# A2 Danny Right to Environment AC - EP

## Anthro

### 1NC Anthro

#### The idea of a human right to the environment could not be more anthropocentric – their argument about human rights ignores that the environment is its own existence and the idea of a human right to the environment creates a hierarchy in which humans are at the top.

Lewis 12 [BRIDGET LEWIS (Lecturer at the Faculty of Law, Queensland University of Technology). “ENVIRONMENTAL RIGHTS OR A RIGHT TO THE ENVIRONMENT? EXPLORING THE NEXUS BETWEEN HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION.” Macquarie Journal of International and Comparative Environmental Law, 8(1), pp. 36-47. (2012) Vol 8(2)] AJ

A major criticism of the proposal to introduce a right to a healthy environment is that such a right would be too anthropocentric. In casting the right to a healthy environment as a human right, it is inextricably linked to human interest. This alignment has provoked criticism from the fields of deep ecology,54 and earth jurisprudence,55 on that basis that it effectively denies recognition of animals, plants, species and ecosystems as rights-holders, thereby making their protection contingent on establishing some other human interest.56 Gibson argues that by labelling the right to a clean environment a ‘human’ right, the natural world is valued according to human values and needs with humans being promoted to a position of superiority.57 This is contrary to the deep ecologists’ account, which holds that ‘all organisms and entities in the ecosphere, as parts of the interrelated whole, are equal in intrinsic worth.’58 Promoting a human right to a healthy environment, it is argued, perpetuates the values and attitudes that are at the root of environmental degradation, and reinforces the idea that the environment is only there to serve human needs, creating a hierarchy where human needs supersede environmental concerns.59

#### This also means the case fails since the ideology of anthro grounds all environmental degradation in the first place.

[The impact cards are all generic and not cut by us. See our wikis if you really want these cards]

#### The way we engage with and categorize nature is crucial – frames systems of thought and policy action

Uggla 10 [(Ylva, Associate Professor of Sociology, CUReS, Örebro University) “What is this thing called 'natural'? The nature-culture divide in climate change and biodiversity policy” Journal of Political Ecology Vol. 17 2010] AT

The notions of nature and the natural, as distinct from culture and society and untouched by humans, can be questioned since we cannot find any site on earth that fits that description. As many scholars have convincingly argued, the idea of nature and culture as separate entities is flawed, and nature is better understood as "socio-environmental arrangements" (Swyngdouw 2007: 20), or "seeming nature" (Gandy 2002: 110). In the modern understanding of a strict division between culture and nature as separate categories, Bruno Latour (1993) claims that "we have never been modern", since our world is and always has been full of hybrids: socio-natural objects and subjects. Despite these insights, the separation of nature and culture is manifest in human thought and environmental policies. The concepts of "nature" and the natural are familiar and yet highly elusive. On the one hand these terms are easily and frequently used; on the other they are difficult to grasp and define (Soper 1995; cf. Newton 2007). Contradictory thinking attaches a variety of meanings, values and functions to nature. Most commonly described is the resource and aesthetic value of the natural world. Nature is also enlisted in environmental protection. Nature can be used to complement technical solutions, for example as barrier and buffer in hazardous waste management (Uggla 2004). In this case, it is a sturdy and stable nature that compensates for human shortcomings. Accordingly, there is not one nature, but a diversity of contested natures constituted through socio-cultural processes from which they cannot be separated. Different conceptualizations of nature - as resource, as threatened, or sacred, pure, and stable - imply different responses to potential threats against these natures (Macnagthen and Urry 1998:23). Therefore, nature is an elastic concept, providing an ideological vehicle for almost any position on the relationship between humans and their environment (Gandy 2002:13). The meaning of nature is continuously negotiated in relation to its supposed counterpart - human culture and society. In early sociology, in an effort to explain human consciousness and the mind, animals were frequently used to explain the uniqueness of humankind (Tuomivaara 2009: 49). It is in relation to animals and nature, defined as the other, that the uniqueness of humans and human character stands out. In this sense, nature serves to define what it means to be human. Negotiating nature and culture - drawing boundaries that define the natural versus the non-natural - defines and justifies certain actions. Humans do something to the world when they draw boundaries between nature and culture, between the natural and the non-natural, and between acceptable and unacceptable human interference in natural systems. Any understanding of nature involves an understanding of society, and of certain social choices. In this sense, nature also fulfills political functions, telling us how to live our lives.

#### Fiat is illusory – signing the ballot for the aff will not change any policies anywhere – however, your ballot does carry discursive and ethical implications, which means the K impacts come before fiat.

### A2 CP Links

#### My link evidence is more specific – it says that a human right to environment specifically reinforces a human hierarchy – policies to protect the environment are consistent with the K. However, the aff is primarily a policy to protect humans.

## Econ DA

### Link

#### Even the risk of litigation is sufficient to deter investment

Frynas 4 [(Jerdez, Lecturer in International Management, Birmingham Business School, University of Birmingham.) “Social and environmental litigation against transnational firms in Africa” J. of Modern African Studies, 42, 3 (2004), pp. 363–388] AT

Keeping in mind the above caveats, I concentrate on outlining the potential impact of litigation and try to identify some key factors which may affect the intensity of that impact. In order to structure this discussion, I distinguish between the economic and the developmental impact of liti- gation. This analysis considers the pros and cons of litigation from four different perspectives: the affected firms, the represented claimants, the national economy, and the society as a whole. The discussion reveals that the cons of litigation far outweigh the pros. The potential economic impact on firms is largely negative, as litigation creates commercial risks and costs for foreign firms, which have invested or are planning to invest in Africa. Litigation creates a legal liability risk, i.e. the risk of becoming liable for social and environmental damage. In extreme cases, this risk can prevent a potential investor from committing funds to an African country. More typically, a liability risk can increase costs in terms of higher insurance premiums or higher cost of capital. The capital markets react speedily to legal outcomes. On the day when the House of Lords judgment against Cape was made, Cape’s shares dropped to £0.405, down from £0.550 the evening before (Ward 2001). The potential impact of transnational litigation can be deduced from past experience of social and environmental litigation in the United States. As The Economist (24.3.2001) reported, Moody’s credit-rating agency downgraded twenty-two US companies in 2000 alone, at least in part because of litigation risk involving claims related to issues such as asbestos and anti-trust allegations. Even the largest corporations may be affected; for instance, the chemical company Dow Corning filed for bankruptcy in 1995 under the weight of litigation related to breast implants. ‘Be- cause litigation risk is difficult to analyse, when the financial markets do wake up to these concerns they often panic ’, The Economist continued. The development of US litigation with regard to domestic legal claims is perhaps a warning to corporate managers with regard to transnational claims. Nonetheless, the liability risk in Africa should not be exaggerated, as the number of cases is relatively small and the chances of success for firms are high (especially in the transnational litigation in US and English courts). Most of the cases – except for the anti-apartheid lawsuits in the United States – have focused on ‘dirty industries’ which cause above-average pollution, including oil, mining and chemicals. The litigation risk for a European brewer or an Asian textile manufacturer in Africa appears to be insignificant at the moment. Given the publicity that litigation generates, a much more important issue appears to be reputational risk, i.e. the risk of damage to reputation. As Newell (2001) pointed out, the ‘impact of bringing or threatening to bring cases will often be more important than the legal outcome’. NGOs, local community groups and individuals are often less interested in win- ning the legal arguments, but rather pursue litigation as a means to an end. Newell (2001) indicated that litigation has sometimes been brought against TNCs in order to buy time to mobilise resistance around a project, to demonstrate inequities in existing laws, or to seek official acknowledg- ment of crimes, which otherwise would not be acknowledged. A legal victory by a company several years down the line may not compensate for the adverse publicity generated by a lawsuit. Media publicity is the key weapon in the armour of pressure groups, with litigation being a vehicle for mobilising the media for a given cause. In an age where corporate brand reputations are crucial for firm success, adverse publicity has the potential to inflict major damage on the brand name. Therefore, the impact of litigation on firms is multidimensional. But it should be pointed out at this point that reputational risk may vary by firm size, brand importance or nationality. A large firm with a major brand name from the UK or the United States is likely to be more exposed than a small and relatively unknown Malaysian or Chinese firm. Keeping in mind the above caveats, I concentrate on outlining the potential impact of litigation and try to identify some key factors which may affect the intensity of that impact. In order to structure this discussion, I distinguish between the economic and the developmental impact of liti- gation. 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The potential economic impact on national economies is also largely negative, as litigation (via either legal liability risk or reputational risk to firms) could result in a reduced flow of investment to African countries in certain sectors. The current litigation in African as well as British and US courts focuses on extractive industries including oil and mining, which are Africa’s key attraction to foreign investors. Of the court cases discussed, most are related to the oil industry which attracts the biggest share of Africa’s foreign investment. From this perspective, African economies with their high dependence on raw material exports have potentially more to lose than Asian or Latin American countries, which have more diversified economies and sources of foreign investment.9 Even if successful litigation were not to result in lower absolute levels of investment, it may deter the most technically competent or experienced firms from investing in a country. The Sudanese oil industry offers an example. While we do not know to what extent litigation prompted Talisman to sell its Sudanese assets, activist campaigns against Talisman and other Western firms have deterred other experienced oil firms from investing in the Sudan. At present, no Western oil company operates in Sudan, having been replaced by less experienced Malaysian, Chinese and Indian oil firms (Human Rights Watch 2003). At a minimum, litigation could render commercial operations more costly, for instance, through higher cost of capital for infrastructure pro- jects such as hydroelectric dams or other projects which may be con- sidered risky from a legal or ‘ethical’ perspective. African economies already suffer from high transaction costs (poor infrastructure such as transportation, underdeveloped capital markets etc.), so the risk of litigation would not pose a new economic barrier; yet it could potentially aggravate already existing problems. Nonetheless, the potential impact of litigation on African economies is likely to be small. Countries with high dependence on oil or mineral investment could be more affected. How- ever, the examples of Nigeria and Sudan demonstrate that investment in extractive industries may continue unabated despite very serious political and social instability, and despite considerable international public press- ure to divest.

## Policy PIC

### 1NC Policy CP

#### Counterplan text: All aff actors should pass relevant environmental protection policies in the form of a policy statement, not a right to the environment. I reserve the right to clarify.

#### This best solves environmental impacts since it’s a better fit to environmental harm, applies better to society as a whole, is more efficient; and the aff shifts environmental harm to vulnerable populations.

Hayward 05 [Tim Hayward. “Constitutional Environmental Rights.” UOP, Oxford 2005. ] AJ

Now some argue that if environmental provisions are to be constitutionalized, then they should have the form only of a policy statement and not of a fundamental right. The reason would be that policy statements, as objective goal-orientated provisions, are inherently better suited to the aims of environmental protection than are individual rights-based instruments. Environmental quality appears on this view to have more the character of a public good than that of the appropriate substance of an individual right, and hence would be more fittingly seen as a general social objective than as a matter of individual rights. The identifying of environmental harms and the appropriate steps to remedy them, it could therefore be argued, would better be addressed by concerted government-directed action than by individual claims in courts. Thus Günther Handl, for instance, believes that a generic environmental right would be an ill-considered proposition in that it would make broad environmental policy decisions a central concern of an individual-right-based process which is unsuited to dealing with them. It could defeat the purpose of a right which was intended to benefit all, he argues, if certain parties could use it to pursue their own special interests: ‘the focus of inquiry in a case involving an individual complainant is by definition too limited (p.75) to ensure consideration of all societal interests at stake’, and ‘a case-by-case development of general environmental standards in response to individual complaints would be a very inefficient process’ (Handl 1992: 135).3 Moreover, if some individuals can succeed in actions benefiting themselves, this may be detrimental to the environmental interests of others (e.g. by having polluting sources transferred to locations with less litigious populations)—which is a notable problem of environmental justice.

### Priorities DA

#### Unconditional right to the environmental destroys policy priorities, tanking any risk analysis because they try to INCLUDE all viewpoints WITHOUT LIMITS

Foreman 98 - Christopher Foreman is a nonresident senior fellow in Governance Studies. Since 2000, he has also been a professor and director of the social policy program at the University of Maryland’s School of Public Policy. His research focuses on the politics of health, race, environmental regulation, government reform, and domestic social policy Ph.D. (1980), A.M. (1977), A.B. (1974), Harvard University The Promise and Peril of Environmental Justice

Conceptual Drawbacks of Environmental Justice From a rationalizing perspective, a major problem with the environmental justice version of the democratizing critique is that, like ecopopulism more generally, it threatens to worsen the problem of environmental policy's missing priorities. As Walter Rosenbaum elaborates: like the man who mounted his horse and galloped off in all directions, the EPA has no constant course. With responsibility for administering nine separate statutes and parts of four others, the EPA has no clearly mandated priorities, no way of allocating scarce resources among different statutes or among programs within a single law. Nor does the EPA have a congressional charter, common to most federal departments and agencies, defining its broad organizational mission and priorities.... Congress has shown little inclination to provide the EPA with a charter or mandated priorities, in good part because the debate sure to arise on the relative merit and urgency of different environmental problems is an invitation to a political bloodletting most legislators would gladly avoid. Intense controversy would be likely among states, partisans of different ecological issues, and regulated interests over which problems to emphasize; the resulting political brawl would upset existing policy coalitions that themselves were fashioned with great difficulty. Moreover, setting priorities invites a prolonged, bitter debate over an intensely emotional issue: should the primary objective of environmental protection be to reduce public risks associated with environmental degradation as much as seems practical or—as many environmentalists fervently believe—is the goal to eliminate all significant forms of pollution altogether?18 Environmental justice inevitably enlarges this challenge of missing priorities, and for similar reasons. As noted earlier, the movement is a delicate coalition of local and ethnic concerns unable to narrow its grievances for fear of a similar "political bloodletting."1? Overt de-emphasis or removal of any issue or claim would prompt the affected coalition members (for example, groups, communities, or tribes) to disrupt or depart it. And chances are they would not leave quietly but with evident resentment and perhaps accusatory rhetoric directed at the persons and organizations remaining. Real priority-setting runs contrary to radical egalitarian value premises, and no one (perhaps least of all a strong democratizer) wants to be deemed a victimizer. Therefore movement rhetoric argues that no community should be harmed and that all community concerns and grievances deserve redress. Scholar-activist Robert Bullard proposes that "the solution to unequal protection lies in the realm of environmental justice for all Americans. No community, rich or poor, black or white, should be allowed to become a 'sacrifice zone."20 When pressed about the need for environmental risk priorities, and about how to incorporate environmental justice into priority setting, Bullard's answer is a vague plea for nondiscrimination, along with a barely more specific call for a "federal 'fair environmental protection act™ that would transform "protection from a privilege to a right."21 Bullard's position is fanciful and self-contradictory, but extremely telling. He argues essentially that the way to establish environmental priorities is precisely by guaranteeing that such priorities are impossible to implement. This is symptomatic of a movement for which untrammeled citizen voice and overall social equity are cardinal values. Bullard's position also epitomizes the desire of movement intellectuals to avoid speaking difficult truths (at least in public) to their allies and constituents. Ironically, in matters of health and risk, environmental justice poses a potentially serious, if generally unrecognized, danger to the minority and low-income communities it aspires to help. By discouraging citizens from thinking in terms of health and risk priorities (that is, by taking the position, in effect, that every chemical or site against which community outrage can be generated is equally hazardous), environmental justice can deflect attention from serious hazards to less serious or perhaps trivial ones.

#### These tradeoffs are inevitable – policymakers must balance competing interests for effective achievement of goals – independently this establishes that the method of achieving environmental goods is relevant, justifying the CP

Woller 97 [BYU Prof., “An Overview by Gary Woller”, A Forum on the Role of Environmental Ethics, June 1997, pg. 10]

Yes, it’s the same Woller util justification – the card happens to be about the environment.

Moreover, virtually all public policies entail some redistribution of economic or political resources, such that one group's gains must come at another group's expense. Consequently, public policies in a democracy must be justified to the public, and especially to those who pay the costs of those policies. Such justification cannot simply be assumed a priori by invoking some higher-order moral principle. Appeals to a priori moral principles, such as environmental preservation, also often fail to acknowledge that public policies inevitably entail trade-offs among competing values. Thus since policymakers cannot justify inherent value conflicts to the public in any philosophical sense, and since public policies inherently imply winners and losers, the policymakers' duty to the public interest requires them to demonstrate that the redistributive effects and value trade-offs implied by their polices are somehow to the overall advantage of society. At the same time, deontologically based ethical systems have severe practical limitations as a basis for public policy. At best, a priori moral principles provide only general guidance to ethical dilemmas in public affairs and do not themselves suggest appropriate public policies, and at worst, they create a regimen of regulatory unreasonableness while failing to adequately address the problem or actually making it worse. For example, a moral obligation to preserve the environment by no means implies the best way, or any way for that matter, to do so, just as there is no a priori reason to believe that any policy that claims to preserve the environment will actually do so. Any number of policies might work, and others, although seemingly consistent with the moral principle, will fail utterly. That deontological principles are an inadequate basis for environmental policy is evident in the rather significant irony that most forms of deontologically based environmental laws and regulations tend to be implemented in a very utilitarian manner by street-level enforcement officials. Moreover, ignoring the relevant costs and benefits of environmental policy and their attendant incentive structures can, as alluded to above, actually work at cross purposes to environmental preservation. (There exists an extensive literature on this aspect of regulatory enforcement and the often perverse outcomes of regulatory policy. See, for example, Ackerman, 1981; Bartrip and Fenn, 1983; Hawkins, 1983, 1984; Hawkins and Thomas, 1984.) Even the most die-hard preservationist/deontologist would, I believe, be troubled by this outcome. The above points are perhaps best expressed by Richard Flathman, The number of values typically involved in public policy decisions, the broad categories which must be employed and above all, the scope and complexity of the consequences to be anticipated militate against reasoning so conclusively that they generate an imperative to institute a specific policy. It is seldom the case that only one policy will meet the criteria of the public interest (1958, p. 12). It therefore follows that in a democracy, policymakers have an ethical duty to establish a plausible link between policy alternatives and the problems they address, and the public must be reasonably assured that a policy will actually do something about an existing problem; this requires the means-end language and methodology of utilitarian ethics. Good intentions, lofty rhetoric, and moral piety are an insufficient though perhaps at times a necessary, basis for public policy in a democracy.

### Hollow Hope DA

#### Litigation deflects attention from grassroots activism that better solves the case

Van Schaack 4 – Assistant Prof. of Law @ Santa Clara University School of Law, Vanderbilt Law Review, November, 2004, (Beth, 57 Vand. L. Rev. 2305; Lexis)

Although litigation can provoke and promote other processes of social change, it can also inhibit the development of, deflect attention and resources away from, or even undermine other strategies for social change that may be more efficacious or durable. These alternative strategies include reparations strategies through the political process; n199 direct action; transnational advocacy in countries where abuses are prevalent; **grassroots educational campaigns**; traditional human rights advocacy based upon fact-gathering and shaming; the development of monitoring bodies and international regulatory standards, such as environmental or labor codes of conduct for extraterritorial activities; and the creation and promotion of international institutions**.** n202 The technical, rarified and inaccessible nature of litigation may do little to contribute to the growth of grassroots social movements in certain contexts and communities, especially where individuals are not accustomed to invoking judicial processes to bring about social change. n203 Likewise, lawyers may actually displace natural leaders within community groups, leading to the disempowerment, and even demise, of the group. n204 In addition, litigation (and its attendant legalisms such as standing rules, statutes of limitation, or justiciability doctrines) may diffuse political or moral claims rather than empower potential political constituencies. Indeed, litigation in the United States may ultimately contravene or undermine the strategies of local activists where it is not part of a campaign at the grassroots level in the targeted country.

#### Litigation cause backlash and doesn’t solve

Kostiner, 3, Jurisprudence and Social Policy Program, University of California, 2003 [“Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change”, June, <http://www.blackwell-synergy.com/doi/full/10.1111/1540-5893.3702006>, rwg]

Following Scheingold's argument on the "myth of rights," several empirical studies were conducted to explore whether specific litigation campaigns had been successful in promoting social reform. Focusing primarily on the direct effects of legal tactics, many of these studies revealed a substantial gap between the promises of rights litigation and its minimal impact in reality. In his well-cited book The Hollow Hope (1991), Rosenberg concludes that major litigation campaigns for school desegregation, abortion rights, and environmental justice failed to produce significant social reform. According to Rosenberg, some of these campaigns even had negative effects on social movements, as they led to backlash reactions and the rise of reactionary social movements. Other studies of the impact of litigation campaigns conclude with similarly pessimistic accounts of the fate of legal tactics as a tool for social reform.

### Court Clog DA

#### Expansion of rights via the courts opens the floodgates for other groups

Araiza 5 Professor of Law @ Loyola Law School, 20**05** (William, Tulane Law Review, February 2005, 79 Tul. L. Rev. 519; Lexis)

Obviously, one of those consequences feared by the Court was the prospect that if the mentally retarded were granted suspect class status, many other groups could make similar arguments for heightened scrutiny. This "floodgates" concern is a legitimate one - at least since the legal realists, it has been accepted that a court formulating a legal rule must be aware of the rule's practical implications as well as its formal logic.

#### Independently, the Hayward evidence provides a link since it proves that it would result in a massively inefficient flood of people using suing for environmental rights

#### A flood of frivolous claims trivializes worthy cases—gutting the AFF. Solvency:

Van Schaack 4 Assistant Prof. of Law @ Santa Clara University School of Law, Vanderbilt Law Review, November, 20**04**, (Beth, 57 Vand. L. Rev. 2305; Lexis)

Further, cases advancing weak or frivolous claims may threaten to trivialize more worthy cases**.** Pleas for a cautionary approach have even begun to be heard from seasoned ATCA lawyers who, as a result of this more decentralized development of ATCA jurisprudence and the emerging diversity of lawyers engaged in this work, have difficulty keeping track of all the cases that have been filed to date and must consider whether and how to influence shaky cases in order to protect case precedent and the integrity of the enterprise.

### Solves Case

#### Neg solves root cause of environmental problems – this is the internal link to their inequality arguments

White 13 [Rob White (Professor of Criminology, School of Sociology and Social Work, University of Tasmania, Australia). “Resource Extraction Leaves Something Behind: Environmental Justice and Mining.” International Journal for Crime and Justice. IJCJ 2013 2(1): 50-64. [www.crimejusticejournal.com](http://www.crimejusticejournal.com)] AJ

As extensive work on specific incidents and patterns of victimisation demonstrates, some people are more likely to be disadvantaged by environmental problems than others. This is evident with respect to the location of toxic waste dumps, extreme air pollution, chemical accidents, access to safe clean drinking water and so on (see Chunn et al. 2002; Saha and Mohai 2005; Williams 1996). It is the poor and disadvantaged who suffer disproportionately from such environmental inequalities, whether this is in the United States (Bullard 1994), Canada (Rush 2002), India (Engel and Martin 2006) or Australia (Walker 2006). Moreover, it is these communities that also suffer most from the extraction of natural resources. For example, in many places around the globe where minority or Indigenous peoples live, oil, timber and minerals are extracted in ways that devastate local ecosystems and destroy traditional cultures and livelihoods (Brook 2000; Gedicks 2005; Schlosberg 2007).

### 2NR Overview

#### This debate is a question of process – should environmental protection be implemented via a right to the environment, or a policy approach? The CP is an alternate approach that avoids disadvantages associated with a right to the environment enforceable through courts.

#### The aff needs to prove why their advocacy is better than the negatives – absent *an offensive reason* why their advocacy is the better policy option, you should presume neg since the aff hasn’t met their burden of proving the plan. If they don’t have a reason to prefer court action over legislative action, then any risk of offense for the disad is relevant.

#### Extend the Hayward evidence – there are 3 problems associated with the courts approach

#### Public good – By their nature, environmental quality and degradation isn’t an individual rights violation, but concerns the distribution of a public good, so policies are better at resolving them by governing the society-wide allocation of these goods

#### Societal interest – Environmental problems are broad and affect large parts of society, not individual people on a case-by-case basis. Using the courts encourages individual action disconnected from broader societal interests implicated in environmental degradation which *actively prevents* solving the problem which is offense for me

#### Efficiency – Using courts requires each individual to sue for their right to be recognized, instead of using one set of policies to address environmental problems – this is inefficient and ineffective

#### Competition – individuals who do sue for their right to the environment to be recognized do so for their own interests, not for the interests of society as a whole, which only legislative action can serve. Individual suits result in shifting the extraction towards communities who are less likely to sue – means the aff does LITERALLY NOTHING

#### Independently each of these arguments is a massive solvency takeout to the aff

### A2 Perm

#### Legislative overbuilding DA – including more regulations and possibilities for legal action builds extremely complex legal systems – this increases noncompliance and reduces citizen participation which causes apathy

Bobertz 95 [Bradley C.Bobertz, Assistant Professor of Law, University of Nebraska College of Law. “Legitimizing Pollution Through Pollution Control Laws: Reflections on Scapegoating Theory.” Texas Law Review, Volume 73, Number 4, March 1995. Content downloaded/printed from HeinOnline (http://heinonline.org) Wed Dec 25 23:49:03 2013 SW]

The phenomenon of environmental scapegoating helps to foster the massiveness, disorganization, and incomprehensibility that plague environmental law.17 When lawmakers react to a social problem by enacting legislation that hinges on a distorted picture of reality, a legal regime that lacks appropriate formative principles is an unsurprising result. Moreover, a law that depends on false diagnoses will grow in complexity as its legal suppositions come into increasing conflict with the facts." As a coping strategy, lawmakers opt to adjust (and complicate) legislative programs only enough to accommodate the current problematic factors instead of starting fresh with new models that conform more accurately to the true problem. 178 The Clean Air Act's "nonattainment program" (a euphemistic name for a failing system) provides a good example. Its length and complexity increased geometrically between its initial enactment in the mid-course correction amendments of 1977 and its second, monstrously intricate iteration in the 1990 amendments. 79 Explaining the nonattainment provisions and other aspects of the 1990 Clean Air Act amendments to lawyers ordinarily accustomed to reading and understanding statutory law continues to provide lucrative business opportunities for continuing legal educators. 1t8 Overcomplexity in the law by itself imposes costs on society. Initially, regulated entities must add to their ordinary cost of compliance the cost of simply understanding what the law requires them to do. Complicated laws also increase the likelihood of noncompliance,"' undermining the attainment of environmental goals and creating pressures for extending deadlines and raising permissible emission levels-a pattern endemic in environmental law." Even more troubling is the fact that unnecessary legal complexity deprives society at large of a common, comprehensible vocabulary for debating environmental policy. A system of democratic rule implies discourse not only among a select group of experts, but also among the voting public. Environmental law has swollen into a fortress of specialized concepts and jargon practically impregnable to ordinarily informed and aware citizens." Creating barriers to public understanding of, and involvement in, environmental law frustrates the theoretical virtues of democratic self-rule and also engenders a problem of more practical import-a spirit of confusion and anger that characterizes most public encounters with environmental problems and the laws erected to correct them.1 Such encounters typically result in resignation and apathy toward the law, qualities that impoverish any legal system directed toward social reform."

#### 2. The perm brings nothing to the table – the CP solves the entirety of the aff by solving good environments so including a right to the environment only has a risk of linking to the disads

### A2 There’s no Difference

#### CP is a different process than the aff – yes, it has the same ultimate goal, but when the aff reads an advocacy they have limited the debate which allows the negative to contest that advocacy even if the neg still advocates environmental protection. The aff needs to prove their ADVOCACY not just environmental protection.

### A2 CP is Aff Ground

#### Hayward 2 proves the distinction between a court-based enforcement system and policy implementation – prefer comparative evidence that cites literature consensus.

#### There’s a sequencing disad to the perm since Hayward proves that there would be conflict between the goals of a rights-based system and a policy-based one.

#### CP is mutually exclusive – the principles guiding each are different and have different enforcement mechanisms that conflict with one another

Hayward 05 [Tim Hayward. “Constitutional Environmental Rights.” UOP, Oxford 2005. ] AJ

Nevertheless, a significant conceptual distinction can still be drawn, as Brandl and Bungert observe, between ‘a personal right which is enforceable by the individual’, or a ‘subjective’ right, in other terminology, and ‘an “objective” provision, proclaiming a state goal which must be respected in every balancing decision made by the government, but which is unenforceable by the individual’ (Brandl and Bungert 1992: 7). The former is typically justiciable, whereas the latter has a more ‘programmatic’ character, reflecting general goals of the legislature rather than determining specific judicial outcomes.

### 2N Hollow Hope

#### Human rights litigation has a flypaper effect—it attracts litigants to the courts and undermines social change

Van Schaack 4 Assistant Prof. of Law @ Santa Clara University School of Law, Vanderbilt Law Review, November, 20**04**, (Beth, 57 Vand. L. Rev. 2305; Lexis)

Indeed, practitioners of ATCA-style litigation should be wary of espousing an overabundance of objectives for this litigation, because doing so may undermine or overshadow what these cases do accomplish for individual victims of human rights abuses. Likewise, human rights advocates should not pin their hopes on achieving these broader impacts at the expense of their clients and their clients' experience with the litigation process. In any case, notwithstanding the first and second order effects that have been achieved, this Essay cautions that suchlitigation should not replace other forms of human rights advocacy. An overreliance on adversarial litigation, as opposed to other processes of social change, raises some of the same concerns that surface in the civil rights context about the efficacy of resorting to law and the judicial process to promote durable social change and the ability of the judicial process to address major social and economic problems. n9

#### Litigation on human rights issues threatens to derail processes of social change:

Van Schaack 4 Assistant Prof. of Law @ Santa Clara University School of Law, Vanderbilt Law Review, November, 20**04**, (Beth, 57 Vand. L. Rev. 2305; Lexis)

A focus on litigation here to the exclusion of other processes of social change has the potential to marginalize the voices of victims of human rights abuses and derail other potentially efficacious strategies for social change.

## Case

### Solvency Defense

#### Environmental protection can’t be implemented in a system of courts and can’t effectively stop environmental harms

Lewis 12 [BRIDGET LEWIS (Lecturer at the Faculty of Law, Queensland University of Technology). “ENVIRONMENTAL RIGHTS OR A RIGHT TO THE ENVIRONMENT? EXPLORING THE NEXUS BETWEEN HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION.” Macquarie Journal of International and Comparative Environmental Law, 8(1), pp. 36-47. (2012) Vol 8(2)] AJ

As well as concerns relating to the proliferation of new rights, some scholars have identified substantive issues with the scope and content of a right to a healthy environment and on those grounds have argued that it may be inappropriate subject matter for international human rights law, or at least that its inclusion would require significant work in carefully defining the right. Shelton recognises that environmental degradation has the potential to impact upon future generations, and points out that any right to a healthy environment implies ‘significant, constant duties toward persons not yet born.’51 Further, the right to a healthy environment potentially expands the territorial scope of state obligations. Shelton has argued that ‘the required broad expansion of state liability may prove to be the biggest single hurdle to establishing a right to environment.’52 Environmental problems such as pollution, disruption of biodiversity and global warming are not usually confined to political boundaries. Developing over a lengthy period of time, it is difficult to identify the precise cause and effect, or the identity victims of human rights violations. The temporal and geographic dimensions of the right to a healthy environment presents challenges for human rights theory which has traditionally limited the responsibilities of states to protect and fulfil the rights of their own citizens or those within their territories. In light of these obstacles, Shelton concludes that ‘environmental protection cannot be wholly incorporated into the human rights agenda without deforming the concept of human rights and distorting its program.’53

#### Turn – litigation deters beneficial forms of resource extraction

Frynas 4 [(Jerdez, Lecturer in International Management, Birmingham Business School, University of Birmingham.) “Social and environmental litigation against transnational firms in Africa” J. of Modern African Studies, 42, 3 (2004), pp. 363–388] AT

In extreme cases, the costs of potential future litigation could discourage firms from continuing with a harmful activity in a community and prompt a firm’s withdrawal. But the local community may often want the company to stay rather than withdraw, given its reliance on an offending firm in the absence of alternative jobs and income opportunities. Nor does litigation help to improve the relationship be- tween the company and its stakeholders, so the hostility between the local community and the company may render future business operations more difficult, if not impossible. Litigation thus has some potentially negative effects even for the very claimants it is designed to help. It must also be remembered that there are considerable barriers to justice for claimants, which result from the nature of the modern legal process.

#### This outweighs – the harms of litigation outweigh the costs

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In sum, the above discussion suggests that the cons of litigation far outweigh the pros (see Table 3 for an overview), although the reality is more complex and this analysis can only serve as a starting point for understanding the role of litigation and different stakeholder perspectives. The potential economic impact of litigation is purely negative. The de- velopmental impact is less clear-cut, but it is remarkable that litigation does not even have unambiguous benefits for the represented claimants themselves. One might cynically conclude that the biggest beneficiaries ￼￼￼are the lawyers who often demand hefty fees from their clients, notably in Nigeria where lawyers frequently work on a contingency fee basis. In the Shell v. Farah case mentioned earlier, in which the claimants were awarded 4,621,000 Naira by the court in 1994, the lawyers received roughly 2,500,000 Naira or 54% of the total compensation payment, although one should note that a considerable part of that sum was spent on items such as expert reports and travel (Frynas 2001). The Nigerian lawyers’ fees in oil-related court cases may be extreme, but nonetheless underline an additional drawback of pursuing litigation.

#### Corporations have much greater power than individuals in the developing countries since they are incredibly wealthy and have special teams of lawyers to prevent harms from litigation

#### The legal process is too uncertain and ineffective to do anything

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As a survey of 154 Nigerian lawyers has shown elsewhere, claimants in Africa are prevented from instituting a valid claim by the lack of funds, ignorance of legal rights and intimidation by public bodies and defendants (Frynas 2001). Lawsuits are also slow and the outcome is uncertain; for instance, the two Nigerian cases mentioned earlier took five and nine years respectively from the start of the case until the final appeal, while many cases take much longer. The nature of the legal process may therefore dissuade potential claimants and limit the potential benefits of litigation. Litigation has an even more ambivalent developmental impact on society as a whole.

#### Status quo abilities to litigate already exist since constitutional and international law human rights are valid grounds for suits now – a right to the environment won’t significantly solve the status quo harms

#### Litigation for a right to the environment can’t resolve future harm, only compensate for past harm

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In theory, members of the society could then hope that firms will behave more responsibly in future. In practice, the potential for the beneficial developmental impact of litigation is limited. In cases involving tort law, courts focus on compensation payments to injured individuals, not on remedying long-standing social and environmental problems. For example, the site of former Thor Chemicals facilities in South Africa still houses some 3,500 tones of mercury wastes (Ward 2002), despite the successful litigation against the company in the UK. Anderson (2002) argued that litigation against TNCs could take into account environmental costs, ‘if the com- pensation is properly assessed and awarded’. The firm could be forced to pay for environmentally damaging activities and could discourage similar damaging activities elsewhere. But even if courts were to impose additional costs on the defendants such as by the use of punitive damages, they do not tend to look at the larger picture of environmental and social damage, and do not investigate the necessity for clean-up operations or the costs to future generations. Therefore, while claimants may obtain individual compensation payments, society as a whole must still pay for environmental or health-related remedial costs.

#### Courts are extremely corrupt and often have ties to corporations since they can pay off judges who can make decisions however they want, whereas the creation of laws is guaranteed to limit harmful activity

#### No solvency – lawsuits in court is ineffective and courts are unwilling to stop the activity

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But the remedies available to courts may not always satisfy the claimants. Lawsuits brought under tort law reduce social issues to questions of compensation, but sometimes this is not entirely appropriate. For example, if a company destroys a religious shrine in the course of its business operations, the injury may not be easy to compensate; indeed, what is the monetary value of a shrine? The ultimate weapon of courts is to order an end to a harmful activity, but courts have been reluctant to use that weapon. Nigerian courts forced oil companies to make sizable compensation payments to claimants, but failed to put any injunctions in place in order to stop harmful gas flaring, or to force firms to upgrade their facilities before resumption of oil pro- duction (Frynas 1999).

#### A constitutional right is ineffective due to rules on liability, lack of an injured part

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Even if legal outcomes were to provide solutions to a society’s social and environmental problems (notably through a deterrence effect), legal recourse is limited to groups from selected countries, those with NGO sup- port and financial resources, and crucially depends on available legal remedies. Litigation in Africa has so far focused on a few countries – South Africa, Nigeria, Namibia – rather than the continent’s poorest states. The support of international NGOs for litigants has been uneven, focusing on South Africa and Nigeria. The available legal remedies address some wrongs but not others. For example, a Nigerian farmer injured by an oil spill has much better prospects of legal success than a fisherman whose fishing nets were destroyed by an oil company boat, due to the fact that the law applicable to oil spills (notably the strict liability rule) is much more robust than legal rules on negligence (cf. Frynas 2000 : ch. 6). In case of diffuse environmental damage which affects many sections of society (e.g. wide-spread air pollution), there is not a single injured party with an economic incentive or the legal standing to bring a lawsuit (Anderson 2002). In other words, litigation has a very uneven reach and does not always address some of the most serious corporate wrongdoings in society.

### Rights Tradeoff Turn

#### The right to environment undermines existing rights structure

Lewis 12 [BRIDGET LEWIS (Lecturer at the Faculty of Law, Queensland University of Technology). “ENVIRONMENTAL RIGHTS OR A RIGHT TO THE ENVIRONMENT? EXPLORING THE NEXUS BETWEEN HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION.” Macquarie Journal of International and Comparative Environmental Law, 8(1), pp. 36-47. (2012) Vol 8(2)] AJ

Several scholars have argued against recognising a new right to a healthy environment in international law. One criticism centres on the problem of proliferation of human rights. As Shelton argues, ‘there are legitimate fears that the addition of numerous claims will devalue existing human rights.’43 Gibson emphasises the need to ensure that any new right is supported by existing human rights theory and architecture commenting: [t]he right to a clean environment is not a frivolous claim; however, declaring it to be a human right without support at the highest level threatens the integrity of the entire process of recognising human rights.44 While it is important for international human rights law to evolve to meet contemporary problems, Alston argues that a ‘delicate balance must be struck which ensures respect for the integrity of the tradition both in terms of its content and of the process by which it evolves.’ 45

### A2 Customary ILaw

#### The right to environment does not meet the conditions for customary law

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As can be seen from this small sample, various constitutions employ a very wide range of language, and are open to interpretation. Even an apparently simple formulation such as ‘right to a healthy environment’ raises significant questions as to the scope and content of the right. How is a ‘healthy environment’ to be defined? Is it intended to mean an environment which is good for human’s health, or which is in good health itself? Many formulations of the right to a healthy environment appear on closer inspection to be merely reiterations of existing rights, albeit with emphasis on their environmental dimensions. There are relatively few examples of a truly independent right articulated in national constitutions or regional instruments. For example, the right to a generally satisfactory environment found in the African Charter refers to an environment which is favourable for people’s development, the implication being that we should judge how satisfactory the environment is by reference to whether it serves to further human development. As such, rather than providing evidence of a new right, domestic and regional human rights law seems merely to reaffirm existing human rights principles. The other criterion for accepting a new principle of customary international law is that of opinio juris – that is, consistent state practice must be accompanied by an attitude among states that they are legally obliged to adhere to the those practices.42 Although national constitutions indicate a willingness to recognise certain values or national priorities, the mere inclusion of wording in a constitution is not on its own, sufficient evidence of opinio juris. Furthermore it would be necessary to consider the justiciability of such constitutional rights, their enforcement by the courts and their incorporation into legislation. While beyond the scope of this paper, without evidence of widespread implementation and enforcement within domestic legal systems, it seems unlikely that a customary right could be established at the international level.