yet available to play this role—and in part due to British juries who were unwilling to uphold what was essentially a slave system.[29] The last villein case was decided in 1618, freeing the villein at bar.[30]

But just as Britain abolished slavery at home, it discovered the profit of slaves from abroad. Hawkins himself had made a 60% return on his voyage.[31] Others soon followed and the trade boomed, becoming the dominant economic force that would confront the later reformers. The law bent itself around the peculiar institution. The first slave case to

16. *See generally* Melz, *supra* note 14.

17. Drescher, *supra* note 2, at n.65.

18. Kaufmann & Pape, *supra* note 5.

19. Stephen D. Behrendt, *The Annual Volume and Regional Distribution of the British Slave Trade, 1780-1807*, 38 J. Afr. Hist. 187, 187 (1997).

20. *Id.* at 189, tbl. 1.

21. *Id.* at 194, tbl. 5.

22. Hochschild, *supra* note 3, at 2.

23. Louis Taylor Merrill, *The English Campaign for Abolition of the Slave Trade*, 30 J. Negro Hist. 382, 382 (1945).

24. Hochschild, *supra* note 3, at 3.

25. Kaufmann & Pape, *supra* note 5, at 634.

26. Wise, *supra* note 13.

27. *Id.* at 15.

28. *Id.*

29. *Id.* at 16.

30. *Id.*

31. *Id.* at 17.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

be recorded, *Butts v. Penny*,[32] saw a slave returned to his master as property, as an inhuman thing.[33] There was, however, a burst of liberalism under Chief Justice of the King's Bench Sir John Holt in the early 1700s, who, in a trilogy of opinions, declared that "as soon as a Negro comes into England, he becomes free."[34] This movement so alarmed the slave interests that they brought the two chief legal officials in Britain, Attorney General Sir Philip Yorke and Solicitor General Charles Talbot, together to roll back the liberal tide.[35] The two men issued the infamous Joint Opinion of 1729 which declared that "A slave coming into England . . . doth not become free; and that his master's property or right in him is not thereby determined or varied."[36]

This was the state of affairs in Britain and the world at the time of the anti-slavery movement. Thousands upon thousands of Africans were carried off to America to work and to die to enrich the empires of Europe. In large part, this wealth was in the form of sugar (and rum, its preserved form). The sweet tooth of Europe, the consumptive demand that drove the economy, was fed by slave labor at enormous profit. Slaves themselves were legally invisible; they were property, not humans possessed of their inalienable rights. The system was pervasive and it was brutal. Over the course of the trade in the British West Indies, two million imported slaves left a surviving population of only 670,000.[37]

The degree of moral blindness associated with this practice is perhaps best illustrated by the Codrington Plantation on the island of Barbados. Codrington produced 2,000 pounds in profit every year—roughly $300,000 in modern terms.[38] It was run for efficiency, not humanity. Slaves worked 12-hour shifts over boiling cauldrons of sugar cane.[39] Punishment was swift, harsh, and consequence free for the owners—to kill a slave meant a 25 pound fine.[40] The plantation branded its slaves to keep track of them and to reduce runaways.[41] This place, utterly dehumanizing as it was, was not atypical. It is worth noting because of its owner: the Church of England.[42]

And yet, this was business as usual, the background norm, not the moral crisis. For reform to be possible, it was necessary to imbue the market itself with moral force: "commerce itself had to be understood as a moral exchange."[43] It is the story of that transition that makes British anti-slavery so remarkable. The history of the movement has spawned a long-running historical debate in part because it seems almost too incredible that a civilization could make a costly moral choice of this nature.[44] Indeed, the end of slavery was tangled up in the rise of the market economy that would lead to the modern climate crisis. As slave labor was abolished, the dehumanizing industrial revolution took hold. But this compromised historical moment does not strip away the remarkable nature or moral force of abolition: it continues to represent a singular instance of national self-criticism and insight.

B. Warming World

Before tracing the anti-slavery movement forward to its legal victories and the political victories that followed, we must return to the present day to investigate our own moral, legal, and political blindness. We live in a time shaped by the other legacy of early modern Britain: the industrial revolution and the ever-increasing consumption and growth that were its gifts to the world. This is not the place to rehash the debate over the absolute merits of that cultural change; what is important is to see how utterly the machine age altered our physical relation to the world.

That relationship is, increasingly, one of exploitation and control. It is not that human beings have not long been involved in ecosystem change. The first great wave of human settlement, just after the end of the last ice age glacial maximum saw the extinction of many large mammal species, due, at least in part, to overhunting.[45] But for the vast majority of our history, human populations were low enough, and economic growth small enough, to leave non-human forces as the dominant ecological actors on the planet. This is no longer true.

The title of a 1997 *Science* summary paper puts it well: "Human Domination of Earth's Ecosystems."[46] Humans are now capturing between 39% and 50% of the total primary productivity of the planet's ecosystems[47]; humanity is thus the single largest consumer in the world. This dominance extends to the world's biogeochemical systems, whose dynamic equilibrium sustains all life. Humans now use over one-half of all the world's freshwater, are moving toward doubling the amount of biologically-available nitrogen fertilizing the world's soils, and have flooded the world with synthetic chemicals that have never before existed in large quantities, including ozone-destroying chlorofluorocarbons (CFCs).[48] This dominance comes with great costs. Global extinction rates are now between 100 to 1,000 times greater than they have been.[49] The human costs of this feckless dominance are truly daunting. The Millennium Ecosystem

32. 83 Eng. Rep. 518 (K.B. 1677).
33. Wise, *supra* note 13, at 27.
34. *Id.* at 29.
35. *Id.* at 24-25, 30.
36. *Id.* at 30.
37. Hochschild, *supra* note 3, at 67.
38. *Id.* at 62.
39. *Id.* at 63.
40. *Id.* at 64.
41. *Id.* at 65.
42. *Id.* at 67.
43. Philip Gould, Barbaric Traffic: Commerce and Anti-Slavery in the Eighteenth-Century Atlantic World 3-4 (2003).
44. On this, see Eric Williams, *The Golden Age of the Slave System in Britain*, 25 J. Negro Hist. 60 (1940). Eric Williams, a Caribbean historian, argued that the slave system only ended when it became unprofitable and that the moral self-congratulations of the British were the acts of "intellectual eunuchs," *id.* at 106. His critique was founded on economic data that has proven largely unreliable; the trade was in fact at the height of its profitability when it was brought to a close. However, Williams' work serves as an important reminder that the movement was never untainted by considerations of self-interest or by the newly emerging market economy's imperatives.
45. Assessments of the importance of human overhunting in destroying the Pleistocene megafauna vary, but most observers agree that the human role was substantial and, perhaps, dominant. On this, see Craig Segall, *Lost Worlds: The Late Pleistocene Extinctions and the Modern Crisis*, 1 Chi. Biological Investigator 14 (2004). The theory was first proposed in Paul Martin, *The Discovery of America*, 179 Science 969 (1997).
46. Peter M. Vitousek et al., *Human Domination of Earth's Ecosystems*, 277 Science 494 (1997).
47. *Id.*
48. *Id.* at 497-98.
49. *Id.* at 498.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

Assessment, an international effort designed to assess the health of the biosphere, has found that nearly 60% of ecosystem services—the vital provisioning of services including fresh air, clean water, and fertile soil by functioning ecosystems—have been degraded in the last 50 years.[50] The world and its ability to support us are in steep decline.

Perhaps the most frightening of these trends is the human alteration of the global carbon cycle and, hence, the global climate. Before the industrial revolution, CO_2 was found in the atmosphere at a concentration of roughly 280 parts per million (ppm).[51] In 2000, the gas stood at 368 ppm.[52] Other heat-trapping gases (GHGs) are also at their highest recorded levels; methane, for instance, has more than doubled.[53] These gases have increased as a result of the massively expanded burning of fossil fuels that occurred during the last two centuries. The idea that these gases can and will cause global warming is a surprisingly old one. The theory was first proposed by Svante Arrhenius in 1896.[54] Arrhenius, better known for his work on acid and base chemistry, recognized that CO_2 would act to trap heat and activate a series of global climactic feedback mechanisms that could ultimately significantly increase global temperatures.[55] This theory, at the time, was little more than a curiosity: humans were so used to the idea of a stable climate, well beyond the reach of anthropogenic change, that they simply did not pay attention to greenhouse warming.[56]

Evidence that CO_2 was indeed accumulating at dangerous rates would have to wait until 1960, when scientist Charles Keeling published the first iteration of his now world-famous Keeling curve, a chart taken from highly precise atmospheric measurements.[57] The curve, extended every year, shows the grim progression of accumulation: every year GHG concentrations ratchet steadily higher in a jigsaw curve, rising in the winter months when the northern hemisphere consumes more energy and green plants are not available to absorb the resultant gases.[58] This drumbeat of growing danger, each winter seeing a bit more accumulation, each summer, on average, growing hotter, has continued throughout the lifetime of everyone on the planet. By 1985, the world's assembled meteorologists declared that "in the first half of the next century a rise of global mean temperature could occur which is greater than any in man's history."[59]

Awareness of the problem has grown since the hothouse summer of 1988. Like the 1990s and 2000s after them, the 1980s were the hottest years in human history.[60] 1988 was dramatically bad, a year of droughts, storms, and fires.[61] At a congressional hearing in June of that year, NASA scientist James Hansen testified that warming was underway and that it was "time to stop waffling, and say that the evidence is pretty strong that the greenhouse effect is here."[62] Out of that testimony and that summer grew the political will to establish the Intergovernmental Panel on Climate Change (IPCC), the gathering of world scientists that has become the central source of climate science and policy data. Over the 1990s, the IPCC provided the data used to ultimately bring the world community together in Kyoto in 1997 to agree to the world's first systematic GHG reduction accords.[63]

The negotiations were fraught with complexities, many of which had been anticipated six years before in the work of James Sebenius. Sebenius' 1991 paper on future climate negotiations captures many of the on-going challenges facing international climate change efforts.[64] Put simply, "the causes of the greenhouse problem are deeply embedded in the central aspects of the world's economic and social activity;" they cross all sectors and regions of the globe.[65] At root, the climate problem has emerged from "the interaction of two vast and complex systems, the planet's ecosystem and the human socioeconomic system," both of which will require immense effort to significantly alter.[66] Among the central challenges to international negotiations, in addition to the sheer pervasiveness of the problem, is the gap in interests between the developed world, which has created the present crisis and the developing world which, if it builds energy capacity along the lines of what presently exists, will swamp much of any anti-global-warming effort that the developed world takes.[67] Add to this north-south divide the powerful interests of the petroleum and automobile industries, and sustained international progress, even with a formal treaty on the books, becomes a challenging proposition.[68] These fears did come to pass in Kyoto where only a last-minute push by then-Vice President Al Gore led to a compromise solution.[69]

Determined opposition from powerful lobbies within the United States blocked the implementation of the Kyoto Protocol nationally, although it has since gone into force globally.[70] Kyoto's long-term efficacy is debatable; even if fully implemented, it will only return global GHG emissions to 5% below 1990 levels.[71] This is still well above the emissions rate that the biosphere can successfully compensate for; consider that warming began well before 1990.[72] However, the Kyoto Protocol has created incentives for governments and corporations to move away from carbon-intensive practices, perhaps shifting markets and regulatory policies far more than its immediate requirements. Whether or

50. Harold A. Mooney et al., Ecosystems and Human Well-Being: Millennium Ecosystem Assessment Synthesis 1, 6-7 (2005).
51. Vitousek et al., *supra* note 46, at 496.
52. Watson et al., *supra* note 7, at 5.
53. *Id.*
54. Weart, *supra* note 6.
55. *Id.*
56. *Id.* at 8-10.
57. *Id.* at 37.
58. *Id.*
59. *Id.* at 151.
60. *Id.* at 154.
61. *Id.*
62. *Id.* at 155.
63. *Id.* at 160-74.
64. James K. Sebenius, *Designing Negotiations Towards a New Regime: The Case of Global Warming*, 15 Int'l Sec. 110 (1991).
65. *Id.* at 121.
66. *Id.*
67. *Id.* at 129.
68. *Id.* at 131.
69. Weart, *supra* note 6, at 174.
70. For more on Kyoto's implementation, see the United Nations' website for the treaty at http://unfccc.int/2860.php (last visited Apr. 25, 2006).
71. Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 3, §1.
72. Weart, *supra* note 6, at 189-90.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

not Kyoto will achieve a partial success, the global warming problem simply cannot be solved without the active engagement of the United States. U.S. CO_2 emissions have climbed nearly 20% since 1990 and show no sign of slowing.[73] This GHG growth has been accompanied by steadily growing hostility to meaningful environmental protections within a Republican Party dominated by an absolutist view of private property rights.[74] As Republicans presently control all branches of government, their move away from environmental policies represents a major success of the global warming countermovement. The countermovement, composed mostly of an assortment of oil industry-funded front groups and conservative think-tanks has attempted to suggest that climate change is either a natural cyclical phenomenon, is not occurring at all, or is simply not worth the cost of addressing.

This countermovement has grown as the environmental movement has "failed to give the public a vivid picture of what climate change might truly mean."[75] While the elite discourse focused on the scientific findings of the IPCC, the public instead received a steady diet of misinformation from the moneyed interests that benefit most from the petro-economy. Aaron M. McCright's and Riley E. Dunlap's recent analysis of the counterclaims show three major themes.[76] First, the countermovement has taken advantage of the inherently complex climate system to chip away at public faith in the underlying science behind the movement's claims.[77] Even as the scientific consensus grew, the anti-movement devoted its time to telling the public that, as the Competitive Enterprise Institute puts it, "a decade of focus on global warming and billions of research funds have still failed to establish that global warming is a significant problem."[78] Secondary themes include potential benefits from global warming—the Hoover Institution absurdly suggested that we could save on snow shoveling—and the economic and political costs of action.[79]

For a particularly stark look at the countermovement, the words of grand old party pollster Frank Luntz are invaluable. Luntz has been very frank about the need to maintain public uncertainty, even in the face of scientific consensus. His 2003 confidential memo to Republican candidates explains that "voters believe that there is *no consensus* about global warming within the scientific community. Should the public come to believe that the scientific issues are settled, their views . . . will change accordingly. Therefore, *you need to continue to make the lack of scientific certainty a primary issue in the debate*."[80] Luntz himself recognizes that "the scientific debate is closing (against us)" but feels it is "not yet closed."[81] Note, of course, that this memo was issued two years after the IPCC had declared in simple terms that "there is new and stronger evidence that most of the warming observed over the last 50 years is attributable to human activities."[82]

Because the powerful have obscured the debate, it is important to provide an image of what is, in fact, happening to the world. Note first that the average global temperature is now a full degree higher than it has been in one thousand years and is well outside the range of variability for that period.[83] One degree is not a trivial amount. Bear in mind that average global temperature is a measure of the energy contained in the vast ocean of air that is the atmosphere; consider how much energy it takes to heat a room and then consider how much energy it takes to heat a world. The last ice age was only on the order of four degrees Celsius (°C) cooler than today.[84] Temperatures in 2100, with unabated warming, will be as much as 7°C warmer than the present.[85] This is a forecast for transformation and for chaos. The IPCC, in the dispassionate language of scientists predicts a centuries-long increase in sea level, severe storms and droughts, and regional ecosystem collapse.[86] The monsoon cycle that sustains Asian agriculture will become increasingly unreliable, while El Niño floods and droughts will become more severe.[87] Crop yields will fall even as global population continues to rise.[88] Climate shifts will put additional pressures on the already failing ecosystems that maintain global ecosystem services.[89] The sea level rise alone means disaster and it is happening far more rapidly than anticipated. The seas are already rising at near the maximum rate predicted for the next 1,000 years.[90] Once the ice caps begin to melt, feedback effects take hold: "a threshold triggering many meters of sea level rise could be crossed well before the end of this century."[91] Millions of people living in coastal areas are at risk. A warmer world does not just mean higher seas, it means more violent oceanic storms and they are already with us. An April 2006 headline adds a grim coda to last year's hurricanes: "Global Warming Behind Record 2005 Storms."[92]

What do higher seas and more violent storms mean? Here, even ignoring the other specters of the coming years, we find death waiting. While researching this Article, for in-

73. U.S. Environmental Protection Agency, The U.S. Inventory of Greenhouse Gas Emissions and Sinks (2004), *available at* http://yosemite.epa.gov/OAR/globalwarming.nsf/UniqueKeyLookup/RAMR6P5M5M/$File/06FastFacts.pdf.

74. Charles R. Shipan & William R. Lowry, *Environmental Policy and Party Divergence in Congress*, 54 Pol. Res. Q. 245 (2001). It was not always so. President Richard M. Nixon signed the majority of our environmental statutes and President Theodore Roosevelt was among the White House's strongest advocates for land conservation. The reasons for this shift are beyond the scope of this Article, but it is to be lamented, particularly, for the hostility toward science exhibited by those who lead the modern grand old party: we find ourselves debating whether problems exist rather than how to solve them.

75. Weart, *supra* note 6, at 182.

76. Aaron M. McCright & Riley E. Dunlap, *Challenging Global Warming as a Social Problem: An Analysis of the Conservative Movement's Counter-Claims*, 47 Soc. Problems 499, 510 (2000).

77. *Id.* at 511.

78. *Id.*

79. *Id.* at 513-16.

80. Frank Luntz, *The Environment: A Cleaner, Safer, Healthier America* 7 (2003).

81. *Id.* at 8.

82. Watson et al., *supra* note 7, at 5.

83. Weart, *supra* note 6, at 184.

84. National Climate Data Center, Paleoclimatology Program Climate Timeline, http://www.ngdc.noaa.gov/paleo/ctl/100k.html (last visited Apr. 26, 2006).

85. Watson et al., *supra* note 7, at 34.

86. *Id.* at 31-32.

87. *Id.* at 15.

88. *Id.*

89. Mooney et al., *supra* note 50, at 17.

90. Overpeck et al., *supra* note 1, at 1748.

91. *Id.* at 1750.

92. Thom Akeman, *Global Warming Behind Record 2005 Storms: Experts*, Reuters, Apr. 24, 2006.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

stance, I found myself on the coast of Louisiana and Mississippi. It had been months since Hurricane Katrina blasted the area, much of which is below sea level even today. New Orleans stretches vast, dead, and dark, boats in its streets and bodies in its buildings, for miles along the broken marshes. Trees were snapped like twigs. Along the Mississippi coast, where a 25-foot wall of water slammed into what had once been the second-largest city in the state, houses are just splinters. The choir pews of a church hang twisting above empty air where the sea blasted through the walls below. Toxic sludge, dredged up from factories and chemical plants, coats the region. Hundreds of thousands of people are homeless; most of them are poor. Hurricane season will come around again and again.

Now imagine this same scene repeated with the seas meters higher and the storms even more violent. Imagine the floods in Buenos Aries, Calcutta, Dhaka, Lagos, New York, and Washington. The great cities of the world lie along its coasts. Imagine the refugees, the wars, the endless brutal business of living. The Pentagon has already done just that. In a secret 2003 report, which was later leaked to activist groups and the press, defense department experts considered the consequences of abrupt climate change triggered by our current warming.[93] Because the climate system is dynamic and unstable, there is broad concern about abrupt climate change—caused, for instance, by the failure of the Gulf Stream, as has happened as recently as 8,000 years ago—and the U.S. Department of Defense is urged to be aware that it can (and quite possibly will—there is credible evidence that the Gulf Stream is beginning to fail)[94] happen again. This is, the report says, "a U.S. national security concern."[95] They dryly report that such an event would "challenge[ ] the notion that society's ability to adapt will make climate change manageable."[96] Their forecast is of a Europe with Siberian temperatures and drought across much of the rest of the world.[97] In such a world, "humanity would revert to its norm of constant battles for diminishing resources."[98] Nuclear resource wars are entirely possible.[99] Changes are already in motion. In addition to the impending failure of the Atlantic circulation that drives the Gulf Stream, the trade winds that trigger El Niño years in the Pacific also appear to be failing in a way that will cause essentially chronic El Niño effects.[100]

Now begin to see these coming wars and plagues, fires and floods, when you turn on a light, when you start your car, when you go about any piece of your daily business. Just as the slave system permeated the economy of Britain two centuries ago, the carbon system permeates our own, just as invisible and just as deadly. In the technocratic debate over climate change, between scientists and policy wonks on the one hand and industry flacks on the other, it is easy to lose the thread of justice. But it is a monstrous thing we are doing.

93. Peter Schwartz & Doug Randall, An Abrupt Climate Change Scenario and Its Implications for United States National Security (U.S. Department of Defense 2003).

94. *Id.* at 19.

95. *Id.* at 3.

96. *Id.* at 4.

97. *Id.* at 13.

98. *Id.* at 15.

99. *Id.* at 18.

100. Carl T. Hall, *Trade Winds' Slowdown Backs Warming Theory*, San Francisco Chron., May 4, 2006, at A1.

C. From the World of Slaves to the Warming World

Before moving from the world as it is to the world as it could be, it is important to pause and consider the structural similarities between the Britain of 1765 to 1838 and the America of today. Both were at the center of webs of international trade and power. Both were imperially dominant while maintaining domestic isolation, Britain aloof from the affairs of the Continent, America from those of the world, even as both nations went about the business of hegemony. Both nations were at a moment of economic change, Britain in the transition from agrarianism to the industrial age, America at the end of its industrial period and the beginning of a service economy. Most centrally, both nations derived their wealth from a practice at once pervasive and abhorrent, and one whose harms fell first and hardest on people of a different race thousands of miles away. In a period that was already one of transformative moment, reformers were faced with the task of toppling a settled and powerful economic order.

These parallels are important to draw because they make clear what is at stake in the climate debate. Global warming does not simply present another environmental problem, thorny and interlinked with society as all environmental problems are. It was, for instance, possible to deal with the threat of ozone depletion, perhaps the nearest analogue, through the regulation of CFCs, an important but limited chemical sector of only middling importance to the general economy. Even this took years of negotiation and debate. Carbon regulation, by contrast, strikes at the heart of everything we do as a society. Fossil fuels power the world. But this is not simply a technological challenge. It is also, and perhaps primarily, a challenge to our society's moral worth. And because moral obligations must be perceived to be acted upon, three perceptual shifts are needed.

The first of these shifts can be called a *frame* shift. After millennia of perceiving the natural world as essentially stable in a "balance of nature," people must come to perceive that human activities are, as discussed above, now as or more significant than many natural phenomenon. Industrial society has allowed our species to magnify its impacts a millionfold since its time on the savannahs of Africa.

The second of these shifts is a *causal* shift. Here, once a person has perceived that humanity's actions on the whole are globally significant, she must disaggregate these effects to recognize the impacts of her own actions and lifestyle. It is here that people begin to see the connection between the light switch and the hurricane.

Finally, if any political action is to occur, there must be a *moral* shift. It is not enough simply to accept that one is changing the world; the change must be seen as fundamentally unjust, a disaster that one bears personal culpability for. A sense of personal responsibility, linked with the ability to perceive national responsibility, is required before agitation for change can begin.

The anti-slavery movement was faced with essentially similar challenges. First, the *frame* had to be shifted; Africans had to be seen not as things or beasts but as people. Second, the *causal* connection between sugar in one's tea and the devastation of Africa and the cruelty of the West Indies had to be made unavoidable. And finally, the *moral* link was

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

drawn, bringing the sharp tang of blood into the sweetness of sugar. With all three bridges crossed, the anti-slavery reformers saw the greatest human rights revolution in our history: the beginning of the end of slavery, an economic institution thousands of years old and rooted in deep-seated assumptions about the nature of the world. A similar shift will be required today.

If anything, however, today's reformers face the harder task. Although the slave trade dominated its world in the same way that the carbon trade dominates today's, the world itself was a smaller one. That world—one where the economic elite of Britain could likely have fit into a single hall—is well-illustrated by the fact that the headquarters of the abolition movement were just a few doors down from the headquarters of the pro-slavery lobby.[101] Today's reformers face a vastly more complex economy taking place on a wider stage and with a population at least six times as large and well into the billions globally and hundreds of millions nationally.

But the difference is not simply one of size. It is also one of dependency and of intimacy. First, Britain was not dependent upon the slave trade in the same way that America is dependent upon carbon. While the slave interests were central to Britain's empire, they intruded into daily life directly in the form of sugar and rum and indirectly as capital. While these interventions were far from trivial, they could be removed without significant technological innovation and without massive domestic social disruption. The same is simply not true of fossil fuels today. Our society cannot wean itself from carbon without significant international effort and technological innovation. In a related vein, the moral culpability associated with global warming is significantly more intimate than that associated with slavery. This is not to say that the slave institution did not distort the entirety of British society; it did. But it was relatively easy for a person to disassociate himself from at least the most objectionable aspects of those influences; the slave trade was not so pervasive that it was not impossible to refrain from using sugar in daily life and, if one were concerned with capital flows, to avoid the port cities where the trade's influence was most dominant. Again, carbon poses a greater personal challenge. From cars to light switches, from planes to the Internet, everything touched by electrical power or industrial manufacture is ultimately powered by fossil fuels and so adds to the global crisis. In Britain, one who wished to be free from slavery's taint might be perceived as eccentric. In America, the same task moves one close to hermitage.

The conclusion to draw from this is that the task of eliminating global warming is similar in kind to the task of eliminating slavery, but significantly more challenging in scale. There is no good measure of the moral weight of atrocity: the slave system led to wars, racial hatred, and geopolitical disruption that has not left us. This new disaster will spawn disruptions even greater. Consider the world we are leaving behind, one shifted into a climactic mode different than modern humans have ever known, committed to a course that will lay waste its cities, devastate its agriculture, and fall hardest upon Africa, the same continent that earlier bore the brunt of slavery, and upon the rest of the developing world.[102] Both the lingering pain of slavery and the growing crisis of global warming took their root in economic systems that created and benefited from moral blindness as to their consequences: their survival depended on a person being able to taste sweetness or drive a car without sensing the devastation behind their immediate pleasures. The enemy, then, was not so much an opposing power—although the slave merchants and fossil fuel mercenaries stand in the same moral station—but the mass indifference and ignorance of the body politic. Change will come in making the darkness underlying our society visible.

III. First Light: Legal Changes and the Beginnings of Vision

Confronted with a world founded on fundamentally unjust economic ordering, what are we to do? A first step is to look at what others have done. In this section, I trace the earliest break-through in the British anti-slavery movement in parallel with the current legal action being taken against global warming.

A. From Harmless Eccentrics to the Remaking of Society

British anti-slavery was present as a movement of sorts as early as 1671, but for most of the first hundred years of its existence it was a movement of conscientious objectors, not a popular groundswell.[103] The Quakers were the early leaders, repeatedly passing resolutions against the trade.[104] They were viewed then as harmless eccentrics.[105] Although free slaves in Britain, among them the memoirist and activist Olaudah Equiano, valued the Quakers' work, the movement had little traction.[106] This began to change in 1765, when a young ordinance clerk named Granville Sharp first met an escaped slave named Jonathan Strong.[107] Sharp, a moralist, pamphleteer, and scion of a liberal family of traveling musicians, embarked on a legal campaign that led from Strong through the famous case of James Somerset and which effectively abolished slavery within Britain, converting slaves from things into people in the eyes of the law.[108] It is this early phase of the movement, when fervor was as yet confined to a small group and the battles were for basic legal visibility that most closely resembles the situation of the global warming movement today.

After Sharp's initial victories, the Quakers formed a committee to abolish the slave trade in 1787.[109] To this committee came the young Clarkson, who had just won an essay contest at Cambridge in 1785 whose topic was the justice of the slave trade.[110] Clarkson would prove to be an organizer of prodigious talent, a man who traveled at least 35,000 miles across England, largely by night, gathering petitions

101. Hochschild, *supra* note 3, at 159.

102. *See generally* Joel B. Smith et al., *Vulnerability to Climate Change and Reasons for Concern: A Synthesis, in* Climate Change 2001: Impacts, Adaptation, and Vulnerability 915 (McCarthy et al. eds., 2001) (discussing variability of climate impacts and particular vulnerability of the developing world).

103. Merrill, *supra* note 23, at 383-84.

104. *Id.* at 383.

105. Hochschild, *supra* note 3, at 77.

106. *Id.* at 78.

107. E.C.P. Lascelles, Granville Sharp and the Freedom of Slaves in England 16-24 (Negro Universities Press 1969) (1923).

108. *Id.* at 16-34.

109. Hochschild, *supra* note 3, at 95.

110. *Id.* at 87-97.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

and evidence against the trade.[111] With the work of William Wilberforce, an otherwise deeply conservative master of oratory and political gamesmanship, Clarkson and the committee repeatedly brought a bill to abolish the trade to the floor of Parliament.[112] The struggle lasted years, becoming almost quiescent through the long hard years of the French Revolution ideas of all kinds were considered suspect.[113] The great slave revolt in Haiti brought new challenges, but also acquainted more and more Briton with the essentially ugly nature of slavery and the determination of the slaves to be free.[114] The image of the colonies as a benign source of wealth, "already tarnished by years of anti-slavery literature and iconography, never recovered from Britain's defeat."[115]

It was after this interregnum of foreign war and domestic suppression that the first abolition bill passed in 1806. The bill barred British subjects from involvement in the slave trade to colonies of France and its allies.[116] Almost impossible to oppose in the time of Napoleon, it sailed through Parliament, taking with it nearly two-thirds of the trade. A final bill, abolishing the remainder, passed in 1807.[117] Each parliamentary action (of which there had been 11 in the 15 years before 1805) had been accompanied by the petitions of thousands of Britons; the movement was fought in the streets as much as it was in the halls of power.[118] Even the stealth 1806 bill was supported by a petition of 2,300 names gathered and delivered to the House of Lords within a matter of hours.[119]

After the triumph of 1807, the movement again became dormant, in part because many activists believed the brutality of slavery would cease once the planters could no longer import fresh slaves from Africa.[120] To this end, Clarkson made an ill-fated pilgrimage to the Concert of Europe in 1815 to end the international trade diplomatically.[121] Despite years of letter-writing and periodic meetings, the abolitionists were ultimately forced to settle with what they characterized as "vague generalities of verbal reprobation, which, as experience teaches, bind them to no specific efficient measures."[122] One imagines a similar result at Kyoto had Al Gore not intervened. Domestic and international support for stronger measures was scuttled on the rocks of national self-interest.

Indeed, abolition ultimately came only when the same revolutionary spirit that led to the British Reform Bill of 1831 threw itself behind the final end of slavery. Clarkson was joined by new radical voices, among them that of Elizabeth Heyrick, who was involved in a network of over 70 women's anti-slavery organizations.[123] It was Heyrick who organized a second sugar boycott, following in the footsteps of an earlier successful boycott in 1790 during the first wave of parliamentary action.[124] She stated her reasons in clear, compelling, and above all morally-grounded terms: "The West Indian planter and the people of this country, stand in the same moral relation to each other, as the thief and the receiver of stolen goods . . . why petition Parliament *at all*, to do that for us which we can do more speedily and effectually for ourselves?"[125] This agitation combined with the new voters created by the Reform Bill to create a real possibility for final abolition. When slave revolt threatened in Jamaica, memories of Haiti made abolition a reality.[126] The final bill passed in 1833; it contained nearly 40% worth of the national budget as compensation for the planters and allowed for one more year of slavery and four years of a sharecropper-like apprenticeship.[127] Finally, in 1838, Britain freed all of its 800,000 living slaves.[128]

This larger story began with litigation but grew well beyond the courthouse doors. That journey—driven by a hybrid strategy that linked organization, legislation, and moral witnessing to legal efforts—is taken up below. Here, however, we must turn back to the present and the anti-global warming movement which finds itself at the very beginning of mobilization, in the days when legal efforts are paramount. The blossoming of moral and political vision which ultimately ended slavery and which could turn the tide on climate change began in the removal of legal blindness.

This early moment is the nearest to the situation that the anti-global warming movement finds itself in today. Although a global elite mobilized to create the Kyoto Protocols, the movement has largely remained the province of the equivalent of the Quaker groups of the 1770s. In our larger society, these groups are larger: large membership organizations like the Natural Resources Defense Council (NRDC) and Environmental Defense (ED) are hardly the committee of 12 that met in 1787. The state Attorneys General who signed onto, shaped, and marshaled the resources to fight the first global warming cases also bring considerable and legal force to bear. But, compared with the scaling up of the industry on the other side, the power differential begins to look familiar. Arrayed against the reformers is a significant portion of the political and economic infrastructure of the planetary fossil fuel complex. Despite the international victory of the 1997 protocol (pyrrhic though it was, with the failure to draw in U.S. involvement), the anti-global warming movement can, in truth, be barely described as a "movement." The public is not yet roused; there are no marches filling the National Mall. The U.S. Congress is not besieged with petitions. Despite having less than one decade to seriously stem the crisis, change remains the province of dissident politicians and activists rather than a mainstream preoccupation.

It is possible that the movement more closely resembles the anti-slavery movement of the 1790s, when foreign wars and a reactionary domestic polity pushed back the earlier or-

111. Ellen G. Wilson, Thomas Clarkson: A Biography 29, 39-52 (1989).

112. *Id.* at 39-52.

113. Hochschild, *supra* note 3, at 241-55.

114. *Id.* at 256-79, 280-87.

115. *Id.* at 295-96.

116. *Id.* at 302-03.

117. *Id.* at 304-08.

118. Seymour Drescher, *Whose Abolition? Popular Pressure and the Ending of the British Slave Trade*, 31 Past and Present 136, 137 (1994).

119. *Id.* at 138.

120. Charles H. Wesley, *The Neglected Period of Emancipation in Great Britain 1807-1823*, 17 J. Negro Hist. 156, 157-58 (1932).

121. *See generally* Betty Fladeland, *Abolitionist Pressures on the Concert of Europe, 1814-1822*, 38 J. Mod. Hist. 355 (1966).

122. The Directors of the African Institution quoted in *id.* at 373.

123. Hochschild, *supra* note 3, at 324-26.

124. *Id.* at 325-26.

125. *Id.*

126. *Id.* at 343-46.

127. *Id.* at 347.

128. *Id.* at 348.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

ganizing gains made in the 1780s. The present political climate certainly is closer to that of that grim decade, and parallels drawn to that time are rich. However, there are crucial differences. By the 1790s, the anti-slavery movement had already begun a popular mobilization that was never entirely quiescent. And it had already won crucial legal victories that had, politically if not completely on fine points of legal doctrine, created slaves as people. By contrast, the anti-global warming movement has yet to meet considerable success in a general public organizing campaign; the climate crisis is still a province of specialized concern, although, post-Katrina, this may be changing. Crucially, the anti-global warming movement has not yet created carbon as a legal liability; it has not dropped the first veil. For this reason, a more detailed study of the courtroom battles of the earliest period of the anti-slavery movement will repay study in parallel with the nascent legal cases of today.

B. Somerset v. Stewart *and the End of Legal Blindness*

Let us meet Granville Sharp in his own words. Here he is, rigid, supremely moralistic, and righteous in the year that he won his greatest legal triumph:

> [I]t is obvious to whom the misery of a slave is to be attributed: for the guilty possessor will certainly be answerable to God for it; and every man, who endeavors to palliate and screen such oppression, is undoubtedly a partaker of the guilt. The slaveholder deceives himself if he thinks he can really be a Christian and yet hold such a property. Can he be said to love his neighbor as himself?[129]

It was this man who the escaped slave Strong, badly beaten by his master, was lucky enough to meet when he sought treatment from Sharp's surgeon brother.[130] Sharp secured treatment for Strong and was appalled when, two years later, Strong's former owner sought to recapture him and send him to the brutal West Indian plantations.[131] It was this rank injustice that began Sharp's legal crusade. After succeeding in freeing Strong from confinement, Sharp found himself confronted with a damage action from the slavers. They appeared to be in the legal right. As discussed above, the state of British slavery law had been settled since the Joint Opinion of 1729 which had held that slaves remained slaves in Britain and could be treated as things wherever they were transported. Sharp's attorneys advised against going forward against the full weight of English law.[132] Sharp was not deterred by the law's blindness to justice. He told his attorneys that he "could not believe the law of England was really so injurious to natural rights as so many great lawyers for political reasons had been pleased to assert."[133] And so the process of legal change began.

The general structure of this process is more important than its specific incidents. Strong's case was one of many. The damage action in that case would be fought for eight years until the case at last was dismissed.[134] Sharp would also be involved in the successful efforts of the freedman John Hylas to recover the freedom of his slave wife Mary from the West Indies.[135] He would rescue the kidnapped Thomas Lewis from on board the ship carrying him away from England and secure his freedom.[136] And he would write his remarkable *A Representation of the Injustice and Dangerous Tendency of Tolerating Slavery, or Even of Admitting the Least Claim of Private Property in the Persons of Men, in England*, a lengthy legal treatise by the self-taught Sharp which demonstrated how greatly slavery had distorted the legal tradition of Britain.[137]

But at every turn, Sharp failed in his larger goals because the courts of Britain, under the influence of the conservative, cautious, and brilliant Lord Mansfield, the Lord Chief Justice, simply refused to reach the central question of the legality of slavery.[138] The *Hylas* court awarded relief and money damages but refused to issue a declaratory judgment on the question of slavery itself.[139] The *Lewis* court, under the direction of Lord Mansfield himself, dodged the issue by finding that, whether or not men could be had as property, Lewis was not the property of his purported owner.[140] Mansfield was a remarkably capable jurist—his accomplishments include introducing equitable principles into the British common law[141]—but he also believed fiercely in the judicial virtue of humility and was a great respecter of property. Until the question was directly presented to him, in an unavoidable fashion, he would avoid ruling on the matter of slavery. And until he did so, slaves were legally invisible.

The time came at last with the case of Somerset, an American slave who escaped from his master once they reached Britain.[142] When he was recaptured in 1771, Sharp was ready with a demand for a writ of habeas corpus; Mansfield granted the writ.[143] The question would turn on whether Somerset had remained a slave once he entered England; there was no dispute that, if he remained a slave, he remained the property of his master, Charles Stewart. Mansfield struggled mightily to avoid the decision, strongly urging the parties to settle before he issued his opinion.[144] He was very aware that setting free the 15,000 slaves in Britain represented a major commercial loss and would cause considerable social disruption.[145] But, he said, "'if the parties will have it decided, we must give our opinion . . . compassion will not, on the one hand, nor inconvenience on the other, be to decide; but the law . . . [i]f the parties will have judgment, *fiat justitia, ruat coelum* [let justice be done though the heavens may fall].'"[146]

Justice was done, but done as narrowly as Mansfield could manage it. On the one hand, he wrote that slavery must, if it was introduced at all, be introduced by statute, not by common law, because "it is odious that nothing can be

129. Granville Sharp, The Just Limitation of Slavery in the Laws of God 38-39 (Negro Universities Press 1969) (1972).

130. Lascelles, *supra* note 107, at 16-17.

131. *Id.* at 18.

132. *Id.* at 20-22.

133. *Id.* at 21.

134. Wise, *supra* note 13, at 57-58.

135. *Id.* at 45-48.

136. *Id.* at 59-67, 97-110.

137. *Id.* at 32-33.

138. *Id.* at 48, 69-80, 105.

139. *Id.* at 48.

140. *Id.* at 105.

141. *Id.* at 71-73.

142. *Id.* at 6, 9.

143. *Id.* at 114-16.

144. *Id.* at 173.

145. *Id.* at 171.

146. *Id.* at 173.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

suffered to support it but positive law."[147] But this was dicta; the judgment itself was simply that no slave could be taken from England against his will.[148] Indentures and other legal devices ensured that there were still slaves in Britain in 1833.[149] But for the vast majority, freedom came with the Mansfield judgment. Without a positive law of slavery in Britain, there was no way to maintain the institution through forced deportation and no way to hold slaves once they were brought to Britain.[150] As Seymour Drescher puts it, "no black in Britain in 1772 was any longer under any general constraint . . . to stay either in service or to return to the colonies. Only if they voluntarily did so did they revert to slave status."[151] The balance of power had shifted and slavery in Britain would wither away.[152]

The victory in the media was considerable. Skilled campaigning by Sharp and his allies and a media uninterested in finer points of law ensured this. The *Middlesex Journal* reported that Mansfield had ruled that "every slave brought into this country ought to be free."[153] The *Boston Gazette* reported that all the slaves of Britain had been freed.[154] It was a particular coup that the only common legal report of the case, by one Capel Lofft, was a summary that construed the case very broadly and quoted the anti-slavery arguments of Somerset's lawyers.[155] The case, built up in the press during the argument phase and widely reported afterwards provided "the distaste for claims to property in persons an opportunity to crystallize."[156] Newspaper stories, tracts, and the popular understanding all created a broader judgment than the court had intended. The legal holding mingled with political organizing to turn the slave from invisible property into a person of intense political significance.

This legal journey can teach the anti-global warming movement a great deal. First, the very qualities that make judges judicial make them awkward avatars for social change. The courts of Britain dodged ruling on the substantive question of slavery for years, precisely because it so deeply implicated justice. If courts can use procedure to avoid radical justice, they will do so. Second, existing legal orthodoxy can be overturned with the right case, skilled counsel, and a charged political climate. Because courts exist in a highly-structured world, they can only dodge root questions of law for so long before they must be decided. Third, the performative role of justice is as important as the decision itself. The earlier cases had educated the courts and the public about the evils of slavery; *Somerset* itself was heavily reported and widely understood to be intended to settle the matter. The opportunity to use courts to amplify arguments about social justice is real and important. And fourth, once a decision is issued, its import depends upon political organizing, not just the words of the text.

147. *Id.* at 182.

148. Jerome Nadelhaft, *The Somerset Case and Slavery: Myth, Reality, and Repercussions*, 51 J. Negro Hist. 193, 194 (1966).

149. Drescher, *supra* note 2, at 37.

150. *Id.* at 37-39.

151. *Id.* at 38.

152. *Id.* at 39.

153. Nadelhaft, *supra* note 148, at 194.

154. *Id.*

155. *Id.* at 199-201.

156. Drescher, *supra* note 2, at 37.

It is hard to say whether the rest of the movement would have been possible without Sharp's efforts to end Britain's legal blindness. The case itself was a central early step in building the political pressure that would ultimately abolish the slave trade and lead to general emancipation. But the case itself grew out of the moral awakening of one sector of British society and it is hard to believe that, even without the Mansfield judgment, those who viewed slavery as a grievous wrong would have simply been silent. But the nature of their speech is important. It is one thing to argue against a settled practice, both legal and ancient. It is another to argue on the offensive, pushing the law back as one goes. This was the effect of *Somerset*: it placed the slave power, for the first time, on the defensive. It turned what had been a morally and legally unobjectionable trade practice into something "odious." And it was the first step in putting the facts of the case before the public of Britain. Legal visibility preceded large-scale political visibility and may have been a precondition for broad political action. And it is this effort to gain legal visibility that is going on now, in the courtrooms of America.

C. The Legal Visibility of Carbon

And so we come, at last, to the movement in America as global climate change becomes a crisis. Developing legal routes to address climate change is becoming the increasing province of many of the country's nonprofit groups from Earthjustice to ED and of many state Attorneys General. But while the cast of characters is large, the NRDC perhaps most clearly plays the role of the Quaker's London Committee in this account, often shaping cases and equally often talking with the leaders of other groups. For our purposes—the creation of legal visibility—NRDC is among the central players. David Doniger, their litigation chair, has developed their "multi-pronged" strategy. Like Sharp's before it, the strategy turns on legal visibility, this time, for carbon. In play, among other cases, are a multi-state lawsuit against the U.S. Environmental Protection Agency (EPA), *Massachusetts v. EPA*,[157] to force it to regulate CO_2 emissions, a legal defense of the state of California's auto-emissions controls, and a common-law public nuisance action. *Connecticut v. American Electric Power Co.*[158] to regulate CO_2 due to its global warming effects.[159] The cases are inter-related. Should, for instance, EPA have been found to have the power and obligation to regulate carbon dioxide under the Clean Air Act (CAA), as the *Massachusetts* plaintiffs contended,[160] then the common-law case for nuisance-based regulation would have been significantly weakened. The cases move towards a common goal: to create CO_2 as a liability for corporations and use pressure from environmentalists and a newly-concerned business community to push for federal regulation.[161]

The Congressional Research Service recently tracked climate litigation, which it described as "heating

157. 415 F.3d 50, 35 ELR 20148 (D.C. Cir. 2005).

158. 406 F. Supp. 2d 265, 35 ELR 20186 (S.D.N.Y. 2005).

159. Interview with David Doniger, NRDC Climate Center Policy Director (Mar. 21, 2006).

160. Thus far, the claim has not succeeded, but is summarized in *Massachusetts v. EPA*, 415 F.3d 50, 35 ELR 20148 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 2960 (2006).

161. Doniger Interview, *supra* note 159.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

up."[162] The report chronicles litigation on four fronts. Some cases work within the statutory structure of the CAA to first establish that EPA can regulate CO_2 and, secondly, must regulate it.[163] The second, independent, prong is a fight against industry arguments that state regulation is preempted by federal (non)efforts.[164] Third are efforts to develop sources of common-law liability for carbon emission.[165] Finally, litigants are seeking to force the analysis of climate impacts into the nation's procedural environmental laws, including the National Environmental Policy Act of 1969.[166] The report, tracking the present failure of many of these routes concludes that environmental plaintiffs face "an uphill climb."[167]

The course of this litigation strongly resembles that of Sharp's campaign. Like that effort, it is marked with defeat. Although Sharp won his earlier cases, he lost the precedents he had hoped for through narrow decisions. The global warming campaigners have, thus far, lost their cases but they too have lost them on narrow grounds. The story of their litigation is the same story that we see in Britain: cautious courts, aware of the political explosiveness of the issue at hand, have gone out of their way to avoid it.

1. Prologue to Vision: *Massachusetts*

The first case to reach judgment, although not the central focus of this section, is important to consider. This is *Massachusetts*, in which the petitioners, an alliance of states and other public interest groups, demanded that EPA regulate CO_2 as a CAA pollutant.[168] The two judges in the majority, A. Raymond Randolph and David B. Sentelle, both go out of their way to avoid the merits of the case. Randolph telegraphs his views in his description of the greenhouse effect, which, conflating the natural CO_2 greenhouse and anthropogenic contributions to it, he describes as "a natural phenomenon without which the planet would be significantly colder and life as we know it would not be possible."[169] Cherry-picking the available research reports, he concludes that "uncertainty" remains in the science and that, therefore, the EPA Administrator was right to refuse to regulate.[170] Sentelle goes even further, denying standing with the remarkable argument that, because global warming causes harm "to humanity at large" and because "petitioners are or represent segments of humanity at large," they therefore cannot show the particularized injuries required to come before the court.[171] For both controlling judges, the case looks rather like that of *Lewis* in the British courts: regardless of the justice claim at issue, the court need not look into it.

This is what makes Judge David S. Tatel's dissent in the same case so remarkable. At 21 pages long, it is significantly longer than both majority opinions combined and represents the first judicial exegesis of the climate crisis.[172] Although in dissent form, it is a map of a future majority opinion. Tatel's rhetorical strategy is of particular interest here, as it foreshadows that of the plaintiffs in *Connecticut*. Like them, he attempts to highlight the enormous dangers associated with climate change while fitting it into an existing legal framework. Thus, the issue is both "welfare-endangering climate change" and whether "the [CAA] clearly gives EPA authority to regulate 'any air pollutant' that may endanger welfare," the prosaic and the revolutionary mingling.[173] This odd rhetorical fusion, in which radically new threats are recast in the comforting language of statutory authority is very much a creature of the common-law tradition, which insists on confining the rhetoric and reality of legal change to comfit with existing principles and precedents. Thus the purely procedural focus of Tatel's discussion of Sentelle's standing argument: Tatel explains that Massachusetts does, in fact, face a particularized (standing-granting) injury rather than a generalized harm because, for instance, "the extent of damage to the Massachusetts coastline depends on the magnitude of the rise in sea level."[174] The transformation of the global map enters the case not for its substantive or moral value but because it speaks to the arcane doctrine of standing. The same rhetorical trope appears later in the dissent, where Tatel wrestles with whether EPA regulation of GHGs based on the CAA would trespass upon the political domain of Congress and the executive branch because of "the extraordinary political and economic significance of the regulation."[175] Tatel answers in the negative, writing that he is "unconvinced" that regulation of GHGs would be "as significant as FDA jurisdiction over tobacco" because the regulations would come in gradually, because EPA already regulates energy companies, and because Congress generally wanted various air pollutants to be regulated.[176] If this argument seems a bit strained—surely even the dire health effects of smoking do not compare to the literally world-changing import of climate change—it is because Tatel must speak in the constrained language of the law, rather than the broader dialect of a social movement. There is little question that he is deeply concerned. His dissent contains a remarkable complete exegesis of the dangers of climate change, but he must insist that the case "presents a quite traditional legal issue."[177] For our purposes, the accuracy of his legal reasoning matters less than the observed difficulties of bending entrenched common law to accommodate problems to which it is blind. The U.S. Supreme Court has granted certiorari in the case, ensuring that the legal and political struggle to force the courts to recognize the threat before them will continue in the statutory context.

162. Melz, *supra* note 14.

163. *Id.* at 4, 2-9.

164. *Id.* at 4, 9-11.

165. *Id.* at 4, 11-14.

166. *Id.* at 4, 14-17.

167. *Id.* at 22.

168. Massachusetts v. EPA, 415 F.3d 50, 53, 35 ELR 20148 (D.C. Cir. 2005).

169. *Id*.

170. *Id.* at 58.

171. *Id.* at 59-60 (Sentelle, J., concurring in part and dissenting in part).

172. *Id.* at 61-82 (Tatel, J., dissenting).

173. *Id.* at 61-62 (quotation from statute in original, citations omitted).

174. *Id.* at 65.

175. *Id.* at 70.

176. *Id.* at 71. The tobacco language is a reference to *Food and Drug Administration v. Brown and Williamson Tobacco Co.*, 529 U.S. 120 (2000) in which the Court held that the Food and Drug Administration lacked the authority to classify tobacco as a drug in part because such a strong extension of authority needed very clear congressional authorization.

177. *Id.* at 82.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

2. Carbon as Liability: *Connecticut*

Massachusetts was decided on July 15, 2005; the same month a year earlier, *Connecticut* had been filed.[178] Where *Massachusetts* had sought to force federal regulation directly, *Connecticut* was designed to mobilize the old common-law doctrine of nuisance to allow suits directly against emitters. It was largely the vision of one man, a sort of later-day Sharp. Matthew Pawa had "always been concerned with the environment" but it was reading Bill McKibben's "The End of Nature," a seminal environmental work discussing the ethical and practical implications of human dominance of the biosphere, that turned him toward an environmental career in college.[179] The difference between his awakening and Sharp's highlights a significant challenge for the modern movement: Sharp was awakened by contact with an oppressed person, Pawa by a book. The one struggled against a crisis that was immediately visible in human flesh; the other against one larger but more subtle.[180]

Pawa pursued his environmental interests into law school and a career with the District of Columbia plaintiff-side law firm of Cohen, Milstein, Hausfeld, and Toll, where he did anti-trust work with some environmental law on the side.[181] By 1999, as the science closed on global warming, he began to play with ideas on how to hold corporations responsible. As NRDC's offices were just across the street, Pawa began holding a series of meetings to discuss his ideas; his own firm was uninterested and discussions petered out.[182] It might have faded entirely had Pawa not found himself defending a coalition of environmental groups against the Western Fuels Association (WFA), a coal trade group.[183] The WFA had filed a commercial slander suit against the groups because they had claimed that coal contributed to global warming. The suit was legally groundless and Pawa saw it dismissed on procedural grounds, but the experience had what he calls "the unintended consequence" of putting him, and the movement, back on the legal offensive.[184] Suddenly his little meetings were large strategy sessions and there was a concrete idea of how to go about a lawsuit, conceptualized at about the same time by Pawa and by other people in the movement: use the public nuisance doctrine.

The legal road would not be an easy one. The doctrine, though well-established, had never been used for anything as large as global warming. Because the suit is ongoing and its principals must maintain confidentiality, the debates over whether or not to use the doctrine must be reconstructed from outside analyses. It is first important to understand the structure of the claim. A public nuisance is an "unreasonable" interference with another's "use and enjoyment of land" and, in the public nuisance context with "the public interest."[185] Unreasonableness is an obviously slippery term. At the least, the harms must be caused knowingly, but determining whether or not they are unreasonable in effect invites the court to make a policy decision based on the data available to it. As such, public nuisance is a particularly appropriate doctrine for the problem, as it implicitly provides for policy balancing.

Although federal interstate public nuisance doctrine was not dead, it had never been used for anything so large. The most recent Supreme Court case dealing with interstate nuisance concerned sewage discharges from Milwaukee which had drifted south and fouled Chicago's drinking water.[186] Although the "200 million gallons of raw or untreated sewage" per day at issue in that case were no small problem, this was a contained interstate matter, not a challenge to a global pollution problem.[187] The matter had, at any rate, later been dismissed as preempted by the passage of the Clean Water Act, a move which shunted nuisance doctrine into the background.[188] But in the carbon context, of course, no federal statute existed to preempt the suit: this was the implicit holding of *Massachusetts* which, by letting EPA's refusal to regulate under the CAA stand, also preserved a common-law challenge. The road was open, but rocky.

Challenges to a suit in this model, beyond the fact of its considerable audacity, are considerable but not insurmountable. Thomas Merrill, a conservative and skeptic of the movement, laid them out in a recent article. Because any suit must be against a limited number of emitters, and hence contributors, to the larger nuisance, he suggests that it is at least difficult to find that they are clearly causing the nuisance, that changing their behaviors would end the nuisance, or as Judge Sentelle wrote, that the nuisance is simply too general to allow particularized injury.[189] Further, he suggests that there is also a possibility that the foreign policy power of the president might apply because the suit could "undermine the position of the United States in international negotiations" by taking away "bargaining chips"—emissions reductions that the president may want to offer.[190] These contentions are generally refutable. Nuisance doctrine is designed to abate, not just end nuisances, and so partial contributors to nuisances may be enjoined. Questions of causation, too, are closing practically and legally as the crisis worsens. And the argument for foreign policy preemption is grounded on fuzzy precedent. But it is not my intention to dip deeply into the legal challenges faced by Pawa and his compatriots in planning the suit. It is enough to note that, as Merrill writes, the suit presented "a host of challenging legal issues [and] the plaintiffs must prevail against a variety of defenses in order to obtain relief [while] if the defendants succeed on only one, the plaintiffs are out of luck."[191]

178. Interview with Matt Pawa, Principal of the Law Offices of Matthew Pawa (Apr. 7, 2006). The case is *Connecticut v. American Electric Power*, 406 F. Supp. 2d 265, 35 ELR 20186 (S.D.N.Y. 2005).

179. *Id.*

180. Pawa is aware of the similarities; he explicitly referenced *Somerset* in my interview with him, *id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. Daniel V. Mumford, *Curbing Carbon Dioxide Emissions Through the Rebirth of Public Nuisance Laws—Environmental Legislation by the Courts*, 30 Wm. & Mary L. & Pol'y Rev. 195, 206 (2005).

186. Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972).

187. *Id.* at 93.

188. City of Milwaukee v. Illinois, 451 U.S. 304, 317-18, 11 ELR 20406 (1981).

189. Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 Colum. J. Envtl. L. 293, 297-98 (2005).

190. *Id.* at 321-23.

191. *Id.* at 332-33.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

From this, Merrill concludes that "global warming is not going to be solved by public nuisance litigation."[192] Opinions differ; at a minimum, Merrill's assessment is clearly overbroad: none of the plaintiffs expected the problem to be "solved." Their aim was legal liability and an injunction against the largest U.S. emitters. Even on the narrow question of the suit's viability, opinions differ. David Grossman, in a 2003 article, had suggested that the doctrine was a good fit to the facts of climate change because, as a threshold matter, the crisis implicates public nuisance by interfering with public rights. Further, that interference is unreasonable because it "significantly interferes with the public safety, health, peace, comfort, or convenience" and is "continuing conduct" which has a "permanent or long-lasting effect."[193] He found issues of standing to be uncontroversial; indeed, because plaintiffs in the suit would be trying to vindicate the typical public nuisance concerns of public safety and peace, they would be "paradigmatic" public nuisance plaintiffs.[194] Remedy, he wrote, would likely turn on whether "climate change plaintiffs could contend that even if potential defendants' activities are of great utility to society [it would] still be unreasonable to inflict the harm on plaintiffs without compensating them for it."[195] He suggested that a reasonable remedy might be based on a court injunction to reduce emissions over time rather than simply enjoining operations.[196]

Although Grossman found that such a suit had much to recommend it, he cautioned that "such suits might fare better if some preliminary suits and steps paved the way by getting discussions of climate change into the courts."[197] His argument should by now be quite familiar: when confronted with a novel claim, even one with strong legal merits, it takes time to force the courts to acknowledge and create legal visibility. The need is to "get the concept of climate change harms into the courts and . . . start to bolster their comfort level and familiarity with the idea."[198] It is this sort of familiarity that we see in Tatel's opinion in *Massachusetts*, the fitting of global crisis into comforting legal terms. But Tatel's opinion is a dissent; the procedural barriers that Merrill discusses are high enough to allow courts to avoid the central question if they are not yet intellectually or politically ready to face it.

It is this gap between legal possibility and legal realist political feasibility that seems to have driven the debate at Pawa's meetings. The benefits of bringing a public nuisance suit against the largest and dirtiest American utilities were clear. A successful suit would have at least four major benefits: it would directly ameliorate the nuisance by reducing emissions from the defendants; it would make carbon a legal liability, making room for more suits; crucially, this new liability would give business a strong incentive to press for federal regulation to escape from the common-law system; and, finally, as in *Somerset*, the case itself, if reported upon properly, could place climate change squarely in the public eye.[199] The litigation could result in not only immediate reductions but the conditions for larger social and political change. But were courts ready for it?

Over the years between the initial proposal and the final complaint, the state Attorneys General, Pawa, and the nonprofit groups assembled the legal and scientific evidence necessary to file and try the case. This coalition-building and evidence-gathering process involved thousands of miles of travel and the combined resources of all involved. While this sort of a coalition is not rare, this gathering was particularly successful at marshalling its case.

Eight states—California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin—would ultimately join along with the city of New York.[200] On a very hot day in July of 2004, the suit was filed. The defendants were the American Electric Power Company, Inc., the American Electric Power Service Corporation, the Southern Company, the Tennessee Valley Authority, Xcel Energy, Inc., and Cinergy Corporation. The top five utilities in America, collectively responsible for 10% of all emissions in the United States, were about to see the first legal challenge to the large-scale industrial emissions of CO_2.[201]

The complaints—one filed by the Open Space Institute and the Audubon Society of New Hampshire and one by the states—are structurally very similar. They call for "an order requiring defendants to reduce their emissions of carbon dioxide, thereby abating their contribution to global warming, a public nuisance."[202] The complaints are remarkable documents, as they must both fit global warming into the public nuisance doctrine and function to demonstrate the seriousness of the problem. The states' complaint explains that there "is a clear scientific consensus that global warming has begun and that most of the current global warming is caused by emissions of greenhouse gases" and points to the recession of glaciers and sea ice and the die-offs of coral reefs as evidence for present effects.[203] Condensing the science discussed earlier in this paper, it emphasizes that the possible warming over the next century is significant in geologic time, as "at the depths of the last ice age . . . the average global temperature of the earth was only seven to eleven degrees Fahrenheit cooler than today" while a similar amount of warming is now possible.[204] This will "constitute an extraordinary shift in world climate that is unprecedented in thousands of years of human civilization."[205] The defendants have contributed to this shift by emitting "large amounts of carbon dioxide from the combustion of fossil fuels for many years," nearly 650 million tons per year.[206]

The bulk of the complaint then details the potential harms to the plaintiffs. It demonstrates considerable warming al-

192. *Id.* at 333.

193. David A. Grossman, *Warming Up to a Not-So Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 54 (2003).

194. *Id.* at 55.

195. *Id.* at 58.

196. *Id.* at 58-59.

197. *Id.* at 60.

198. *Id.* at 61.

199. Interview with David Doniger, *supra* note 159; Interview with Matt Pawa, *supra* note 178; Interview with Simon Wynn, New York Assistant Attorney General (Apr. 3, 2006).

200. *Id.*

201. State Complaint at 1, Connecticut v. American Elec. Power, 406 F. Supp. 2d 265, 35 ELR 20186 (S.D.N.Y. 2005) at 1.

202. *Id. See also* Open Space Institute Complaint at 3, *Connecticut*, 406 F. Supp. at 265 (Plaintiffs seek an order . . . directing each Defendant to cap its emissions of carbon dioxide and then reduce them by a specified percentage each year for at least a decade.").

203. State Complaint, *supra* note 201, at 22-23.

204. *Id.*

205. *Id.*

206. *Id.* at 26.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

ready and potentially major temperature increases to come.[207] With these increases will come "injuries to public health," including more smog and more heatwaves, "injuries to coastal resources" due to flooding, storm intensity increases, salinization of marshes and tidelands, and increased erosion, "injuries to water supplies" due to saltwater intrusion and reduced snowpack, "injuries to the Great Lakes," which are projected to shrink and develop dead zones, "injuries to agriculture" due to unpredictable and severe weather, "injuries to ecosystems" due to climactic shift, "wildfires in California" and major "economic" harms.[208] The nonprofit land trust complaint adds injuries to particular properties the trusts own throughout the Northeast.[209]

As a result of these injuries, the complaints assert, "Defendants, by their emissions of carbon dioxide . . . are knowingly, intentionally, or negligently creating, maintaining, or contributing to a public nuisance—global warming—injurious to the plaintiffs and their citizens and residents."[210] It is unreasonable because "defendants could generate the same amount of electricity while emitting significantly less carbon dioxide by employing readily available processes and technologies" that do not contribute to the destruction of the natural world.[211] The Court, then, must hold the defendants liable and permanently enjoin each defendant to "abate its contribution to the nuisance by requiring it to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade."[212]

As public documents, the complaints contain detailed and comprehensive data about the scope and impact of global warming, while at the same time making the same rhetorical leap that the Tatel dissent makes: this unprecedented process can be controlled by existing precedent, fitting into the common-law tradition. While this may in fact be so, and as noted above, opinions differ, it is at least somewhat jarring. However, it is no more jarring than Sharp's use of the courts to demonstrate the then-radical idea that, despite centuries of practice, slavery was unacceptable to British common law.

Like Sharp's early suits, *Connecticut* rapidly bogged down in procedural challenges. We can pass over them rapidly here, as the case ultimately was decided on none of these grounds. It is sufficient to say that all through the summer the defendants fought the case on technical jurisdictional grounds, not on the merits of the suit.[213] The court, headed by Southern District of New York Judge Loretta A. Preska, was in a box but found a way out. Although it did not explicitly adopt the doctrinal challenges raised by the defendants, it did borrow from their rhetoric.

Their general theme was that the problem of global warming is deeply complicated and due to its broad implications, beyond the court's power. The Tennessee Valley Authority, for instance, notes in one of its briefs that it is "difficult to imagine a better example of decisions susceptible to social, economic, and political policy balancing" than those concerning energy policy in an age of climate change.[214] In another brief, the defendants characterize the dangers of warming as "vague and hypothetical" which are "international" in nature and which, borrowing from Judge Sentelle, "give[ ] no state any special standing or interest."[215] Their attack moves from an assault on the plaintiffs' interests to one on strategy. Construing the strategy, the utilities write that states' interests "cannot be protected in a single lawsuit against five utilities."[216] Characterizing the relatively mild reductions requested by the plaintiffs as "draconian"—and suspicious because only one plaintiff state contains a power plant owned by the big five—they move for dismissal.[217] The argument thus has three themes: (1) that the problem is too big for a court to address; (2) that even a remedy in this case could not wholly solve the problem; and that (3) the plaintiffs in any account have no right to bring suit to solve it. Before a judge less concerned than Tatel, it is not an uncompelling case; while nuisance doctrine does allow partial remedies and does not distinguish by the size of the problem, the briefs offer an intellectual grounding for a reluctant judge to stand on. They appear, recast into a different doctrine, in the lower court's decision.

It is to the district court decision, issued in September of 2005, that I now turn. Preska's opinion opens with a retreat to formalism, far from the actual question at hand. She opens by writing of the separation of powers established by "the Framers" and warning that "were judges to resolve political questions, there would be no check on their resolutions because the Judiciary is not accountable to any other branch or to the People."[218] Therefore, when a case presents a political question, it must be "consigned to the political branches;" and this is just what the Court does.[219] Although Preska cites to one line in a reply memo to claim that the argument was raised before her, the plaintiffs interviewed all report that the political question doctrine was never raised. The court was truly determined to escape.

Preska provides at least cold comfort to the plaintiffs by acknowledging the seriousness of their concerns. She does so, however, in language coached entirely in what "plaintiffs say" or "plaintiffs allege," not in her own findings.[220] She relies on Congress' failure to act on the Kyoto Protocol and the George W. Bush Administration's refusal to take action as evidence that the policy of the nation cuts against the plaintiff's suit.[221] Although she acknowledges and preserves the standing arguments raised by the defendants, she addresses none of them, finding the political question doc-

207. *Id.* at 28-29.

208. *Id.* at 28-42.

209. Open Space Institute Complaint, *supra* note 202, at 24-30.

210. State Complaint, *supra* note 201, at 43.

211. *Id.* at 44.

212. *Id* at 49.

213. Interview with Matt Pawa, *supra* note 178. For an excellent analysis of the legal (rather than strategic) issues faced in the case, it is best to turn to the source and consult Matthew F. Pawa and Benjamin A. Krass, *Global Warming as a Public Nuisance:* Connecticut v. American Electric Power, 16 FORDHAM ENVTL. L. REV. 407 (2005).

214. Memorandum of Law in Support of Tennessee Valley Authority's Motions to Dismiss on Federal Discretionary Function Grounds at 13 (Sept. 30, 2004), Connecticut v. American Elec. Power, 406 F. Supp. 2d at 265.

215. Memorandum of Law in Support of the Motions of the Southern Company, Tennessee Valley Authority, Xcel Energy Inc., and Cinergy Corp. to Dismiss for Lack of Personal Jurisdiction at 22, Connecticut v. American Elec. Power, 406 F. Supp. 2d at 265.

216. *Id.*

217. *Id.*

218. Connecticut v. American Electric Power Co., 406 F. Supp. 265, 267 (S.D.N.Y. 2005).

219. *Id.*

220. *Id.* at 268.

221. *Id.* at 269-70.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

trine to be the threshold question.[222] Preska does not make the rhetorical jump that Tatel and the plaintiffs made, writing that

> [p]laintiffs advance a number of arguments why theirs is a simple nuisance claim of the kind courts have adjudicated in the past, but none of the pollution-as-public-nuisance cases cited by Plaintiffs has touched on so many areas of national and international policy. The scope and magnitude of the relief Plaintiffs seeks reveals the transcendently legislative nature of this litigation.[223]

She goes on to cite examples of the political and administrative challenges involved in setting and monitoring an emissions reduction plan and suggests, as Merrill had written, that foreign policy issues in particular militate against judicial intervention.[224] So ended the district court case; it is presently on appeal on the political question point before the Second Circuit and was argued this May.[225]

The utility of the suit in its own right can not yet be judged completely. As it stands, its sole legal result is the creation of a potentially dangerous new political question doctrine that could be applied to other interstate public nuisance pollution cases—a counterproductive result. This ruling may yet be over-turned, but it is an example of the danger to the law that plaintiffs risk when they attempt to introduce old doctrine to a radically new injury, especially one to which judges wish to be blind. Potential further erosion of standing to sue also seems possible if the court, backed into a corner on remand, adopts Judge Sentelle's reasoning. The plaintiffs press on in this case and in new ones. The problem grows steadily more visible in the world. There will yet be a winning case to make it visible to the law.

IV. Lost Cases, Found Movements, and the End of the World

The movement stands, then, about where Granville Sharp stood during the interminable pre-*Somerset* cases: the legal arguments are in place but the courts are not. Their strategy seems to be to move from case to case, pushing for liability here or regulation there while at the same time working to create state-level regulations.[226] Although a ruling in Connecticut would establish a uniform nuisance standard, other state-based regulatory or legislative action may lead to a patchwork of carbon regulation without a federal standard. As the greenhouse problem grows worse and both liability and state efforts to solve the problem expand, pressure will grow for federal regulation. Thus, although the immediate goal of *Connecticut* is to establish emissions reductions, it is a part of a larger legal and legislative moment driven by diverse actors whose ultimate likely result is federal regulation. This elite pressure strategy is distinctly different from that followed by the anti-slavery reformers; it contains very little focus on popular pressure. As Doniger explains, this is about influencing what certain elites think, not about changing what the public thinks.[227] Pragmatically, it is more about incentive structures than the particular motivations of executives. The reason for behavioral shifts is of limited importance; the crucial thing is creating incentives for them to change their behavior.[228]

This view has a certain starkness to it, but there is some evidence that it is working. The suit received relatively little press coverage—there was certainly no equivalent of the broad public attention that *Somerset* received—but it was covered in the outlets that mattered. The public may have read a few stories around the times of filing and dismissal and editorials that ranged from dismissive (Pundit Robert Samuelson in the *Charleston Daily Mail*, for instance, wrote that "[t]here's a name for what the attorneys general are making of themselves: a public nuisance"[229]) to the supportive (The *New York Times* lauded the Attorneys General for trying to control "environmental problems that the Bush Administration and Congress have ignored."[230] Pawa found the coverage to be mixed, with some strong articles but with most articles "highly superficial."[231] Articles covering the case tended to stumble over legal concepts, failing to understand that under principles of joint and several liability, even partial contributors to a nuisance can and will be enjoined.[232] As global warming reporting has very often been skewed by the efforts of the fossil fuel trade to fuzz the science on the issue, the additional legal confusion is unfortunate.[233] Coverage has, at least, been fairly slim. The story is very different, however, in the trade journals of the mining and energy interests, which have followed the story with continuing interest.

The readers of the *Mondaq Business Briefing*, the *Platts Coal Outlook*, the *Risk Policy Report*, the *Foster Electric Report*, *Electric Utility Week*, the *Mining Journal*, and *Energy Trader*, among others, stayed well abreast of the suit.[234] The message reaching the corporate world is clear: liability is coming soon. Even before the suit, in 2004, J. Kevin Healy and Jeffrey Tapick were warning readers of the *Columbia Journal of Environmental Law* that climate change was "not just a policy issue for corporate counsel—it's a legal problem."[235] Their article warns that "[c]ompanies that

222. *Id.* at 270.

223. *Id.* at 272.

224. *Id.* at 273-74.

225. Interview with Simon Wynn, *supra* note 199.

226. Interview with David Doniger, *supra* note 159.

227. Interview with David Doniger, *supra* note 159.

228. Interview with David Doniger, *supra* note 159.

229. Robert Samuelson, *Publicity Seekers Are Public Nuisances*, Charleston Daily Mail, Aug. 16, 2004, at A4.

230. *A Novel Tactic on Global Warming*, N.Y. Times, July 28, 2004, at A14.

231. Benjamin A. Krass & Matthew F. Pawa, *Behind the Curve: The National Media's Reporting on Global Warming*, 33 B.C. Envtl. Aff. L. Rev. 485, 507 (2006).

232. *See id.* at 507-09.

233. *See id.* at 497-507. As Krass and Pawa note, journalistic norms to report both sides of a story can be subverted by a determined misinformation campaign which effectively creates a public controversy even when there is no factual controversy. This has clearly happened in the case of global warming where, perversely, the public continues to debate the existence of a crisis that is fact upon them.

234. *See, e.g.*, *Innovative Suit Against Large American Power Companies*, Mondaq Bus. Briefing, Sept. 9, 2004; *States Appeal Global Warming Case*, Platts Coal Outlook, Oct. 31, 2005; *Eight States and New York City Sue Five Power Producers*, Foster Electric Rep., July 28, 2004, at 10; Brian Hansen, *Industry Groups Urge Court to Reject Lawsuit Targeting Big Power Generators*, Inside Energy With Fed. Lands, Mar. 6, 2006, at 11; *Judge Weighs Global Warming Suit Dismissal*, Energy Trader, Aug. 16, 2005, at 10; Michael T. Burr, *Corporate America Feels the Heat*, Corp. Legal Times, Aug. 2005, at 44.

235. J. Kevin Healy & Jeffrey M. Tapick, *Climate Change: It's Not Just a Policy Issue for Corporate Counsel—It's a Legal Problem*, 29 Colum. J. Envtl. L. 89, 89 (2004).

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

are major emitters . . . may be targeted for lawsuits commenced . . . by proactive state attorneys general," with claims including public nuisance.[236] They urge corporations to take preemptive action by joining a climate registry and beginning to make emissions reductions, creating carbon accounting systems, and by preparing for possible federal regulatory schemes.[237] Both sides of the struggle, then, know the ultimate result: the battle is over when and how it will come. Regardless of whether or not *Connecticut* ultimately succeeds, no one seems to doubt that as the problem worsens, that some suit will. Although it may happen earlier, that success will cause companies to throw their support behind federal regulation.

Problem solved? It is possible, but unlikely. The trouble is threefold. First, we are already committed to a warming trajectory and every passing day brings increasing climactic stressors: we will not escape at least some warming before regulation. Second, regulation is unlikely to first appear as a truly rigorous system; recall that even Kyoto's moderate reductions met with stark resistance. And third, the political reality is that global warming is still largely a game among the elites, a technocratic discussion of possible liability, coming impacts, and modes of policy change. The wider American public, which contributes more to the climate crisis than the citizens of any other nation on earth, is still largely unaware of its practical and moral complicity in what may be the largest shift in human history since the end of the Ice Ages. Simply put, the public conversation still turns largely on whether there even is a problem rather than how to solve it or, crucially, whether it must be solved and what sacrifices should be made to do so.

This is deeply troubling: even if the legal veil falls, there is only a very limited and unorganized public movement waiting to drive legislative and cultural change. Instead, the environmental nonprofits and the state litigants are in part relying on the polluters themselves to lobby for regulation. It is troubling in part because of the implications for democratic rule: the largest challenge facing America and the world is one which its polity is only thinly aware of at all, and wholly unaware of its true magnitude. Sleepwalking into a dangerous future is not to be countenanced; no matter whether serious policy action begins to limit emissions or business goes on as usual until the end, the lives of millions are at stake and their voices are, as yet, largely silent. But this silence is also troubling because it seems likely to limit the scope of change—and at a time when radical shifts become more critical by the day.

The evidence from British anti-slavery, as condensed by political scientists Chaim D. Kaufmann and Robert A. Pape in a recent paper, suggests that radical change requires more than litigation or a conversation among elites.[238] Kaufmann and Pape write that there was "strong evidence" that Britons knew how much anti-slavery would cost.[239] The costs, indeed, were enormous: 20 million pounds, 5,000 British sailors' lives, a near war with France over trade suppression efforts, and a drop of 25% in the crucial sugar industry while foreign competitors saw 210% growth.[240] These are not changes that any policy/industry elite would have proposed, and analogous changes are very unlikely to be proposed in the model being used by the NRDC. Kaufmann and Pape point, instead, to the acts of a general public driven by a "parochial religious movement that held particular beliefs and identified slavery as one of a set of interconnected evils for which England would face divine punishment if left uncorrected."[241] In their view, the movement was created by tying international distant suffering to the personal domestic virtues of Englishmen, by, in short, arguing that England's virtue was endangered by the suffering it had caused Africa—"anti-slavery overseas was one component of a program for redemption at home. The spiritual and political stakes in this struggle for the soul of England were so great that any material losses seemed unimportant by comparison."[242] While the cooperation of the political elite is required, this is itself "partially a function of the general popularity of the saints' moral arguments and especially of whether the specific content of the saints' program would help shield the elite against particular charges against their legitimacy."[243] Commentators in other fields cast this argument in different terms—as a mobilization of rhetoric designed to provoke empathy and moral outrage,[244] as a triumph of populist human rights organizing,[245] or as the product of a religious revival that created a time "when values have taken precedence over economics, when the spiritual triumphed over the material."[246] The core of the argument is the same: while shifting elite incentives may have been the proximate cause of change, the ultimate change was in a popular moral revolution that created moral visibility for the previously common practice of slavery.

Now, given that time is short and the public hostile, indifferent, or distracted, a litigation- and legislation-driven strategy is not wholly unreasonable but it is inadequate. As discussed above, far more change is being asked of the American public than was of the British public and change must be accomplished in a shorter time. Given these constraints, a focus on the elites, short-circuiting popular organizing, makes some sense. However, this efficient route may only lead so far: can an adequate response to a planetary change really only involve a select few? At root, still, lies our failure to perceive the fact of their biophysical dominance or the moral responsibility that carries with it. The lesson for lawyers throughout the intertwined stories of the two movements is that legal visibility is simply not enough. It is the beginning of change, but the radical uprooting required then and required now ultimately must take place well outside of the courtroom. A lawyer making social change is not a general leading an army; she is a scout, spotting breaches in the enemy's position for the people to pass through.

This general social blindness must be addressed, and soon. One imagines large advertising campaigns driving

236. *Id.* at 101.

237. *Id.* at 109-14.

238. Kaufmann & Pape, *supra* note 5.

239. *Id.* at 639.

240. *Id.* at 635-36.

241. *Id.* at 643.

242. *Id.* at 643-45.

243. *Id.* at 663-64.

244. *See generally* Helen Thomas, Romanticism and Slave Narratives (2000); Brycchan Carey, British Abolitionism and the Rhetoric of Sensibility (2005).

245. *See generally* Hochschild, *supra* note 3; John R. Oldfield, Popular Politics and British Anti-Slavery (1995).

246. Edith F. Hurwitz, Politics and the Public Conscience 1 (1973).

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

home the science and the moral need to act for our own children and for the world—indeed, the nonprofit Environmental Defense has recently begun airing such ads. One thinks of street corner organizers, of town hall meetings taking place across the nation, of marches and petitions. The tools of such change are different in the very large and expensive world of American politics than they were in Britain two centuries ago. The public is larger, less engaged, and far more distracted by other concerns and media. But the tools for outreach are commensurately greater and the moral message one that has barely been tried. It is little wonder that the movement has seen a fractious debate over whether or not environmentalism is "dead" and how or whether it should join forces with other social movements.[247]

But the fact that the movement is, at present, overly technocratic and little experienced in mass organizing should not prevent it from learning how to approach litigation and legislative advocacy as if organization mattered. The movement can and should invest very heavily in organizers, in outreach, and in connections with religious leaders and other voices experienced in the language of moral obligation. States with particular political salience—those with renewable resources that could be exploited, fossil resources that must not be tapped, climatic vulnerability, or with persuadable congressional delegations—should be particularly targeted by such a coordinated national campaign of litigation, legislation, and organization. In a movement used to taking limited risks within an increasingly bureaucratic structure, the time has come to open the floodgates of moral transformation. If the movement does not take risks now it will cases to matter as climate change sweeps away everything it has accomplished. But if it does act—if it finds the charismatic leadership and political will that must be built, if it makes mass mobilization not just a goal but a reality, it can save the world. It is time for the environmental movement to stop treating global warming as simply another issue and start treating it as a moral crisis for which they, and all of us, must take responsibility and action.

At the core of this challenge, however, lies one last problem that provides a place to conclude, for the present. This is the matter of witnessing. People respond to personal stories, to the moral claims of another human being in pain. And yet the debate over global warming has largely turned on matters of gas concentrations and climactic models. Very little has been said by its victims. All too soon, there will be very many of them. But, of course, then it will be too late. We must make the moral dimension of the crisis visible now. Clarkson, two centuries ago, risked his life to gain information on the conditions within slave ships and on plantations; he used this information to mount campaigns on the streets and in Parliament. Some such visibility could come from *Connecticut* at trial, if it reaches that far: a succession of scientists testifying before the court would draw considerable attention. But there have been many hearings and we have not yet seen the public move. Court documents can do only so much. No document, not even the scriptural passages that dominate anti-slavery writings, can without an awakening of the moral conscience. As Hochschild puts it, "the abolitionists placed their hope not in sacred texts, but in human empathy."[248]

Some few court documents do, however, have the moral power of true witness. There is some of this in the complaints in *Connecticut*, but the future harm there is cast in abstract terms: predictions that will affect land trust holdings or hurt people in the future. The remarkable amicus brief filed by Trustees for Alaska, a public interest group that represents environmental interests in the state, which is very rapidly warming, is something else entirely.[249] The brief is, more than anything else, a legal chronicle of the destruction of Alaska's native communities due to climate change. Filed in support of the existence of a public nuisance, its ultimate claim is more moral than legal. Each section of the brief opens with a quote from a member of the native community or a scientists; the first, an understated description of the profound rapid changes in the far north, is among the most telling: "We are experiencing things in our lifetime that should take five or six generations."[250] The brief chronicles the recession of the sea ice and imminent threats to those who hunt upon it, the reduction of salmon spawning runs, melting permafrost that has caused entire forests to begin to fall over and villages to sag and collapse.[251] The great caribou herds are losing their forage and are in danger.[252] "Time is running out for the Arctic."[253] It is in briefs like these that the structural strategy of liability shifts and federal politics, effective though it may ultimately be, is subsumed in a larger appeal to a basic truth: our way of life is fundamentally grounded on the destruction of the lives of our children and of the least powerful among us.

From north to south, it is those on the margins of our society, those who have never shared the benefits of the carbon trade, who are suffering most. The Gulf Coast now stands as both exemplar and warning of our terrible vulnerability to the climate and to the future. It is not a coincidence that Al Gore cites Katrina in his talks. Moving fast out of New Orleans, heading east toward the Pontchartrain bridge, drivers see miles of sprawling malls and houses, all of them vacant, dead, and empty. Passing the dead city myself not long ago, I was struck by how the sprawl—that peculiarly placeless symbol of the modern American metropolis, somehow untouchable in its anonymity and corporate uniformity—had been brought back down to earth. The blocks and blocks of empty parking lots, broken signs, shattered mini-marts looked like the end of our civilization: an empty mall ringed by the broken trees of the old swamps.

Driving along that road from flooded New Orleans to the wind and storm-blasted cities of Mississippi, watching the empty streets, the growing darkness pressed in on both sides of the car. It will keep growing now, very fast and inexorably, until we decide to change. The legal cases being brought now will provide the seeds of that change, but only that: lawyers can open the door to a better world but we must choose

247. *See, e.g.*, Michael Shellenberger & Ted Nordhaus, The Death of Environmentalism: Global Warming Politics in a Post-Environmental World (2004); Adam Werbach, Is Environmentalism Dead? (2004); Michael Gelobter et al., The Soul of Environmentalism: Rediscovering Transformational Politics in the 21st Century.

248. Hochschild, *supra* note 3, at 366.

249. Amicus Brief for *Amici Curiae* Alaska Inter-Tribal Council and Akiak Native Community, *Connecticut v. American Electric Power*, 406 F. Supp. 2d 265 (on appeal in the 2d Cir. 2006).

250. *Id.* at 4.

251. *Id.* at 8, 11-14, 15-17.

252. *Id.* at 18-19.

253. *Id.* at 7.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

to pass through. Instead, most of us stay blind, waiting for the next storm as the world becomes something strange. Will we choose to destroy ourselves and, by our reliance on the carbon trade in the developed north destroy the developing south, or will we, like Clarkson, bring these calamities to their end?