

# THE LAW OF WORDS: STANDING, ENVIRONMENT, AND OTHER CONTESTED TERMS

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*Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), exposes fundamental incoherencies within environmental standing doctrine, even while it ostensibly makes standing easier to prove for plaintiffs in environmental citizen suits. According to Laidlaw, an environmental plaintiff needs only to show personal injury to satisfy Article III's standing requirement; she need not show that the alleged statutory violation actually harms the environment. This Article argues that Laidlaw's distinction between injury to the plaintiff and harm to the environment is nonsensical. Both the majority and dissent in Laidlaw incorrectly assume that there exists an objective standard by which a plaintiff, society or a court can measure harm or injury. Using examples drawn both from history (the Trail Smelter Arbitration (1930–41)) and fiction (Barbara Kingsolver's novel *Animal Dreams*), this Article illustrates that the inherent contingency of language renders it impossible to define harm or injury without acknowledging the systemic perspective from which the concepts are viewed.

The path to an intelligible standing doctrine lies not in focusing on this artificial opposition, but instead in acknowledging statutory violations as injurious to the social and legal system of which we all form a part. Assuming the violated statute contains a citizen suit provision, the resulting harm to the system could and should enable individuals to sue. This policy would conform the Court's standing jurisprudence to the language and intent of the statutes before it. Moreover, this policy would counter the undermining of the rhetoric of environmental protection that persists so long as the Supreme Court continues its frequent yet unsuccessful efforts to retool its definition of cognizable legal injury.

## I. INTRODUCTION

This Article is about one sentence. The sentence, found in the majority opinion of *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,<sup>1</sup> reads as follows:

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<sup>1</sup> 528 U.S. 167 (2000) [hereinafter *Laidlaw IV*]. Since the Article discusses two district court opinions, a Fourth Circuit appeal, and a Supreme Court case with the same case name, the Article will employ a numbering system for all of the *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, decisions: 890 F. Supp. 470 (D.S.C. 1995) [hereinafter *Laidlaw I*], 956 F. Supp. 588 (D.S.C. 1997) [hereinafter *Laidlaw II*], 149 F.3d 303 (4th Cir. 1998) [hereinafter *Laidlaw III*].

The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff.<sup>2</sup>

Both alone and in the context of the full opinion, this sentence exposes fundamental incoherencies within standing doctrine, especially with respect to standing's relationship with environmental law. This Article argues that the opposition the sentence creates—injury to the plaintiff versus harm to the environment—is both nonsensical and entirely ancillary to the language and purpose of the statute *Laidlaw* supposedly interprets. Declaring that injury to the plaintiff rather than harm to the environment comprises the requisite for standing enables the Court to ground its basis for standing in an opposition that makes no sense, even though it is firmly grounded in precedent.<sup>3</sup> In other words, the sentence (and, consequently, the rest of the opinion) is simultaneously legally strong and rhetorically incoherent.

The path to an intelligible standing doctrine does not lie in such fruitless comparisons. It lies instead in acknowledging statutory violations as injurious to the social and legal system of which we all form a part.<sup>4</sup> Assuming the violated statute contains a citizen suit provision, the resulting harm to the system could and should enable individuals to sue. This policy would relieve the Supreme Court of having to constantly retool its definition of cognizable legal injury. It would also conform the Court's standing jurisprudence to the language and intent of the statutes before it. Under the current regime, the statutory language often factors very little in the Court's analysis.

Even though its holding enhances citizen suit standing, *Laidlaw* nevertheless continues a trend wherein the environment is consistently marginalized within environmental jurisprudence.<sup>5</sup> Using examples drawn both from history (the Trail Smelter Arbitration (1930–41)) and fiction (Barbara Kingsolver's novel *Animal Dreams*), this Article attempts to situate *Laidlaw* within the context of the larger issue of a growing incoherence that is undermining the rhetoric of environmental protection.

*Laidlaw* also highlights structural problems within the larger legal system—problems that date at least from the time of Galileo's trial in the

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<sup>2</sup> *Id.* at 181.

<sup>3</sup> See *Laidlaw IV*, 528 U.S. at 183 (citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–63 (1992).

<sup>4</sup> See *infra* Part IV.A.

<sup>5</sup> Many commentators view *Laidlaw* as an unalloyed positive because of its relaxed standing requirements. See, e.g., RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 1140 (4th ed. 2002); Jeffrey G. Miller & Chris Hilton, *The Standing of Citizens to Enforce Against Violations of Environmental Statutes in the United States*, 12 J. ENVTL. L. 370, 379 (2000) (noting that *Laidlaw* “treats citizen suits as a valued and legitimate form of litigation . . . [which] sends positive signals to lower courts about the value of citizen suits . . .”). My own view is more tempered. I see the decision as a triage rather than a lasting cure.

seventeenth century. Galileo was accused of defying the Church's prohibition against defending and teaching Copernicus's theory that the earth revolved around a stable sun, rather than vice-versa. By maintaining that canonical law was not objective truth and that the sun did not revolve around the earth, Galileo forever undermined the law's authority.<sup>6</sup> His subsequent trial precipitated the downfall of the notion of law as objective and immutable, replacing it with the equally problematic notion of an objective and immutable science. Though the idea of an objective science has also fallen into disfavor in recent years,<sup>7</sup> it retains great currency, particularly within jurisprudence. Often the law aligns itself with science, effectively cloaking itself with the mantle of objectivity.<sup>8</sup> I call this phenomenon a "Galileo Problem" and take it up at greater length in Part V. Galileo Problems arise from attempts to manufacture permanent and unwavering truths from words that can at best express the historically or analytically contingent products of human thought and language. In *Laidlaw*, a Galileo Problem manifests when the concept of harm is treated as an objectively ascertainable fact and parleyed into a norm and then into law.

Norms are language-based, their existence a product of communication among the members of the social system. That the law is formed of words is hardly news. But when those words are contingent, they form a shaky foundation upon which to rest a lattice of norms.

*Laidlaw* offers a compelling demonstration of a type of contingent language whose use undermines the Court's credibility, sowing the seeds of an environmental legitimation crisis.<sup>9</sup> The rhetoric of both the majority

<sup>6</sup> Galileo also argued that his views (based on the theories of Copernicus) did not conflict with the teachings of the Church. It bears noting that the geocentric theory of the universe (i.e., that the sun revolved around the earth) was based as much on the teachings of Ptolemy and Aristotle as on any scriptural authority. Once given the imprimatur of the Church, however, the theory rose above scrutiny. See generally JEROME J. LANGFORD, *GALILEO, SCIENCE AND THE CHURCH* (1992).

<sup>7</sup> See, e.g., STEPHEN TOULMIN, *THE RETURN TO COSMOLOGY: POSTMODERN SCIENCE AND THE THEOLOGY OF NATURE* 255 (1982) ("[T]he pure scientist's traditional posture as . . . spectator, can no longer be maintained: we are always—and inescapably—participants or agents as well."); CAROLYN MERCHANT, *ECOLOGICAL REVOLUTIONS: NATURE, GENDER, AND SCIENCE IN NEW ENGLAND* 4 (1989) ("Science is an ongoing negotiation with non-human nature for what counts as reality."); EVELYN FOX KELLER, *SECRETS OF LIFE, SECRETS OF DEATH: ESSAYS ON LANGUAGE, GENDER AND SCIENCE* 74 (1992):

[T]he standard response to so-called relativist arguments has been that . . . scientific stories are different . . . for the simple reason that they "work" . . . As routinely as the effectiveness of science is invoked, equally routine is the failure to go on to say what it is that science works *at*, to note that "working" is a necessary but not sufficient constraint.

<sup>8</sup> See MICHEL SERRES, *THE NATURAL CONTRACT* 86 (1995) (noting that we live now in a world where science alone is believed and "where only its courts judge in a doubly competent way, uniting law and non-law").

<sup>9</sup> See JÜRGEN HABERMAS, *LEGITIMATION CRISIS* 68 (1975). Legitimation crises inevitably occur when people no longer trust in the certitude of a central authority. See *id.* at

and dissenting opinions reveals fundamental misapprehensions about the role of language within the law, and of the language of law as it relates to standing and the environment. Consequently, the case brings into stark relief a number of the most vexing aspects of standing doctrine's incompatibility with environmental jurisprudence.

My discussion of the *Laidlaw* opinion requires several detours that frame the parts of this Article. Part II examines the evolution of standing doctrine and situates it with respect to environmental law in general and the *Laidlaw* decision in particular. Part III examines the convoluted result for standing doctrine of the distinction between injury to individuals and harm to environment. Part IV offers an overview of systems theory, the critical apparatus through which I approach the discussion. It uses the Trail Smelter Arbitration and *Animal Dreams* to illustrate the implications of the issues raised by the case. The Trail Smelter Arbitration offers a real-life example of the consequences of contingent language. *Animal Dreams* underscores the dangers inherent in such language, demonstrating that the problem does not lie in a given set of circumstances, but rather with the larger phenomenon of linguistic uncertainty, a characteristic that is equally present in fact and fiction. Part V suggests a possible means of egress—predicated in systems theory—from the rhetorical morass created by the Court's standing doctrine and by modern environmental jurisprudence. It applies this new framework to *Laidlaw*, and then attempts to show how the rhetorical basis for a new, more effective system of environmental laws already exists to some degree in the language of statutes like the National Environmental Policy Act ("NEPA").<sup>10</sup>

The purpose of this Article is not simply to empty my quiver into the hail of arrows already directed at standing doctrine.<sup>11</sup> It rather seeks to point out how standing is both symptom and cause of a larger incoherence that undermines our national understanding of, and commitment to, environmental protection. This incoherence can be resolved, I argue, by abandoning the convoluted and impractical doctrine of standing and cleaving instead to a standard of injury derived from the statutes themselves, a standard measured by whether the injury alleged negatively af-

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74–75 ("A legitimation crisis . . . must be based on a motivation crisis—that is, a discrepancy between the need for motives declared by the state . . . and the motivation supplied by the socio-cultural system on the other.").

<sup>10</sup> 42 U.S.C. §§ 4321–4370 (2000).

<sup>11</sup> See, e.g., Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000) [hereinafter Sunstein, *Standing for Animals*]; Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992) [hereinafter Sunstein, *What's Standing After Lujan?*]; Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397 (1996); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence on Lyons*, 59 N.Y.U. L. REV. 1 (1984); Joseph L. Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 13 NAT. RESOURCES J. 76 (1973); Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

fects the well-being, longevity and self-reproductive capacity of the social system.

The social system is the web of communication and shared expectations that enable human interaction.<sup>12</sup> These expectations are codified as norms and enacted into law.<sup>13</sup> Laws offer concrete articulations of the normative standards that enable the social system to function smoothly.<sup>14</sup> Deviation from those standards can create injury, not necessarily to individuals, but to the system's ability to function and self-reproduce. That injury to the system—rather than to individuals—should determine the viability of citizen suits.

This method of measuring harm is essentially identical to that of statutes that do not contain a private right of action, and its logic is simple and compelling. Both citizen suits and government enforcement actions are statutory creations, and both seek the same goal—observance of the law. Adhering to a standard that was broadly applicable to both types of action—instead of relying on a scattershot standing doctrine—would provide some welcome clarity to the chaotic world of environmental jurisprudence.<sup>15</sup>

## II. STANDING DOCTRINE AND THE COURT'S HOLDING IN *LAIDLAW*

### A. *Article III and the Evolution of Standing*

Article III of the Constitution limits the judicial branch's power of decision to cases or controversies.<sup>16</sup> From these constitutional limits, the Court fashioned standing doctrine, a doctrine designed to ensure that the litigating parties are truly adverse and have personal stakes in the outcome,<sup>17</sup> as well as to preserve the separation of powers.<sup>18</sup> Over time, this commitment to codifying and safeguarding the constitutional role of the judicial branch has evolved into a set of rules described by the Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*:

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<sup>12</sup> See NIKLAS LUHMANN, *ECOLOGICAL COMMUNICATION* 7 (1989) (“[S]ociety’ signifies the all-encompassing social system of mutually referring communications. It originates through communicative acts alone and differentiates itself from an environment of other kinds of systems through the continual reproduction of communication by communication.”).

<sup>13</sup> See NIKLAS LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* ix (Martin Albrow ed., Elizabeth King & Martin Albrow trans., 1985).

<sup>14</sup> See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *Nw. U.L. REV.* 453, 473 (1997) (“The law is . . . a vehicle by which the community debates, tests, and ultimately settles upon and expresses its norms.”).

<sup>15</sup> This approach to standing is equally applicable to non-environmental cases. Under this framework, the unworkable “injury-in-fact” test would be replaced by a statute-based determination of injury. Much of the Court’s current need for unwieldy injury analysis would be eliminated without running afoul of the requirements of Article III.

<sup>16</sup> See U.S. CONST. art. III, § 2.

<sup>17</sup> See, e.g., *Flast v. Cohen*, 392 U.S. 83, 101 (1968).

<sup>18</sup> See *id.* at 96–97; *Allen v. Wright*, 468 U.S. 737, 752 (1984) (“[T]he law of Article III standing is built on a single basic idea—the idea of separation of powers.”).

Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual legal or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."<sup>19</sup>

Courts commonly summarize the *Valley Forge* criteria as injury-in-fact, causation, and redressability.<sup>20</sup> Together, these requirements form what the Supreme Court calls the "irreducible constitutional minimum of standing."<sup>21</sup> In addition, as in *Laidlaw*, an association or organization may sue on behalf of its members when its members would have standing in their own right, the interests at stake are germane to the purposes of the group, and neither the claim nor the relief requested requires the participation of the individual members.<sup>22</sup>

While these requirements appear straightforward, they are surprisingly opaque, and their relationship to the case or controversy requirement of Article III has come under increasing scrutiny. Over the approximately eighty years since the Court began crafting its criteria for standing,<sup>23</sup> it has contorted both language and precedent in an ongoing and futile attempt to divorce the concept of standing from the substantive issues of law within the cause of action.

The structural problems within standing law are well documented. One commentator, noting that the doctrine has been called everything from "incoherent" to "permeated with sophistry," concludes that its intellectual structure is "ill-matched to the task it is asked to perform."<sup>24</sup> Another calls the doctrine "one of the most amorphous [concepts] in the entire domain of public law,"<sup>25</sup> while still another labels standing's injury-in-fact requirement "a large scale conceptual mistake."<sup>26</sup>

<sup>19</sup> 454 U.S. 464, 472 (1982) (citations omitted).

<sup>20</sup> See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102–03 (1998).

<sup>21</sup> *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

<sup>22</sup> See *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

<sup>23</sup> See *Mass. v. Mellon*, 262 U.S. 447, 488 (1923) ("The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."); see also *Fletcher*, *supra* note 11, at 225–26 (noting that modern standing doctrine (i.e., injury-in-fact, causation, and redressability) began to take shape in the 1930s).

<sup>24</sup> *Fletcher*, *supra* note 11, at 221; cf. David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41, 42 (1982).

<sup>25</sup> *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 2d Sess. 465, 498 n.6 (1966) (statement of Prof. Paul A. Freund)).

<sup>26</sup> See Sunstein, *What's Standing After Lujan?*, *supra* note 11, at 167.

*B. Standing and Environment—An Uneasy Marriage*

Citizen suits create some of standing's thorniest dilemmas. They occur when a statute provides a private right of action for its enforcement.<sup>27</sup> According to Judge Skelly Wright, the citizen suit provides a method of ensuring that "important legislative purposes heralded in the halls of Congress are not lost or misdirected in the vast hallways of the federal bureaucracy."<sup>28</sup> Because citizen suits are filed in the public interest, their successful prosecution normally results in fines paid to the government rather than to the plaintiffs.<sup>29</sup> Citizen plaintiffs benefit from the imposition of any injunctive relief as well as from the deterrent power of the suit against future violations.<sup>30</sup> While such suits have proved to be potent weapons in the enforcement arsenal, they are not always possible. A provision enabling them must be written into the relevant law. Federal environmental statutes often contain such provisions and the Clean Water Act is no exception.<sup>31</sup>

The critical sentence from *Laidlaw*<sup>32</sup> purportedly describes the type of injury required for standing to file a citizen suit under the Federal Water Pollution Control Act (hereinafter "Clean Water Act," "CWA," or "Act").<sup>33</sup> Yet, the citizen suit provision of the Act makes no mention of injury. It states simply that a citizen whose interests are or may be adversely affected may file suit if a prospective defendant is "in violation of an . . . effluent standard or limitation."<sup>34</sup>

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<sup>27</sup> The relevant provision of the Clean Water Act, for example, authorizes federal district courts to entertain suits brought by "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(a),(g) (2000).

<sup>28</sup> *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971). (Then) Judge Scalia took issue with Skelly Wright's comment, observing that one aim of limiting standing is to ensure that some actions are "lost or misdirected" within the federal bureaucracy. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 897 (1983); see also Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 44 n.28 (2001) (noting same).

<sup>29</sup> See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106–07, (1998); *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1131 n.5 (11th Cir. 1990).

<sup>30</sup> See *Laidlaw IV*, 528 U.S. 167, 185 (2000) ("We have recognized on numerous occasions that 'all civil penalties have some deterrent effect' . . .") (citing *Hudson v. United States*, 522 U.S. 93, 102 (1997)).

<sup>31</sup> See 33 U.S.C. § 1365(a). A number of other environmental statutes include citizen suit provisions. See 42 U.S.C. § 9659(a) (2000) (Comprehensive Environmental Response and Compensation and Liability Act); 16 U.S.C. § 1540(g) (2000) (Endangered Species Act); 42 U.S.C. § 7604 (2000) (Clean Air Act); 15 U.S.C. § 2619 (2000) (Toxic Substances Control Act); 30 U.S.C. § 1270 (2000) (Surface Mining Reclamation and Control Act); 42 U.S.C. § 1449 (2000) (Safe Drinking Water Act); 42 U.S.C. § 6972 (2000) (Solid Waste Disposal Act). The one major environmental statute without a citizen suit provision is the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (1994).

<sup>32</sup> See *supra* note 2 and accompanying text.

<sup>33</sup> 33 U.S.C. §§ 1251–1387 (2000).

<sup>34</sup> *Id.* § 1365(a)(1).

Having one's interests adversely affected is not the same as suffering an injury.<sup>35</sup> While one's interests and oneself may overlap, they are not identical. Interests are inherently subjective and not necessarily bounded by geography or even logic. I have never visited the Tongass Forest in Alaska, for example, nor do I have any plans to do so. Nevertheless, I am deeply interested in its preservation. If a logging concern in the Tongass were to discharge effluents in excess of its permitted maximum, my interests would be adversely affected.

The language of the Clean Water Act's citizen suit provision (as well as its legislative history) suggests that I should be able to sue. The Court, however, has repeatedly held otherwise, finding that prospective plaintiffs must allege a cognizable injury-in-fact in order to file suit. This requirement holds true irrespective of the statute's purpose or the wording of its citizen suit provision.<sup>36</sup> That injury must be shown through, at a minimum, the defendant's behavior adversely impacting either the plaintiff's current use of an area or the plaintiff's specific plans to do so.<sup>37</sup> Consequently, there is a disjuncture between the Court's requirements for legal injury and the language of the Act, which requires only a violation and an interested plaintiff.

This disjuncture stems from the ancillary role of injury to the enforcement of the statute as written. The Clean Water Act's drafters focused on the existence of violations, *not* on harm/injury either to the environment or to prospective plaintiffs, as the criteria for standing.<sup>38</sup> Thus, the dispute in *Laidlaw* over the right to sue under the Clean Water Act bears little relation to the actual language of the statute. Instead, the Court's framing of the issue effectively rewrites a key provision of the law. Putting aside the disturbing separation of power implications of such behavior, the Court's apparent ability to fashion its own criteria for justiciability also raises serious questions about the basis for judicial decision-making.

One of the principal causes of the rhetorical problems in the law is that the concept of harm<sup>39</sup> to the environment is meaningless. Harm, the foundation of legal injury, derives from traditional property interests. With ownership comes the accompanying notion that one's property should be protected from damage or trespass by others. By contrast, the environment is a type of commons: no one owns it. It is made up of "the surrounding conditions, influences, or forces, which influence or modify"

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<sup>35</sup> See *infra* Part III.B.1.

<sup>36</sup> See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Allen v. Wright*, 468 U.S. 737, 755 (1984); *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

<sup>37</sup> See, e.g., *Lujan*, 504 U.S. at 564; *Laidlaw IV*, 528 U.S. 167, 183–84 (2000).

<sup>38</sup> See *infra* note 107 and accompanying text.

<sup>39</sup> Though the *Laidlaw* court uses harm and injury interchangeably, whenever possible this Article uses injury to refer to humans and harm to refer to the nonhuman.



humans.<sup>40</sup> Those circumstances vary with individual perspective and are not things in which one can hold an ownership interest.<sup>41</sup> Without an owner, there can be neither trespass nor a controlling point of view through which to assess damage. Therefore, the “environment,” as such, is incompatible with traditional notions of harm, as well as with the body of law designed to protect private property.

Standing doctrine represents the Court’s attempt to elide this incompatibility. Unfortunately, its conclusion that standing for a private right of action to enforce environmental laws (i.e., the Clean Water Act) hinges on injury to the plaintiff only complicates the issue further.

The Clean Water Act’s abiding goal is to protect waterways held in common by the citizens of the nation.<sup>42</sup> Its citizen suit provision allows for a private right of action when pollutants are discharged into those waterways. It is hard to see how injury to individual plaintiffs fits into this regulatory framework, or why it should.<sup>43</sup> Requiring injury to plaintiffs as a prerequisite for standing amounts to inserting an extra-statutory provision into the Act, and allows the Court to conform its environmental rulings to private property-based doctrines as well as to the exigencies of the federal docket. In this respect, even while invoking Article III, the Court appears to be imposing a prudential standing requirement both as a rationale and as a means for overriding the statute’s instructions.

Prudential standing stems from courts implementing “‘prudential’ factors, not by virtue of their inherent authority to expand or constrict standing, but rather as a set of presumptions derived from common-law tradition designed to determine whether a legal right exists.”<sup>44</sup> Issues giving rise to prudential standing concerns include, for example, whether the alleged injury is specific to the plaintiff or a widely shared social grievance,<sup>45</sup> and whether a particular plaintiff may properly assert the rights of a third party.<sup>46</sup>

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<sup>40</sup> WEBSTER’S NEW INTERNATIONAL DICTIONARY 856 (2d ed. 1939)

<sup>41</sup> Paul Wapner describes nature (which he uses interchangeably with environment) as “not a single realm with a universalized meaning, but a canvas on which we project our sensibilities, our culture, and our ideas about what is socially necessary.” Paul Wapner, *Leftist Criticism of “Nature”: Environmental Protection in a Postmodern Age*, DISSENT MAG., Winter 2003, at 71, available at <http://www.dissentmagazine.org/menu/test/articles/wi03/wapner.htm>.

<sup>42</sup> See 33 U.S.C. § 1251(a) (2000).

<sup>43</sup> See Sunstein, *What’s Standing After Lujan?*, *supra* note 11, at 209–23.

<sup>44</sup> Scalia, *supra* note 28, at 886.

<sup>45</sup> See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982); *Warth v. Seldin*, 422 U.S. 490, 499 (1975); see also *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 394–403 (1987) (discussing the “zone of interest” requirement as an additional prudential principle necessitating that it be reasonably foreseeable that the plaintiff would benefit from the legislation); *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 523–31 (1991) (applying *Clarke* to deny standing when the benefit to the plaintiff from the statute was fortuitous).

<sup>46</sup> See, e.g., *Valley Forge*, 454 U.S. at 474–75; *Warth*, 422 U.S. at 499; *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Normally, courts invoke prudential standing to determine whether plaintiffs have a cause of action in the absence of a clear statutory directive.<sup>47</sup> The problem with doing so here is that there *is* a clear statutory directive. The Act's language is lucid and unequivocal. When an entity violates the statute's effluent standards or limitations, interested (*not* injured) citizens may sue. Yet statutory citizen suit provisions do not easily conform to the Court's private property-based methods for measuring harm and thereby defining cases and controversies. The resulting tension between Congress's willingness to confer a private right of action to enforce environmental statutes and the Court's unwillingness to recognize the scope of that conferral has created a jurisprudence that is confused, confusing, and potentially detrimental to the national trust.

### III. A CLOSE LOOK AT *LIDLAW*

#### A. *Facts*

Laidlaw Environmental Services (TOC), Inc. ("Laidlaw") purchased a commercial wastewater treatment plant in South Carolina. The South Carolina Department of Health and Environmental Control ("DHEC") issued Laidlaw a National Pollutant Discharge Elimination System ("NPDES") permit under the Clean Water Act,<sup>48</sup> authorizing the discharge of limited amounts of pollutants, including mercury, into the North Tyger River.<sup>49</sup> Laidlaw's subsequent effluent discharges of numerous pollutants, especially mercury, repeatedly exceeded permissible amounts.<sup>50</sup>

In April 1992, Friends of the Earth and Citizens Local Environmental Action Network, Inc. (hereinafter referred to, along with the Sierra Club which joined the action at a later date, as "Friends of the Earth" or "FOE") notified Laidlaw of their intent to sue under the Clean Water Act immediately upon the expiration of a mandatory sixty-day waiting period.<sup>51</sup> Following this notification, Laidlaw invited the DHEC to file suit against it.<sup>52</sup> The DHEC acquiesced and Laidlaw's attorney then drafted the complaint and paid the filing fee.<sup>53</sup> On the final day of the sixty-day waiting period, Laidlaw and the DHEC reached a settlement wherein Laidlaw paid \$100,000 in civil penalties and agreed to "make every effort" to comply with its permit obligations.<sup>54</sup>

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<sup>47</sup> See Fletcher, *supra* note 14, at 252.

<sup>48</sup> See 33 U.S.C. § 1342(a)(1) (2000).

<sup>49</sup> See *Laidlaw IV*, 528 U.S. 167, 176 (2000).

<sup>50</sup> See *Laidlaw II*, 956 F. Supp. 588, 600, 613–21 (D.S.C. 1997) (noting that Laidlaw violated the mercury limits of the permit 489 times between 1987 and 1995).

<sup>51</sup> See *Laidlaw IV*, 528 U.S. at 176; 33 U.S.C. § 1365(b)(1)(A) (2000).

<sup>52</sup> See *Laidlaw IV*, 528 U.S. at 176.

<sup>53</sup> See *id.* at 176–77.

<sup>54</sup> See *id.* at 177 (citing *Laidlaw I*, 890 F. Supp. 470, 479–81 (D.S.C. 1995)).

By inviting the DHEC to file suit and then reaching a quick settlement, Laidlaw sought to abrogate FOE's ability to sue. The Clean Water Act precludes citizen suits alleging violations that have already been the subject of a state enforcement action.<sup>55</sup> In June 1992, FOE filed suit anyway, alleging that Laidlaw was committing ongoing violations and that the DHEC enforcement action had not been "diligently prosecuted" in the manner required by the Act.<sup>56</sup> The group sought injunctive and declaratory relief.<sup>57</sup> In asserting its standing, several members of FOE claimed that they had been injured because they no longer used the river for fishing, camping, swimming, or canoeing due to fears of the river's pollution and an aversion to its smell and appearance.<sup>58</sup> Local homeowners testified that the pollution had decreased the value of their property, while other witnesses stated that the pollution had caused them to abandon their plans to purchase homes near the river.<sup>59</sup> After the suit was filed but prior to judgment, Laidlaw violated its discharge permit thirteen more times and committed an additional thirteen monitoring and ten reporting violations.<sup>60</sup>

In a nuanced holding, the district court found for the plaintiffs but deliberately did not predicate its holding on any finding of damage to the river.<sup>61</sup> Indeed, the court found that the river had suffered no ecological harm from Laidlaw's discharges.<sup>62</sup> Nevertheless, it imposed a civil penalty of \$405,800 and awarded attorneys' fees to FOE, while declining to award injunctive or declaratory relief.<sup>63</sup> In explaining its decision not to award equitable relief, the court observed that the combined deterrent effect of the penalty and fee award should serve to forestall future violations. In addition, the court noted that injunctive relief would serve little purpose since Laidlaw had recently come into substantial compliance with its permit obligations.<sup>64</sup>

FOE appealed as to the amount of the judgment but did not challenge the denial of declaratory or injunctive relief.<sup>65</sup> Laidlaw cross-appealed, arguing that FOE lacked standing and that the DHEC's enforcement action

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<sup>55</sup> *Laidlaw I*, 890 F. Supp. at 478 (noting that Laidlaw's intent in soliciting the suit by DHEC was to bar FOE's proposed citizen suit); see 33 U.S.C. § 1365(b)(1)(B).

<sup>56</sup> See 33 U.S.C. § 1365(b)(1)(B) (precluding citizen suits under the Clean Water Act when "the State has commenced and is diligently prosecuting a civil . . . action in a court of the . . . State to require compliance").

<sup>57</sup> See *Laidlaw IV*, 528 U.S. at 167.

<sup>58</sup> See *id.* at 182–83.

<sup>59</sup> See *id.* at 182.

<sup>60</sup> See *id.* at 178.

<sup>61</sup> See *Laidlaw II*, 956 F. Supp. 588, 601–03 (D.S.C. 1997).

<sup>62</sup> See *id.* at 602 ("[T]he . . . permit violations at issue in this citizen suit did not result in any health risk or environmental harm.").

<sup>63</sup> *Id.* at 603–11.

<sup>64</sup> See *id.* at 611.

<sup>65</sup> See *Laidlaw III*, 149 F.3d 303, 305–06 (4th Cir. 1998).

precluded the lawsuit.<sup>66</sup> The Fourth Circuit vacated the judgment and remanded with instructions to dismiss, holding, *inter alia*, that even assuming FOE had standing, the case was moot since Laidlaw had subsequently come into full compliance and because FOE had not appealed the denial of equitable relief.<sup>67</sup> The absence of equitable relief meant that the plaintiffs had won only civil penalties and, since those penalties were paid to the government rather than to the plaintiffs, the court found insufficient redress to satisfy the requirements for standing.<sup>68</sup> FOE appealed and the Supreme Court granted *certiorari*.<sup>69</sup>

The issues before the Supreme Court included whether FOE had standing to bring the suit and, if so, whether the case had been mooted. The Court reversed the Fourth Circuit, finding that FOE had standing and that the case was not moot.<sup>70</sup> As noted previously, it held that the relevant showing for standing involves injury to the plaintiff rather than harm to the environment.<sup>71</sup> In this instance, FOE demonstrated sufficient injury through affidavits and testimony showing that Laidlaw's discharges adversely impacted affiants' recreational, aesthetic, and economic interests.<sup>72</sup> The injuries alleged were sufficiently concrete and particularized to satisfy the requirements set forth in *Lujan v. National Wildlife Federation*<sup>73</sup> and *Lujan v. Defenders of Wildlife*.<sup>74</sup> In addition, the deterrent effect provided by the civil penalties constituted sufficient redress.<sup>75</sup>

The Court further held that the case was not moot because voluntary cessation of a challenged practice does not generally deprive a court of its ability to rule on the legality of that practice.<sup>76</sup> Laidlaw did not meet its burden of showing that the challenged behavior could not reasonably be expected to recur.<sup>77</sup> The district court's refusal to grant equitable relief did not indicate a conclusion that there was no possibility of future violations. It showed only that, in that court's view, the civil penalties and

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<sup>66</sup> See *id.* at 305.

<sup>67</sup> See *id.* at 306–07.

<sup>68</sup> *Id.*

<sup>69</sup> See 525 U.S. 1176 (1999) (No. 98-822).

<sup>70</sup> *Laidlaw IV*, 528 U.S. 167, 195 (2000).

<sup>71</sup> See *supra* note 2 and accompanying text.

<sup>72</sup> *Laidlaw IV*, 528 U.S. at 183 (holding injury adequately alleged when plaintiffs state that they use the affected area and that the “‘aesthetic and recreational values of the area will be lessened’ by the challenged activity”) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).

<sup>73</sup> 497 U.S. 871 (1990).

<sup>74</sup> 504 U.S. 555 (1992).

<sup>75</sup> *Laidlaw IV*, 528 U.S. at 185 (“The legislative history of the [Clean Water] Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties . . . . [The district court may] seek to deter future violations by basing the penalty on its economic impact.”) (quoting *Tull v. U.S.*, 481 U.S. 412, 422–23 (1987)).

<sup>76</sup> See *id.* (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)).

<sup>77</sup> See *id.* (citing *U.S. v. Concentrated Phosphate Exp. Ass'n.*, 393 U.S. 199, 203 (1968)).

attorney's fees constituted a sufficient deterrent, rendering other relief unnecessary.<sup>78</sup>

### B. *Harm Under Laidlaw*

There are a number of interesting and important threads to this case, but this Article confines the discussion to the majority's fundamental disagreement with the dissent over what constitutes harm for purposes of standing. While the disagreement in *Laidlaw* arises with respect to the Clean Water Act, the issues raised are generally applicable to environmental jurisprudence.

I do not suggest that the Court's holding itself is wrong; as Lord Mansfield noted, decisions are more often right than the reasons behind them.<sup>79</sup> Not only do I believe that the majority reached the proper conclusion (albeit through convoluted reasoning), I also believe the dissent's position to be far more pernicious to the letter and intent of the Clean Water Act as well as to the broader notion of environmental protection.

Even while acknowledging the fundamental accuracy of the majority's statement that standing hinges on injury to the plaintiff rather than harm to the environment (a concession that is itself troubling given the illogic of its assertion regarding harm),<sup>80</sup> the dissent attempts to build into the statute a requirement of empirical, conventionally understood injury to an individual plaintiff. This criterion is tellingly absent from the statute as written<sup>81</sup> and, if adopted, would rewrite the law to make it even more difficult for citizens to exercise their statutorily conferred right to sue. Inevitably, this would make it more unlikely that violators of the Clean Water Act would be prosecuted or deterred. Unfortunately, however, the majority opinion—though properly critical of the dissent's position<sup>82</sup>—adds to the woes of environmental jurisprudence by muddling even further the already artificial boundary between environmental harm and individual injury.

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<sup>78</sup> *Id.* at 185–86.

<sup>79</sup> Specifically, Lord Mansfield is reputed to have said: “Decide promptly, but never give any reasons. Your decisions may be right, but your reasons are sure to be wrong.” Steven Wright, The Quotations Home Page, <http://www.theotherpages.org/quote-02b.html> (last visited Nov. 17, 2003) (on file with the Harvard Environmental Law Review).

<sup>80</sup> *Laidlaw IV*, 528 U.S. at 199 (Scalia, J., dissenting).

<sup>81</sup> See Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 960–61 (1998)

<sup>82</sup> See, e.g., *Laidlaw IV*, 528 U.S. at 188 n.4.

1. *Laidlaw Artificially Distinguishes Injury to Individuals from Harm to the Environment*

The *Laidlaw* majority decrees that no harm need occur to the environment for a citizen suit to lie.<sup>83</sup> Consequently, a plaintiff's injury for purposes of standing under the Act need not arise from actual harm to the affected waterway. This is congruent with the language of the statute, which permits citizen suits based on violations of any conditions of NPDES permits, even if those violations are strictly procedural.<sup>84</sup> In *Laidlaw*, for example, the Court acknowledged that the entity's discharges did no cognizable harm to the river even as it found that the plaintiffs' injuries, which were based on a perceived harm to the river, merited standing.<sup>85</sup> From this we may deduce that, if an entity allegedly violates the Act, prospective plaintiffs need only believe that the waterway suffers harm and alter their behavior accordingly.<sup>86</sup> That belief (along with the alleged violation) creates the injury that enables standing.<sup>87</sup>

While the opinion's reasoning seems sound, the distinction it draws between injury to the plaintiff and harm to the environment is incoherent. Harm is a subjective measure of damage. Subjectivity requires a subject—an entity with a definable conscious perspective. Yet, the environment does not define itself; we define the environment. Depending on one's point of view, the concept of environment can range from the inanimate through an infinitely complex polyphony of perspectives.<sup>88</sup> In light of this lack of consensus regarding what the environment is, it is understandable that attempts to conceive of a judicial framework wherein the environment

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<sup>83</sup> See *id.* at 181.

<sup>84</sup> See 33 U.S.C. § 1365(f)(6) (2000) (allowing citizen suits that allege violations of permits or conditions thereof); *id.* § 1318 (outlining procedural requirements of permits); see also *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000) (noting same).

<sup>85</sup> *Laidlaw IV*, 528 U.S. at 181.

<sup>86</sup> See *id.* at 181–183; Adler, *supra* note 28, at 56 (“The harm recognized by the Court was the lessening of the ‘aesthetic and recreational values of the area’ brought about by nothing more than the plaintiffs’ beliefs that the repeated violation of NPDES permits had a significant environmental impact.”).

<sup>87</sup> See *Ecological Rights Found.*, 230 F.3d at 1151 (citing *Laidlaw* and finding that “the threshold question of citizen standing under the CWA is whether an individual can show that *she* has been injured in her use of a particular area because of concerns about violations of environmental laws, not whether the plaintiff can show there has been actual environmental harm”).

<sup>88</sup> For a useful survey of the history of ecology and the linked evolution of the notion of environment, see DONALD WORSTER, *NATURE'S ECONOMY: A HISTORY OF ECOLOGICAL IDEAS* (1977). James Lovelock, architect of the Gaia Hypothesis, sees the earth as a self-regulating living whole, with rights that trump those of all its components (including humans). See JAMES LOVELOCK, *GAIA: A NEW LOOK AT LIFE ON EARTH* 124–40 (1979); see also THEODORE ROSZAK, *PERSON/PLANET: THE CREATIVE DISINTEGRATION OF INDUSTRIAL SOCIETY* 32, 41, 49 (1978); Stephen R. L. Clark, *Gaia and the Forms of Life*, in *ENVIRONMENTAL PHILOSOPHY: A COLLECTION OF READINGS* 182, 188–90 (Robert Elliot & Arran Gare eds., 1983).

could achieve legal standing have met with little success.<sup>89</sup> Not surprisingly, given this variety of perspectives, notions of harm to the environment also vary greatly. For example, as we will see shortly in *Animal Dreams*, a local community's definition of harm to the environment can differ radically from that of the management of a nearby mine. This lack of unanimity makes the idea of harm to the environment unintelligible as a concept separate and independent from the person expressing it. Therefore, the majority's distinction between harm to the environment and injury to the plaintiff falls prey to radical subjectivity, rendering it meaningless. Even setting aside its logical flaws, the opinion remains troubling. On a basic, common sense level, it seems counterintuitive to hold that injury to the plaintiff determines justiciability under a statute where the stated goal is environmental protection. Under this formulation, the environment is relegated to a subordinate role within environmental jurisprudence. The plaintiff, on the other hand, assumes a prominence that belies the statute's language.

This de-emphasis of the environment is not a new development, nor is *Laidlaw* the most glaring instance of it. For the last decade or more, the Court's cases have consistently marginalized the environment while elevating the importance of the perceived woes of the humans litigating under environmental statutes.<sup>90</sup> This trend occurred despite the fact that the stated aim of laws from the Clean Water Act through the Endangered Species Act<sup>91</sup> is the protection of the environment.<sup>92</sup>

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<sup>89</sup> This is not to say that there have not been admirable attempts to do so. *See, e.g.*, Stone, *supra* note 11, at 464–73 (arguing that the resource itself could be given standing with a guardian ad litem appointed to represent its interests); Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 *YALE L.J.* 1315, 1345 (1974) (suggesting that a spirit of “moral evolution” had recently spread to include African Americans and women and could one day include canyons, mountains and seashores); CHRISTOPHER D. STONE, *EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM* (1987) (revising and reworking the notion of standing for trees); Sunstein, *What's Standing After Lujan?*, *supra* note 11, at 232–34 (suggesting that Congress create a bounty for prospective environmental plaintiffs, thus enabling them to meet the injury-in-fact requirement); *see also* Sunstein, *Standing for Animals*, *supra* note 11, at 1335 (arguing that it is perfectly conceivable and practicable for Congress to confer standing to animals); RODERICK FRAZIER NASH, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* 6–7 (1989) (noting the historical tradition of extending rights to oppressed minorities from the Magna Carta through the Endangered Species Act).

<sup>90</sup> *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (noting that acquiring standing will become “substantially more difficult” if the plaintiff “is not himself the object of the government action or inaction he challenges”). Justice Scalia, the opinion's author, first previewed these views in an article published shortly after he was named to the federal bench. *See* Scalia, *supra* note 28, at 894 (asserting that standing should be infrequently available when “the plaintiff is complaining of an agency's unlawful failure to impose a requirement or prohibition upon someone else”); *see also* Carlson, *supra* note 81, at 935 (acknowledging the trend toward human-centered environmental jurisprudence, arguing for a human-centered standing requirement, and noting that a stringent injury-in-fact requirement will “require environmental plaintiffs to demonstrate why an environmental resource matters to real people”).

<sup>91</sup> 16 U.S.C. §§ 1531–1544 (2000).

<sup>92</sup> According to the declaration of goals and policy that open the Clean Water Act, “it is the national goal that the discharge of pollutants into the navigable waters be eliminated

The Court's elevation of the plaintiff at the expense of the environment effectively turns the citizen suit provision into an extension of nuisance law. Under the common law, nuisance doctrine offers remedies to landowners who have been injured as a result of damage to their property. To attain standing under the common law, landowners must demonstrate that the nuisance complained of is a private nuisance—that the damages claimed are particular to an individual or small group. By contrast, only an agent of the state (or, if other criteria are met, members of a class action) has standing to sue to abate a “public” nuisance, wherein the damages involve a large number of people.<sup>93</sup>

Rather than focus on the statute's conferral of standing to any party intending to enforce the Act, the *Laidlaw* holding seems to replace it with an expanded availability of standing to abate public nuisance. Instead of determining whether the statute has been violated, the operative issue becomes whether a private plaintiff can show that she has been cognizably damaged. While there is arguably a place for the expansion of private rights of action for public nuisance, there is no legal basis for instituting it at the expense of the statute's directive.

The *Laidlaw* dissent's use of the term “environmental plaintiff” implicitly highlights the tortured reasoning underlying this collision of standing doctrine and environmental law. The dissent (authored by Justice Scalia and joined by Justice Thomas) states that: “[t]ypically, an environmental plaintiff . . . argues that the discharges harm the environment, and that the harm to the environment injures him.”<sup>94</sup> Under this formulation, the justiciability of the case hinges not on whether a defendant violated a legal duty to refrain from polluting, but rather on whether the defendant injured the “environmental plaintiff” serving as the environment's proxy. By the Court's own reasoning, a plaintiff's injury can exist or not exist wholly independently of any harm to the environment; thus it strains logic to posit that a human plaintiff's interests mirror those of the environment. In this context, there is no such thing as an “environmental plaintiff.” The term is a convenient legal fiction.<sup>95</sup>

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by 1985.” 33 U.S.C. § 1251(a)(1) (2000). The Endangered Species Act aims “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species . . . .” 16 U.S.C. § 1531(b). Virtually every major environmental statute contains a comparable statement of goals.

<sup>93</sup> See RESTATEMENT (SECOND) OF TORTS § 821C (1979) (noting that one must have either suffered a different kind of harm than others exercising the same public right, be a public official, or be a member of a class action in order to sue for the abatement of a public nuisance).

<sup>94</sup> *Laidlaw IV*, 528 U.S. 167, 199 (2000) (Scalia, J., dissenting).

<sup>95</sup> Professor Carlson sees this as a non-issue, arguing that a “human-centered standing requirement” works in the environment's favor because

[i]f potential audiences for environmental litigants—judges, juries, members of the media . . .—find a closer focus on the human relationship with the resource



## 2. *Judicial Standing Doctrine Effectively Amends and Distorts Environmental Statutes*

The majority affirmed the existence of the plaintiffs' injury despite the district court's finding that the river had not been harmed by the discharges.<sup>96</sup> The injury arose because Laidlaw's mercury discharges purportedly interfered with several FOE members' ability to pursue recreational, aesthetic, and economic interests on the river. The presence or absence of harm to the river did not factor into the district court's analysis of the standing equation.<sup>97</sup> Plaintiffs believed that the discharges harmed the river and consequently injured them as well. In essence, plaintiffs were injured because they *believed* they had been injured (a rhetorically powerful reflexivity).

The dissent argues that because the district court found no harm to the environment and because FOE's affidavits of injury were therefore, of necessity, vague, FOE lacked standing.<sup>98</sup> In Justice Scalia's view, the supposed injuries arising from plaintiffs' belief that the river was polluted did not reach the level of "concrete and particularized" injury that the law requires.<sup>99</sup> He further noted the absence of any hard data that might indicate decreased home values, declining recreational usage, or some other quantifiable injury.<sup>100</sup>

The dissent grudgingly acknowledges that the assertion by the majority that the relevant showing for standing is injury to the plaintiff rather than harm to the environment is "correct, as far as it goes."<sup>101</sup> Nevertheless the dissent maintains that "[i]n the normal course . . . a lack of demonstrable harm to the environment will translate, as it plainly does here, into a lack of demonstrable harm to citizen plaintiffs."<sup>102</sup> According to the dissent, "[s]ubjective apprehensions," absent any empirical evi-

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more persuasive, the recent Supreme Court standing decisions may actually improve the effectiveness of litigation as a tool for environmental protection . . . . Such a change in focus could, in turn, help environmental groups reach beyond their traditional constituencies to people who have not previously considered themselves environmentalists.

Carlson, *supra* note 81, at 935–36. While I am skeptical that tighter standing requirements will win any converts to environmentalism or to the plaintiffs' side in environmental litigation, I do believe that a greater emphasis on the human bringing the suit inevitably diminishes the role of the environment in the suit. This in turn degrades the overall purpose of the statute, namely environmental protection.

<sup>96</sup> See *Laidlaw IV*, 528 U.S. at 181 (quoting *Laidlaw II*, 956 F. Supp. 588, 602–03 (D.S.C. 1997) ("All available data . . . fail to show that Laidlaw's actual discharges have resulted in harm to the North Tyger River.")).

<sup>97</sup> See *Laidlaw II*, 956 F. Supp. at 600 (noting that the "overall quality of the river exceeds levels necessary to support . . . recreation").

<sup>98</sup> See *Laidlaw IV*, 528 U.S. at 198–201 (Scalia, J., dissenting).

<sup>99</sup> See *id.* at 198 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

<sup>100</sup> See *Laidlaw IV*, 528 U.S. at 199–200 (Scalia, J., dissenting).

<sup>101</sup> *Id.* at 199.

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

dence, are legally insufficient and “accepting them even in the face of a finding that the environment was not demonstrably harmed . . . makes the injury-in-fact requirement a sham.”<sup>103</sup> In other words, the dissent argues, though harm to the environment is not required by the law, courts should require it nonetheless.<sup>104</sup>

If it had been adopted, this formulation would have effectively written a new provision into the Clean Water Act. Such action is necessary, the dissent contends, in order to keep standing doctrine from devolving into farce.<sup>105</sup> The Court’s failure to adopt this position means that, “if there are permit violations, and a member of a plaintiff environmental organization lives near the offending plant, it would be difficult not to satisfy today’s lenient standard.”<sup>106</sup> In the dissent’s view, this is a dangerously expansive precedent, even though it amounts to no more than the statute’s language explicitly allows, and is considerably less expansive than what the statute’s drafters intended.<sup>107</sup>

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<sup>103</sup> *Id.* at 201.

<sup>104</sup> Indeed, as discussed in *supra* text accompanying note 36, the statute requires neither a showing of harm to the environment *nor* harm to the plaintiff. *See* 33 U.S.C. § 1365(a)(1) (2000):

[A]ny citizen may commence a civil action on his own behalf—

(1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter . . . .

*See also* Karl S. Coplan, *Refracting the Spectrum of Clean Water Act Standing in Light of Lujan v. Defenders of Wildlife*, 22 COLUM. J. ENVTL. L. 169 (1997):

[T]he Congress [in enacting the Clean Water Act] adopted a blanket prohibition on all discharges of pollutants, *whether or not the discharge caused any demonstrable harm to the receiving water body*, except and unless the discharge was authorized by (and in compliance with) a permit issued in accordance with its provisions.

*Id.* at 174 (emphasis added).

<sup>105</sup> *See Laidlaw IV*, 528 U.S. at 201 (Scalia, J., dissenting).

<sup>106</sup> *Id.*

<sup>107</sup> *See* ENVIRONMENTAL POLICY DIV. OF THE CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, 93RD CONG., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 221 (Comm. Print 1973) [hereinafter LEGISLATIVE HISTORY]. Senator Muskie stated that under the citizen suit provision as drafted

I would presume that a citizen of the United States, regardless of residence, would have an interest as defined in this bill regardless of the location of the waterway and regardless of the issue involved.

*Id.*

Senator Bayh then commented:

[T]he conference provision will not prevent any person or group with a legitimate concern about water quality from bringing suit against those who violate the act

Though flawed, the dissent nevertheless raises crucial problems with the majority's reasoning. For example, it correctly points out that the injury-in-fact requirement of standing doctrine is a sham. It bears noting, however, that *Laidlaw* did not make this so. In actuality, the *Laidlaw* majority's conclusion that belief rather than actual injury is all that is required for standing merely validates what Judge William Fletcher has long argued—that a genuine belief in an injury having occurred comprises actual injury, and that to claim otherwise is to attach external normative requirements to an ostensibly factual inquiry.<sup>108</sup> Consequently, the voluminous prose that the Court has produced as part of its ongoing efforts to codify the concept of factual injury has only served to obfuscate an inherently unworkable notion.<sup>109</sup>

### C. *Injury to the Plaintiff—The Implications of a Judge-Made Law*

The *Laidlaw* majority appears to recognize that its holding effectively amends the Clean Water Act, and purposely mitigates the impact of this amendment by relaxing the requirements for a showing of harm. Its finding that a belief in an injury's having occurred is equivalent to an actual injury expands the definition of injury to the point of irrelevance. Assuming a plaintiff is not lying, belief in an injury is always an actual injury.<sup>110</sup> Yet, even as it tempers the impact of its judge-made amendment

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or a permit, or against the Administrator if he fails to perform a non discretionary act.

*Id.*

<sup>108</sup> See Fletcher, *supra* note 11, at 231 (“[T]he ‘injury in fact’ requirement cannot be applied in a non-normative way.”); Sunstein, *Standing for Animals*, *supra* note 11, at 1352 (“[It is important] to recognize that the legal system is denying that people suffer injury in fact for reasons that involve not facts but judgments about what facts, and what harms, ought to count for legal purposes.”).

<sup>109</sup> The Court itself has acknowledged that its rulings on standing have been less than clear. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982):

We need not mince words when we say that the concept of “Art. III standing” has not been defined with complete consistency in all of the various cases decided by this Court . . . nor when we say that this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition.

See also Fletcher, *supra* note 11 (reviewing the lack of clarity in standing jurisprudence); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988) (discussing the development of standing doctrine); Fallon, *supra* note 11 (noting that the Court's standing doctrine is particularly problematic with respect to public law litigation).

<sup>110</sup> See Fletcher, *supra* note 11, at 231 (“There cannot be a merely factual determination whether a plaintiff has been injured except in the relatively trivial sense of determining whether plaintiff is telling the truth about her sense of injury.”); Sunstein, *Standing for Animals*, *supra* note 11, at 1352 (“[T]he legal system is denying that people suffer injury in fact for reasons that involve not facts but judgments about what facts, and what harms, ought to count for legal purposes.”).

to the statute, the Court undermines the Act's substantive language. If a plaintiff must show injury to herself in order to enforce a statute designed to protect the nation's waterways, then there exists a fundamental disconnect between the statute's purpose and the Court's interpretation of it.<sup>111</sup>

*Laidlaw* is by no means an isolated example of this phenomenon. The Court has faced similar dilemmas on numerous other occasions. In *Sierra Club v. Morton*,<sup>112</sup> for example, the Sierra Club sought to enjoin the Walt Disney Corporation from developing a ski resort in a section of the Sequoia National Forest that lay adjacent to Sequoia National Park. The complaint alleged that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations"<sup>113</sup> and that the Club was therefore entitled to standing under Section 10 of the Administrative Procedure Act ("APA").<sup>114</sup> While acknowledging that such allegations can theoretically comprise legal injury, the Court nevertheless denied standing on the grounds that the Sierra Club had neither claimed economic injury<sup>115</sup> nor had any of its members alleged that they would be otherwise affected by the development.<sup>116</sup>

*Morton* merits attention here not because the holding was necessarily wrong, but rather because it offers one of the first and best examples of the Court defining legal injury in the environmental context to require specific and articulable injury to the plaintiff.<sup>117</sup> Sometimes, as in *Morton*, the language of the statute (in this case, the APA) suggests that injury to the plaintiff is necessary for standing.<sup>118</sup> Other times, as with the Clean Water Act and other environmental statutes, nothing in the text of the statute supports such an inference.

The Clean Water Act confers standing on all "persons having an interest which is or may be adversely affected."<sup>119</sup> Elsewhere the Act refers to "any interested person."<sup>120</sup> Courts have found no discernable difference between these two terms. In fact, according to the D.C. Circuit, both phrases incorporate the injury-in-fact rule set forth in *Morton*.<sup>121</sup> While a finding

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<sup>111</sup> See *supra* note 90 and accompanying text.

<sup>112</sup> 405 U.S. 727 (1972).

<sup>113</sup> *Id.* at 734.

<sup>114</sup> 5 U.S.C. §§ 551–559.

<sup>115</sup> See *Morton*, 405 U.S. at 734.

<sup>116</sup> See *id.* at 734–41.

<sup>117</sup> For other examples, see *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221 (1986); *Bennett v. Spear*, 520 U.S. 154 (1997); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978); *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

<sup>118</sup> 5 U.S.C. § 702 (2000) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.") (emphasis added).

<sup>119</sup> 33 U.S.C. § 1365 (a),(g) (2000).

<sup>120</sup> 33 U.S.C. § 1369(b).

<sup>121</sup> See *Montgomery Envtl. Coalition v. Costle*, 646 F.2d 568, 578 (D.C. Cir. 1980).

that there is no discernable difference between these two terms is itself worthy of discussion, the matter becomes even more curious when one considers the language of *Morton* that the terms supposedly incorporate.

*Morton*, in interpreting the APA's requirement that prospective plaintiffs suffer legal wrong or be adversely affected by agency action, finds that the "party seeking review must allege facts showing that he is himself adversely affected."<sup>122</sup> In contrast, the Clean Water Act's citizen suit provision requires only an allegation that one's *interests* were adversely affected. The difference in the language of the two statutes involves more than mere semantics; there is an important distinction between one's interests and oneself. Yet, even though the plain meaning of the statutes' wording should control,<sup>123</sup> these discrete concepts of interest and selfhood are lumped together under a general requirement that an "environmental plaintiff" must allege injury to herself. This seems simply wrong.

The *Morton* Court went out of its way to note that in order to merit standing, an affected interest must rise to the level of injury<sup>124</sup>—but also acknowledged that not every negatively affected interest amounts to an injury.<sup>125</sup> Rather, an affected interest becomes an injury when the threat to that interest is "actual and imminent."<sup>126</sup> Those criteria are met, for example, when a plaintiff demonstrates concrete plans to visit the area where the proposed violation is occurring.<sup>127</sup> Even when they do not rise to the level of injury, the Court recognized that affected interests can and do exist.<sup>128</sup>

Thus, under the Court's reasoning, having one's interests detrimentally affected can—but need not—amount to an injury to oneself. It follows that while one's interests and oneself overlap, they are not one and the same.

The Clean Water Act grants standing to prospective plaintiffs whose interests are affected; there is nothing in its language to suggest that those affected interests must have metamorphosed into an injury.<sup>129</sup> Neverthe-

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<sup>122</sup> 405 U.S. at 740.

<sup>123</sup> See, e.g., *Smith v. U.S.*, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.").

<sup>124</sup> See 405 U.S. at 738 ("[B]roadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.").

<sup>125</sup> *Id.* at 738–39 (noting that mere interest in a problem is not sufficient to render an individual or organization sufficiently aggrieved to merit standing).

<sup>126</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) ("[I]ntentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.").

<sup>127</sup> See *id.*

<sup>128</sup> See *id.* at 563 (1992) (demanding that plaintiffs must show they would be injured by defendant's action over and above demonstrating a "special interest" in the subject).

<sup>129</sup> While there is some discussion in the legislative history averring that the Clean Water Act's citizen suit provision is based on Section 10 of the APA and the *Morton* Court's interpretation thereof, see LEGISLATIVE HISTORY, *supra* note 107, at 249–50 (remarks of Congressman Dingell), the statute's language does not bear this out. If the draft-

less, despite clear statutory language and its own cases setting out the difference between interests and injuries, the Court continues to conflate the two.

When one considers that statutory interpretation is nothing if not attentive to nuance and that a court's reading of a statute can turn on matters as subtle as the choice of conjunction, this willingness to disregard a key difference in statutory phrasing seems both puzzling and at loggerheads with the Court's traditional jurisprudence.<sup>130</sup> As Justice Frankfurter liked to say, the three cardinal rules of statutory interpretation are: "(1) Read the Statute; (2) read the Statute; (3) read the Statute!"<sup>131</sup>

Having effectively disregarded Justice Frankfurter's admonition and created a line of cases that require injury to the plaintiff in addition to an alleged statutory violation, the Court must periodically face the unenviable task of determining what type of injury to the plaintiff constitutes legal harm. If, for example, the sight of a river running murky makes a person feel unhappy, would that be legal injury for purposes of the Clean Water Act under the Court's definition? It would be hard to argue that the injury is not genuine where the plaintiff's unhappiness is heartfelt and sincere. But is her injury sufficient to state a cause of action? The Court's past precedent offers little encouragement for such a suit.<sup>132</sup> Yet, under *Laid-*

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ers of the Clean Water Act had meant to follow the APA, it would have been a simple matter to simply incorporate its language awarding standing to any person "suffering legal wrong" or "adversely affected or aggrieved." 5 U.S.C. § 701(6) (2000). Instead, the Clean Water Act speaks of persons whose *interests* (rather than their person(s)) were affected. 33 U.S.C. § 1369(b)(1) (2000). The legislative history also chronicles a colloquy between Senators Bayh and Muskie suggesting that the chosen language in the bill was meant only to track the *Morton* Court's finding that an affected interest may "reflect aesthetic, conservational and recreational as well as economic values" rather than the need for personal injury to a plaintiff. LEGISLATIVE HISTORY, *supra* note 107, at 221.

<sup>130</sup> See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."); *De Sylva v. Ballentine*, 351 U.S. 570, 572–78 (1956) (contrasting disjunctive and conjunctive readings of key provisions of the Copyright Act).

<sup>131</sup> Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in FELIX FRANKFURTER: THE JUDGE 30, 36 (Wallace Mendelson ed., 1964).

<sup>132</sup> See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (finding plaintiff's claims that they had visited area and intended to do so again inadequate for standing because they failed to demonstrate specific concrete plans to visit the area again and thus did not show "actual or imminent" injury). *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973), cited in *Laidlaw IV* by both the majority, see 528 U.S. at 188 n.4, and dissent, see *id.* at 203–04 (Scalia, J., dissenting), offers another excellent (non-environmental) example of the difficulty such cases present. In *Linda R. S.*, the mother of an out-of-wedlock child sued to force a Texas district attorney to enforce the state's child support laws regardless of the marital status of the parents. 410 U.S. at 614–15. The Court held that she lacked standing because there was no "direct relationship" between the alleged injury and the claim sought to be adjudicated. *Id.* at 618. Because the suit, if successful, would not result in the payment of child support, *Linda R. S.*'s injury was not cognizable. *Id.* Since *Linda R. S.* did not sue for child support, but rather for equal protection violations, the Court's ruling—rather than hinging on redressability—seems to hinge on whether equal protection violations fall within the zone of interest of Texas child support laws. The Court's holding suggests that they do not.

law, her injury should suffice, even if the river's murkiness did not result from the violation itself. As long as an entity violated the Act in some fashion and the plaintiff believes that the violation caused the murky water, then her resulting despondency would seem to constitute legal injury and her citizen suit should lie.

While it seems unlikely that the Court would allow standing in the above scenario, it is not clear on what grounds standing would be denied. Having to consistently fashion fact-specific rules to determine whether an alleged injury is standing-worthy is a burden the Court has brought upon itself. Furthermore, insistence on injury to the plaintiff is a requirement of the Court's own design, a design it claims is necessary to satisfy Article III.<sup>133</sup>

Article III requires a justiciable case or controversy, which over the years the Court has interpreted to mean adverse litigants with personal stakes in the outcome.<sup>134</sup> The idea that this personal stake must be an "injury-in-fact" dates from the Court's 1970 decision in *Ass'n of Data Processing Service Organizations v. Camp*.<sup>135</sup> As Fletcher has explained, this requirement has served only to confuse, rather than clarify, the meaning of case or controversy.<sup>136</sup>

For its part, the Clean Water Act enables the creation of discharge limits ostensibly to protect *waterways* (not plaintiffs) from harm.<sup>137</sup> There is no dispute that Laidlaw exceeded those limits. According to the district court, Laidlaw violated its permit no fewer than 489 times.<sup>138</sup> Nevertheless, the court found that the river had not been harmed. While this finding did not derail FOE's lawsuit (the statute does not specifically require that a waterway be harmed for a violation to have occurred<sup>139</sup>) it did create a dilemma for the court.

The Court's quandary may be summarized as follows: The Clean Water Act regulates the discharge of pollutants into waterways. Pollutants must be harmful or they would not be pollutants.<sup>140</sup> Yet, the Court

<sup>133</sup> See, e.g., *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99–100 (1979) ("In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. Otherwise the exercise of federal jurisdiction 'would be gratuitous and thus inconsistent with the Art. III limitation.'") (citations omitted) (quoting *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

<sup>134</sup> See *Baker v. Carr*, 369 U.S. 186, 204 (1962) ("Have the appellants alleged such a personal stake in the outcome of the controversy as to assure . . . concrete adverseness . . . ?").

<sup>135</sup> 397 U.S. 150, 152 (1970).

<sup>136</sup> See Fletcher, *supra* note 11, at 230–34 (arguing that since anyone who honestly claims to be injured is in fact injured, the injury-in-fact requirement is a disguised normative inquiry and the requirement itself is incoherent).

<sup>137</sup> See 33 U.S.C. § 1251(a) (2000) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.")

<sup>138</sup> See *Laidlaw II*, 956 F. Supp. 588, 613–21 (D.S.C. 1997).

<sup>139</sup> See *supra* note 90 and accompanying text.

<sup>140</sup> See *infra* note 209 and accompanying text.

simultaneously finds Laidlaw liable for the discharge of pollutants even as it finds that those pollutants did no harm. While it is true that the *potential* to cause harm can qualify a substance as a pollutant, this definition contains its own set of problems, as we shall shortly see. In an attempt to resolve the issue while yet maintaining allegiance to its tortured standing doctrine, the Court demands a showing of injury (however attenuated) to the plaintiff instead of harm to the waterway. That injury, according to the Court, arises from the fact that those who live near and use the river *think* that Laidlaw's discharges have harmed the river. Thus, for purposes of Article III, the case or controversy stems from plaintiffs' mistaken perception that the river has been harmed.

According to *Laidlaw*, then, even though the plant violated the CWA 489 times, the cause of action under the Act survives only because plaintiffs (mistakenly) believe that the river was harmed. As a matter of both law and policy, this approach seems convoluted and counterproductive. The statute prohibits discharges into waterways in excess of permitted limits. If the goal is to deter such discharges and the statute contains a private right of action to enable enforcement, why require plaintiffs to assert injuries to themselves—injuries that, under *Laidlaw*, may or may not have an empirical link to the alleged violation—in order to sue?

The Court has yet to come to grips with the dissonance within its rhetoric and reasoning that this approach creates. When the Clean Water Act explicitly confers a private right of action in the event of its violation, the Court's demand for a further showing of harm (whether to the plaintiff or to the environment) imposes an extra-statutory requirement cloaked in the protective rhetoric of Article III. Perhaps more important, however, the Court does not define harm in either context. As a result, it must contort both the English language and its own precedent to find that injury (or harm) can exist under the Clean Water Act even when there is apparently no harm (or injury) to the very object that the Act was adopted to protect.

#### IV. SYSTEMS THEORY AND HARM: A LOOK AT THE TRAIL SMELTER ARBITRATION AND *ANIMAL DREAMS*

Even though it complicates standing doctrine, distinguishing between injury to the plaintiff and harm to the environment nevertheless seems useful for clarifying the nature and severity of a claimed injury. It is not. Harm is subjective; one person's harm is another person's boon. In a nation rife with controversy over everything from roads in national forests to offshore drilling to tax cuts to genetically modified food, one need not look far for examples of actions that are simultaneously lauded and demonized by various constituencies. Unless there is a conscious entity from whose point of view harm can be defined, the term lacks meaning. Consider, for example, that among the materials the Clean Water Act



classifies as pollutants (which it elsewhere pledges to eliminate from the nation's waterways) are biological materials, heat, rock, and sand—all of which occur naturally in waterways.<sup>141</sup> This is less a problem with draftsmanship—although it may be that as well—than with the nature of the terminology. The subjectivity of terms like harm and pollution renders them indefinable, making it very difficult to legislate for their control or avoidance.

Two examples illustrate this problem. The first is the Trail Smelter Arbitration, an international environmental arbitration between the United States and Canada that stretched from 1930 through 1941.<sup>142</sup> The second comes from Barbara Kingsolver's novel, *Animal Dreams*, a story about a small town in Arizona fighting to keep its river from being poisoned and dammed by a local mining concern.<sup>143</sup> Understanding the applicability of these examples as well as the workability of my proposed solution will require a brief discussion of the mechanics of systems theory.

#### A. *Systems Theory and the Legal System*

Systems theory posits that society is a conglomeration of systems—political, legal, educational, and so forth. A system is an organization of components functioning as a unit to perpetuate the survival of the whole. Each human is a biological system comprised of many functional sub-systems (digestive, nervous, cardiovascular, etc.). Humans are themselves components of the larger social system, which in turn forms part of an ecosystem, and so on.<sup>144</sup> The social system is “functionally differentiated”—its sub-systems are serving specific functions.<sup>145</sup> All function systems share a common goal—the survival and reproduction of the larger system.<sup>146</sup> The

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<sup>141</sup> 33 U.S.C. § 1362(6) (2000); *see also* NEIL EVERNDEN, *THE SOCIAL CREATION OF NATURE* 4–7 (1992) (discussing the “ongoing debate between the accusers and the alleged perpetrators about what actually constitutes pollution”).

<sup>142</sup> 3 R.I.A.A. 1907 (1941).

<sup>143</sup> Both examples, particularly *ANIMAL DREAMS*, are treated at greater length in DAVID N. CASSUTO, *DRIPPING DRY: LITERATURE, POLITICS, AND WATER IN THE DESERT SOUTHWEST* (2001).

<sup>144</sup> Luhmann offers this stark appraisal of humanity's place within the larger network of systems:

It is clear . . . that “constructivism” is a completely new theory of knowledge, a post-humanistic one. This is not intended maliciously but only to make clear that the concept “man” (in the singular!), as a designation for the bearer and guarantor of the unity of knowledge, must be renounced. The reality of cognition is to be found in the current operations of the various [self-reproducing] systems.

Niklas Luhmann, *The Cognitive Program of Constructivism and a Reality that Remains Unknown*, in *SELFORGANIZATION: PORTRAIT OF A SCIENTIFIC REVOLUTION* 78 (Wolfgang Krohn et al. eds., 1990).

<sup>145</sup> *See* NIKLAS LUHMANN, *ESSAYS ON SELF-REFERENCE* 228–29 (1990).

<sup>146</sup> *See* FRANCISCO J. VARELA, *PRINCIPLES OF BIOLOGICAL AUTONOMY* 13 (1979) (defining an autopoietic system as one that is both autonomous and continually self-

legal system is one of many function systems within the larger social system.

The legal system arises from an evolving network of shared expectations within society. It relies on the assumption that our respective expectations of each other are reasonably congruent.<sup>147</sup> When these expectations are undermined, we can no longer predict how our fellow members of the social system will behave. Even more importantly, we can no longer expect the expectations others will have of us.<sup>148</sup> When this happens, the system's functioning is imperiled and social instability results.<sup>149</sup>

Expectations of expectations can be more colloquially expressed as a sense of how things "ought" to go.<sup>150</sup> That, in essence, is a norm—a universally recognized expectation of the way things ought to go. While these expectations are not always realistic or even rational, they do enable human interaction. They are myths that are accepted as if they were true.<sup>151</sup> Even as we acknowledge the importance of norms to social stability, it is important to remember that expectations are fluid. Norms shift as the so-

producing); *see also* LUHMANN, *supra* note 12 (adapting Varela's concept to social systems and arguing that when system elements are conceived of as communicative acts rather than bioenergetic entities, the concept of autopoiesis extends to the social domain); WILLIAM R. PAULSON, *THE NOISE OF CULTURE: LITERARY TEXTS IN A WORLD OF INFORMATION* 121–27 (1988).

<sup>147</sup> *See* LUHMANN, *supra* note 13, at 30 (“[C]ertainty in the expectation of expectations . . . is much more meaningful than the certainty of fulfilling expectations.”).

<sup>148</sup> *See id.* at *ix*:

The expectation of expectations is a fundamental feature of stable systems of human action, reducing an otherwise unmanageable range of alternative strategies to something predictable. Moreover, that expectation of expectations has to be generalised over the greatest number of persons and alternatives for action to provide the necessary stability.

<sup>149</sup> *See id.* at 41:

[T]he social system has to supervise and channel the process of disappointments of expectation—and this not only to enforce effectively the right expectations (such as legal norms), but in order to create the possibility of counterfactual, disappointment-prepared and normative expectation in the first place. The expectant person must be prepared and equipped in case he arrives at a discrepant reality. He would otherwise not have the courage to expect normatively, and therefore with determination. The channeling and cooling out of disappointments is part of the stabilisation of structures.

<sup>150</sup> *See id.* at 33.

<sup>151</sup> *See* LUDWIG VON BERTALANFFY, *PERSPECTIVES ON GENERAL SYSTEM THEORY* 67 (1975). Bertalanffy discusses the suggestion of Hans Vainginger, one of the originators of systems theory, that such “*As-If*” constructions are necessary components of a functioning society. Even “such moral concepts as Freedom, God, Immortality, and Human Dignity are fictions but nevertheless of immense importance: for we have to behave ‘as if’ they were reality . . . . [T]he myths of tradition are fictions based on the mythical experiences of man and later invested in historical narratives.” *See also* CASSUTO, *supra* note 143, at 123.

cial system evolves.<sup>152</sup> While the legal system relies on a certain amount of predictability within interaction, there must be adaptability as well.

Though an expectation may be thwarted in a particular instance, that failure will not affect future expectations. This is because “ought,” as a normative concept, contains an imbedded determination not to learn. The tendency to adhere to a set of beliefs despite empirical evidence to the contrary is wholly understandable given the nature of the social system.<sup>153</sup> If, for example, I witness someone running a red light, I do not immediately discard my belief that people should and will stop at red lights, nor will I start running them myself. My allegiance to the system’s norms signifies my resolve not to learn from experience. Were my expectations to change every time someone or something deviated from the norm, those expectations would become so ephemeral as to offer no stability at all. If other people’s expectations became similarly capricious, the normative structure on which society depends would be critically compromised.

Nevertheless, even as I expect everyone to stop for red lights, I know that not everyone will. The inevitability of disappointment is thus also built into the concept of expectations. Without the risk of disappointment, expectations would become certainties, creating a world that would be completely predictable and free of contingency.<sup>154</sup> This is impossible, of course; disappointments will always occur and expectations of expectations will continue despite them. Norms are therefore counterfactual—they often belie reality.<sup>155</sup> Systems must retain this norm-based resistance to learning even as they adapt to changing realities. Herein lies one of the principal challenges of the legal system. It must be simultaneously both predictable and mutable.<sup>156</sup>

These characteristics—predictability and inconsistency—exist in delicate counterpoise; their coexistence depends on efficient communi-

<sup>152</sup> See LUHMANN, *supra* note 13, at 35.

<sup>153</sup> See EVERNDEN, *supra* note 141, at 29–30:

[T]he tendency to practice the subterfuge of mythmaking is understandable. In practical terms, it may very well afford us some measure of comfort by legitimating a belief in the certainty of at least a few features of existence and a few behavioral norms. But in the long run, it solves nothing, and has the added effect of drastically transforming . . . nature.

See also CASSUTO, *supra* note 143, at 123–24.

<sup>154</sup> See LUHMANN, *supra* note 13, at 33 (“[N]ormative expectations signify the determination not to learn from disappointments. The possibility of disappointment is foreseen—one knows oneself to be in a complex and contingent world . . . but is, at the outset, seen as irrelevant to the expectation [as opposed to cognitive expectations].”).

<sup>155</sup> See *id.* (“[N]orms are *counterfactually stabilised behavioural expectations*. Their meaning implies unconditional validity . . . as independent of actual fulfillment or non-fulfillment.”) (emphasis in original).

<sup>156</sup> See LUHMANN, *supra* note 145, at 237 (“All autopoietic systems have to live with an inherent improbability: that of combining closure and openness. Legal systems present a special version of this problem. They have to solve it by combining . . . not-learning and learning dispositions.”).

cation within the legal system. That communication is enabled by language. Anything with which the system can communicate is effectively part of the system. That with which it cannot communicate is not part of the system but rather forms part of the system's environment.<sup>157</sup> The environment, as a systems-theoretical construct, is akin to the conventional notion of environment. For the system, the environment is everything that is not the system. Similarly, for individuals, the environment is the totality of one's circumstances. Under either definition, the environment can be described as everything that is not the entity itself.

The system's environment makes itself known to the system through creating disturbances.<sup>158</sup> The moment that the disturbance becomes intelligible to the system (i.e., communication between it and the system occurs), the disturbance ceases to be part of its environment and becomes part of the system. In grasping how to communicate with and create meaning from a disturbance, the system transforms the disturbance into a known quantity. In terms of a map, one might picture the environment periodically ceding territory to the system in a border skirmish and then gaining back other territory elsewhere.<sup>159</sup> Thus, the communicative act is also one of incorporation and boundary realignment.

We see then that the system and its environment share a dynamic border that shifts and flows in response to disruption. A system responds and adapts to environmental perturbation in a manner designed to ensure its survival. As the system adapts, it gains complexity, enabling it to better cope with future perturbations. A static environment/system relationship would mean that communication as well as systemic evolution would stagnate. Stability depends on the system's ability to reproduce and function both despite and because of ongoing environmental disturbance.<sup>160</sup>

The dynamic border between the system and environment means that boundary drawing is ongoing, subjective and in constant flux.<sup>161</sup> The act

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<sup>157</sup> See LUHMANN, *supra* note 12, at 29 (“[O]ne could say that the environment of the social system cannot communicate with society.”); SERRES, *supra* note 8, at 85 (“Nature lies outside the collectivity, which is why the state of nature remains incomprehensible to the language invented in and by society.”); CASSUTO, *supra* note 143, at 101 (“[Environment] includes everything with which the system cannot communicate.”).

<sup>158</sup> See LUHMANN, *supra* note 12, at 29.

<sup>159</sup> CASSUTO, *supra* note 143, at 129 n.8:

The map analogy is not wholly accurate because the system and environment are not finite. Even as the system grows more complex and gains a little territory from the environment, so too does the environment grow more complex and regain its previous size. A more accurate analogy might be a three-dimensional map with the system and environment sharing one border but having nothing limiting their expansion on any other side.

<sup>160</sup> *Id.* at 102.

<sup>161</sup> Ranulph Glanville and Francisco Varela compare the system/environment distinction to a Möbius strip where “[t]he edges dissolve BECAUSE the forms are themselves continuous—they re-enter and loop around themselves.” “*Your Inside is Out and Your*

of drawing boundaries and defining environment is a self-interested act.<sup>162</sup> The system will designate boundaries conducive to its potential to self-reproduce (i.e., perpetuate itself). Despite the inherent uncertainty of the process, boundary drawing is crucial to self-definition. It is also an inherently subjective process infused with ideology and integral to the distribution of power. Thus, when political districts are redrawn, the boundaries are determined by the party in power, and when nations lose wars, their boundaries are redrawn by the victor. This same phenomenon holds true at the level of race and even of species.<sup>163</sup>

If environments vary with subjectivity, so too must the linked concepts of pollution and environmental protection. As Neil Evernden notes, pollution “involves questions not only of concentrations but also of consequences.”<sup>164</sup> This observation seems especially apt with respect to *Laidlaw*. The majority and dissent differ not with respect to the existence of pollutants in the waterways, but as to their implications. Missing from the analysis, however, is any discussion of the meaning of the term “pollutant.”

Pollutants do not exist outside of systems; pollution presupposes a system to pollute.<sup>165</sup> Identifying pollutants involves determining that a foreign presence and potential source of harm exists within the system.<sup>166</sup> Deciding that a substance is a pollutant requires two potentially problematic steps: designating the system’s boundaries and defining harm.

In the case of the Clean Water Act, the statute was enacted to protect the nation’s waterways from contamination.<sup>167</sup> The amount of mercury that

*Outside is In*” (*Beatles*, (1968)), in 2 APPLIED SYSTEMS AND CYBERNETICS: PROCEEDINGS OF THE INTERNATIONAL CONGRESS ON APPLIED SYSTEMS RESEARCH AND CYBERNETICS 640 (George Lasker ed., 1981) (emphasis in original).

<sup>162</sup> See LUHMANN, *supra* note 12, at 6 (“[S]ystems define their own boundaries. They differentiate themselves and thereby constitute the environment as whatever lies outside the boundary.”).

<sup>163</sup> Perhaps the best example of the contingency of harm and the subjectivity of boundaries comes from the ongoing attempt to define and refine the limits of the human, and, within that broader category, to designate specific types of humans. See generally PETER IRONS, *A PEOPLE’S HISTORY OF THE SUPREME COURT* (1999); LEONARD CASSUTO, *THE INHUMAN RACE: THE RACIAL GROTESQUE IN AMERICAN LITERATURE AND CULTURE* (1997); IAN F. HANEY-LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996). See also CARY WOLFE, *CRITICAL ENVIRONMENTS: POSTMODERN THEORY AND THE PRAGMATICS OF THE “OUTSIDE”* 41–45 (1998); Donna Haraway, *A Cyborg Manifesto: Science, Technology, and Socialist Feminism in the Late Twentieth Century*, in *SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE* 149 (1991); Étienne Balibar, *Racism and Nationalism*, in *RACE, NATION, CLASS: AMBIGUOUS IDENTITIES* 57 (Chris Turner, trans., 1991).

<sup>164</sup> EVERNDEN, *supra* note 141, at 4.

<sup>165</sup> See *id.* at 36.

<sup>166</sup> See MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO* 35–36 (2000) (discussing dirt and pollution as windows through which to view a system’s ordering methods). Dirt, according to Douglas, is never an isolated event: “Where there is dirt there is system.” *Id.* at 35.

<sup>167</sup> Specifically, the Act seeks to eliminate “the discharge of pollutants into . . . navigable waters” and to attain a “goal of water quality which provides for the protection and

contaminates a waterway is directly contingent on the optimal state of the waterway as perceived by the system's constituents, which is a function of where the waterway begins and ends. The relevant boundaries would therefore appear to be those of the nation's waterways. Yet, far from simplifying the issue, designating boundaries raises a host of new questions. Does a river begin at its headwaters? If so, is the snow pack on a mountain-top that will eventually melt into a river part of the river? Furthermore, does the river end at its mouth? Would not the discharge of mercury into a waterway also affect the place into which the river empties? Would not polluting its headwaters also pollute the river? These are questions of perception, not of fact.

In defining the optimal state of a waterway—a prerequisite for determining whether the waterway has been polluted—boundaries must be set and agreed upon. Potential pollutants impede the attainment of that perceived optimal state. Yet, there is no objective method for determining when and if contamination takes place because that determination is contingent on systemic priorities. The optimal state of a given waterway is a matter of fierce debate between the many constituencies that look to use it. Such debates often transcend national boundaries.

In the international sphere, expectations of expectations between and among societies are often not clearly established. Views on how people "ought" to act vary widely from nation to nation. Consequently, the system of norms that potentially would be distilled into international law is often ill-defined or non-existent. This is true even on the level of the most basic human rights.<sup>168</sup> The process of codifying international law requires an ongoing negotiation between different societies' norms and expectations, a negotiation that takes place in language. Yet, in order for the law to function in the international arena, language must also juggle the dual roles of solidifying expectations and enabling adaptability. This task often requires surgical precision—a task further complicated by the existence of language barriers. These barriers exist even among nations that ostensibly share a language. One of the best examples of this phenomenon is the Trail Smelter Arbitration between the United States and Canada.

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propagation of fish, shellfish, and wildlife and provides for recreation in and on the water . . . ." 33 U.S.C. § 1251(a)(1)–(2) (2000).

<sup>168</sup> Hannah Arendt, noting that all attempts to codify so-called "eternal Rights of Man" into a set of international governing principles have failed, cites Edmund Burke's observation that human rights are an "abstraction" and that it makes more sense to claim that the privileges one enjoys are the "rights of an Englishman" rather than inalienable human rights. This is because rights spring from within the nation rather than from universal, international norms. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 298–99 (1979); see also JOHN RAWLS, *THE LAW OF PEOPLES* 3–4 (1999) (seeking to formulate a system of norms that transcends national boundaries and is based on a liberal ideal of justice).

### B. *The Trail Smelter Arbitration*

The Trail Smelter Arbitration is one of the most influential pollution-related disputes in international law.<sup>169</sup> The arbitration arose from a cooperative effort by the U.S. and Canada to mitigate the damage and compensate those injured by airborne pollutants that had crossed into the U.S. from Canada. A principal problem facing both the parties and the arbitrators involved the lack of consensus definitions within the international community for the key terms: pollutant and damage.<sup>170</sup> This same problem—lack of common definitions—recurs in different form in *Laid-law*.

#### 1. *History of the Smelter and the Arbitration*

The Trail Smelter was built in 1896 in Trail, British Columbia. During the ensuing years, emissions from the smelter drifted across the border into Washington and fell in the form of acid rain and acid fog. Substantial property damage ensued.<sup>171</sup> In 1928, individual claimants collectively agreed not to pursue claims against the company that owned the smelter, opting instead to wait while the matter was negotiated on a diplomatic level. In 1931, the Canadian-United States International Joint Commission concluded that the smelter had caused \$350,000 worth of damage in the United States, with future damages to be determined and the amount adjusted to reflect changing conditions.<sup>172</sup> While the original award was paid, the amount was never adjusted to reflect damages incurred after 1931.<sup>173</sup> In 1935, the matter went into arbitration.

In 1941, the arbitration tribunal rejected the United States' claim for more than \$2 million in additional damages, awarding it a total of only \$78,000.<sup>174</sup> The tribunal based its decision in part on a finding that foreign emissions (i.e., pollutants) do not cause legal damage unless and until that damage is actual, provable, and substantial.<sup>175</sup> The tribunal's

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<sup>169</sup> See Alfred P. Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, 50 OR. L. REV. 259, 259 (1971) ("Every discussion of the general international law relating to pollution starts, and must end, with a mention of the *Trail Smelter Arbitration*.").

<sup>170</sup> See, e.g., *id.* at 268:

The word "damage" was purportedly defined as "such as would be recoverable under the decisions of the courts of the United States in suits between private individuals," but it seems clear that the tribunal was in fact not defining damage at all with this language, but defining "damages"—the extent to which there should be monetary recovery for "damage." The importance of this confusion in language, and therefore in logic, cannot be emphasized too strongly.

<sup>171</sup> See 3 R.I.A.A. 1907, 1917 (1941).

<sup>172</sup> See *id.* at 1917–19.

<sup>173</sup> See *id.* at 1919.

<sup>174</sup> See *id.* at 1940.

<sup>175</sup> See *id.* at 1931–33; Rubin, *supra* note 169, at 273.

finding effectively meant that foreign emissions caused no legal damage until that damage was quantified. Thus, environmental degradation is not actionable in and of itself. Rather, there must be an “environmental plaintiff” by and through whom the damage may be assessed. Only then can the action succeed. Under this regime, as in *Laidlaw*, the focus shifts from the impact of foreign emissions on the environment to the impact of foreign emissions on people’s relationship to the environment. While the tribunal did lay out the principle that nations must be responsible for transboundary pollution, it found that only those claims that were quantifiable could succeed; those which could not be quantified necessarily failed.<sup>176</sup> In effect, the decision introduced the Roman concept of *sic utere ut alienum non laedas* (one should use one’s own property in such a manner as not to injure that of another) to modern international environmental law.<sup>177</sup> However, requiring such explicitly defined proof of harm to justify compensation effectively hamstrung the principle’s future application.<sup>178</sup>

According to the decision, if an injury could not be measured in monetary terms, there was no damage and, hence, no remedy at law. Consequently, the United States received no compensation for having been subjected to the smelter’s noxious fumes because no proven environmental harm resulted.<sup>179</sup> Similarly, the tribunal refused to hold Canada liable for damage to urban property in the U.S. because “there [was] no proof of facts sufficient to enable the Tribunal to estimate the reduction in the value . . . of such property.”<sup>180</sup>

According to the tribunal’s findings, the fouling of a nation’s air by another nation is not compensable unless and until the damage can be precisely appraised. Nor can a country seek damages when foreign emissions harm wildflowers, birds, or any other resource that has no assigned

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<sup>176</sup> See 3 R.I.A.A. at 1965:

[N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

<sup>177</sup> See Brian R. Popiel, Comment, *From Customary Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States*, 22 B.C. ENVTL. AFF. L. REV. 447, 451 (1995); Martin D. Gelfand, Note, *Practical Application of International Environmental Law: Does It Work Atoll?* 29 CASE W. RES. J. INT’L L. 73, 77 (1997).

<sup>178</sup> While the passage of the decision enjoining states from allowing their territory to be used in such a way as to harm the territory of another is often hailed as a major step forward in international environmental law, one commentator has noted that this portion of the decision is pure dictum and predicated solely on American law. As such it created “no unequivocal customary international law.” Shashank Upadhye, *The International Watercourse: An Exploitable Resource for the Developing Nation Under International Law?*, 8 CARDOZO J. INT’L & COMP. L. 61, 86 (2000).

<sup>179</sup> See 3 R.I.A.A. at 1932.

<sup>180</sup> *Id.* at 1931.



monetary value.<sup>181</sup> The rationale for the decision stems from the tribunal's attempt to assign fixed definitions to value-based and mutable terms like pollutant, damage, and harm.

## 2. *Parallels to Laidlaw*

Consider again the situation in *Laidlaw*. Friends of the Earth decried Laidlaw's discharges into the North Tyger River. Laidlaw argued (and the district court agreed) that the discharges caused the river no harm.<sup>182</sup> The Supreme Court accepted this determination for purposes of the river's ecology but decreed that the *perception* that the company's discharges caused harm, in light of the company's admitted violations of the Clean Water Act, constituted legal harm.<sup>183</sup> The dispute in *Laidlaw*, then, is not over the level of discharges, or whether they occurred, but about whether the damage they caused amounts to legal harm and, if so, how to quantify that harm—the same issues which arose in the Trail Smelter Arbitration. By requiring a showing of injury to the plaintiff for standing in *Laidlaw*, the Court effectively finds that Clean Water Act violations (including serious toxic events) that do not implicate humans in some manner are not actionably harmful. This holding is similar to the Arbitration Tribunal's conclusion that damages that cannot be quantified in economic terms do not constitute legal injury. In both cases, the impact of the defendant's actions on the environment was subordinated to the impact of the defendant's actions on the plaintiff.

From a systems theoretical perspective, this result is completely rational. Systems theory posits that problems do not exist unless and until they generate communication within the system. While “[f]ish or humans may die because swimming in the seas and rivers has become unhealthy . . . [a]s long as this is not the subject of communication it has no social effect.”<sup>184</sup> In other words, until it is articulated, a disturbance (no matter how ecologically significant) will not affect the system. It follows that if communication about a disturbance can be suppressed, the system's functioning will continue unimpaired. This can cause (and has caused) serious problems as polluters attempt to cover up their misdeeds,<sup>185</sup> thereby

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<sup>181</sup> See Rubin, *supra* note 169, at 265:

If the tribunal's decision as to the indemnity owed by Canada to the United States for “damage” resulting from the operation of the smelter is viewed as a definitive statement of international law, the absence of any item of intangible damage . . . implies that general international law permits a state to fail to regulate injurious effusions that drift into the territory of a second state, as long as the damage done is not directly translatable into a provable cash sum.

<sup>182</sup> See *Laidlaw IV*, 528 U.S. 167, 181 (2000).

<sup>183</sup> See *id.*

<sup>184</sup> LUHMANN, *supra* note 12, at 28–29.

<sup>185</sup> See, e.g., JONATHAN HARR, *A CIVIL ACTION* (1991) (chronicling the litigation aris-

removing their actions from the realm of communication and rendering them nonevents.<sup>186</sup>

In *Laidlaw* and the Trail Smelter Arbitration, communication about the respective disturbances was not so much suppressed as stymied. The parties lacked the necessary vocabulary to adequately describe the injury. The Trail Smelter Tribunal could not find a consensus definition within the international community (a loose confederation of linked social systems) for the term “damage” and so chose to confine its scope to those injuries that could be quantified in monetary terms. Similarly, the *Laidlaw* Court faced the problem of defining environmental harm in terms that conformed to the tenets of traditional property interests (and thereby with standing doctrine) even as the injury itself defied such easy categorization. Because of the nature of environmental citizen suits—the statute requires no injury and the plaintiff herself seeks no monetary damages—the Court could not meet its goal and was forced to reframe the issue as one of measuring injury to the plaintiffs.

While the *Laidlaw* decision hinges on standing, it does so only because of the Court’s continued unwillingness to recognize that the issues before it were not truly procedural (i.e., whether the plaintiffs satisfied the criteria for standing) but were rather questions of fact and substantive law. Perhaps this is because nothing short of a fundamental restructuring would cure the woes of standing doctrine, and the Court is understandably reluctant to take on such a task.

In addition, the issues in *Laidlaw*, as with many of the Court’s seminal cases on standing and the environment, are much broader. More than the validity of the plaintiffs’ right to sue, the Court must address the question of how our culture defines harm outside the confines of traditional

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ing from one such attempt).

<sup>186</sup> This phenomenon is well illustrated by the controversy over whether entities regulated by environmental laws should be allowed to self-audit to determine their compliance with federal and state laws and then to remediate any violations without suffering any penalty. Seventeen states have adopted some form of self-audit law: Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, New Hampshire, Oregon, South Dakota, Texas, Utah, Virginia, and Wyoming. See Rena Steinzor, *Democracies Die Behind Closed Doors: The Homeland Security Act and Corporate Accountability*, 12 KAN. J.L. & PUB. POL’Y 641, 663 n.60 (2003). The rationale for such a policy is that regulated entities would theoretically police themselves more regularly and thoroughly if the results of their investigations could not then be used against them in government enforcement actions. Opponents of the self-audit framework (including the EPA) argue that such a regime actually gives entities an incentive to violate (by allowing them to reap the economic gain from their misdeeds), and then to “discover” the problem and fix it without penalty. See *id.* at 663; see generally Lisa Koven, *The Environmental Self-Audit Evidentiary Privilege*, 45 UCLA L. REV. 1167 (1998), Brooks M. Beard, *The New Environmental Federalism: Can the EPA’s Voluntary Audit Policy Survive?*, 17 VA. ENVTL. L.J. 1 (1997). The controversy can be analyzed in systems theoretical terms. The regulated entities look to suppress communication in order to eliminate systemic disturbance whereas the self-audit regime’s opponents maintain that the system’s ability to function depends on effective communication and response to disturbance rather than elimination of potential disturbance through suppression of information.

property interests and specifically within the context of environmental protection. This same issue is addressed in a different context in the novel *Animal Dreams*, to which we now turn.

### C. *Animal Dreams and the Rhetoric of Environment*

#### 1. *The Novel*

*Animal Dreams* is set in the fictional town of Grace, Arizona, where the indigenous Hispanic community faces the acidification of its river by the Black Mountain Mining Company. When the mine became unprofitable to run, the company laid off the local workers and began leaching acid through its enormous tailings piles in order to extract the minerals still contained therein.<sup>187</sup> The acids used in this process seeped into the water table and the river, leading to the death of the river's aquatic life as well as the crops and trees that depended on the water for survival.<sup>188</sup>

This devastation of the local ecosystem did not concern the mining company. It had determined that damming the river and desiccating the town could circumvent the environmental laws protecting the town's water supply. Damming the river would remove the river from the jurisdiction of the EPA, thereby enabling the company to continue its leaching activities.<sup>189</sup>

In the face of this looming catastrophe, the women of the town band together and successfully challenge the monolithic power of the Company and the silently complicit EPA. They succeed in having the town designated a national historic place, thus protecting both the town and the river from further encroachment from the mining company.<sup>190</sup> Once listed as an historic site, the town need no longer fear "the onslaught of industry" nor "demolition or other negative impact."<sup>191</sup> Invoking government regulations to protect the town offers a stark contrast to the regulatory inertia of the EPA that permitted the problem to escalate.

Though the town of Grace is saved and the novel ends on a happy note, the town's historic status offers no long-term implications for sys-

<sup>187</sup> See BARBARA KINGSOLVER, *ANIMAL DREAMS* 43–44, 63–64 (1990).

<sup>188</sup> See *id.*

<sup>189</sup> See *id.* at 111. When Codi Noline, the protagonist, naively assumes that a report to the local authorities will halt the leaching operation, Viola, the town matriarch, quickly disabuses her:

"Dam up the river," Viola said. "That's all they have to do to meet with the EPA laws. Dam it up and send it out Tortoise Canyon instead of down through here . . . [I]f Black Mountain dams up the river, it's out of the jurisdiction of the Environmental Protection Agency."

*Id.*

<sup>190</sup> See *id.* at 274–77.

<sup>191</sup> *Id.* at 277.

temic reform. It merely spares one town a dismal fate. Similar situations will inevitably occur in other locales. This prospect blunts any sense of elation the reader might otherwise feel at Grace's salvation. The most that victories like Grace's can offer is pleasure tempered by a grim awareness of things to come.<sup>192</sup>

## 2. *The Subject of Harm*

Although the preceding thumbnail sketch omits the novel's subtlety and richness and thereby does the work a terrible disservice, it conveys enough of the plot to illustrate my point. For present purposes, the novel's importance inheres in the differing visions of harm evinced by the townsfolk of Grace and the managers of the mine, respectively. It is not just that the parties differ about whether harm occurred. More fundamentally, they differ on the essential nature of the term.

Grace's inhabitants view the mine's leaching operation as pernicious to the community and to the region.<sup>193</sup> The river and the water it carries are integral to their culture and to the well being of the town, as well as to the crops upon which the local people depend for sustenance. The river's demise will doom the community as well. For the people of Grace, this is clearly an unacceptable scenario.

From the company's perspective, however, poisoning the river amounts to an insignificant side effect of a beneficial process. The Company's publicist might describe the acid leaching operation as a "recycling" of the tailings to extract surplus value from already processed material and thereby provide the greatest possible return to shareholders. The river is not vital to the firm's continued profitability, and its contamination poses no danger to the mine's viability.<sup>194</sup> On the other hand, damming the river will serve two simultaneous, beneficial purposes: it will free the company from the regulatory oversight of the EPA, and it will destroy the town of Grace. Destroying the town will eliminate the power base of the grass-roots resistance to the mine's operation.

The opposing views represented by the mine and the townsfolk—each of which represent a different systemic perspective—reiterate the flexibility

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<sup>192</sup> See CASSUTO, *supra* note 143, at 117–19.

<sup>193</sup> See KINGSOLVER, *supra* note 187, at 179 (Codi Noline, invited to speak to a gathering of the women of Grace (which she calls the "Stitch and Bitch Club"), observes that "the Stitch and Bitch Club would officially sanction mass demonstrations against Black Mountain's leaching operation, to be held daily on the dam construction site . . . . Unofficially, the Stitch and Bitch Club would have no objection if a bulldozer met with premature demise.").

<sup>194</sup> See *id.* at 63–64 (discussing the effect of the river's acidification on the local orchards—the spread of "poison ground." As one Grace resident observed: "They're getting gold and moly out of them tailing pipes. If they wasn't, they wouldn't keep running the acid through them. They're not going to stop no leaching operation on account of our pecan trees.")

of the term “pollutant.” The mining company considers the sulfuric acid an asset (and the river extraneous). Grace’s residents, by contrast, view the acid as a pollutant (and the river as essential). If pollution means matter out of place, or a foreign object interfering with the efficiency of a given system, both sides are correct.<sup>195</sup> Clearly, terms like “unnatural,” “harm,” and “pollutant” must be regarded as creations of the systems that give them meaning. In addition, when one considers the infinite number of systems, all of which are observer-defined (which is to say their boundaries are a function of perspective) and self-interested, consensus definitions for terms like harm and pollutant seem unattainable grails. This is not a “problem” with language; it is rather language giving expression to the inherently contingent nature of the concepts themselves.<sup>196</sup>

The concept of harm should link to the health and well-being of the social system and the system’s ability to perpetuate itself, rather than tying itself to an uneasy compromise between and among our limited scientific knowledge, tenuous commitment to conservation, and the unyielding demands of a market economy. Such an approach would not identify the natural environment; it would instead acknowledge the complex interrelationship between and among all members of the social system (human and non-human),<sup>197</sup> as well as the shared imperative of the system’s self-reproduction. Furthermore, since the system depends on the environment to spur evolution (without which it would stagnate and die),<sup>198</sup> it stands to reason that the well being of the system’s environment is integral to the system’s overall integrity and longevity.<sup>199</sup>

#### V. LAIDLAW AS WATERSHED—SUGGESTIONS FOR A STANDINGLESS JURISPRUDENCE

Returning to *Laidlaw*, we must ask what the mutability and subjectivity of terms like harm, pollution, and even environment mean for the law of standing and the workability of the Clean Water Act and other environmental laws. As the foregoing discussion makes clear, using harm to the environment as the determinative criterion for standing—as the dissent suggests—is untenable. Multivalent and constantly shifting perspec-

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<sup>195</sup> Cf. Ronald H. Coase, *The Problem of Social Costs*, 3 J.L. & ECON. 1 (1960) (pointing out that the allocation of legal entitlements implies an environmental harm if a polluter owns the right to pollute, or an economic harm to the polluter if other parties own the right to be free from polluting).

<sup>196</sup> See LUHMANN, *supra* note 13, at 182.

<sup>197</sup> See CASSUTO, *supra* note 143, at 129–31.

<sup>198</sup> Systems require disturbance to evolve. If there were no environmental disturbance, the system would not need to adapt. It would become inert, essentially lifeless. *See id.* at 125.

<sup>199</sup> *See, e.g.*, BRUNO LATOUR, WE HAVE NEVER BEEN MODERN 15 (Catherine Porter trans., 1993) (noting the need to describe our “discursive constitution” through which we “[define] humans and nonhumans, their properties and their relations, their abilities and their groupings”).

tives, as well as the expanding boundaries of scientific knowledge, make any such determination impossible. Yet removing the environment from the standing equation in an environmental statute, and focusing exclusively on injury to the plaintiff—as the majority advocates—is equally unfeasible. The issue of harm (or injury) is a substantive, fact-based query and must be treated as such.

#### A. *Letting the Statute Define the Injury*

Judge Fletcher has suggested reworking the notion of standing to make the operative query be: whether or not the injury alleged falls within the category of injuries that the statute was enacted to prevent.<sup>200</sup> This formulation would satisfy the case or controversy requirement of Article III without falling prey to the caprice of modern standing doctrine. Because the statute's enactment would create a substantive legal right, it follows that the statute's violation would create a legal injury.<sup>201</sup> In *Laidlaw*, for example, the inquiry would not address who was injured or how. No such investigation would be necessary because the Clean Water Act plainly states that simply violating the Act creates a legally cognizable injury. Therefore, the plaintiffs' standing would hinge on the court's determination that the manner of violation alleged was a type the statute aimed to prevent.

In the case of *Laidlaw*, the court would ask whether the discharge of pollutants into the North Tyger River in excess of permitted amounts was something that the Clean Water Act was designed to prevent. The answer: of course. The Act mandates water quality standards designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by eliminating the discharge of pollutants.<sup>202</sup> Entities wishing to discharge effluents must obtain permits and adhere to the limitations contained therein.<sup>203</sup> The statute further states that entities that violate the terms of the Act are subject to citizen suits.<sup>204</sup> In *Laidlaw*, we have a company discharging more mercury (a heavy metal and a CWA pollutant) into a waterway than its permit allows. It is hard to imagine a category of injury that fits more neatly within the statutory parameters than this one.

The Fletcher approach has the dual advantages of comprehensibility and workability. It eliminates unproductive inquiries into the nature of

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<sup>200</sup> See Fletcher, *The Structure of Standing*, *supra* note 11, at 223–24; see also Sunstein, *What's Standing After Lujan?*, *supra* note 11, at 166–67.

<sup>201</sup> As Fletcher argues, this is the very essence of statutory (rather than Constitutional) injury. For the Court to go further and evaluate whether the injury defined by Congress is judicially cognizable "limits the power of the legislature to articulate public values and choose the manner in which they may be enforced." Fletcher, *supra* note 11, at 233.

<sup>202</sup> 33 U.S.C. § 1251(a) (2000).

<sup>203</sup> See 33 U.S.C. § 1342 (2000).

<sup>204</sup> See 33 U.S.C. § 1365(a) (2000).

the injuries suffered by the named plaintiffs as a result of the Act's violation. All that would be required for a citizen suit to lie is for the plaintiff to allege an injury of the type enjoined by the statute.<sup>205</sup>

### B. *Subjectivity Remains—The Galileo Problem*

Under this new regime, the problem might appear resolved. Unfortunately, it is not. As noted earlier,<sup>206</sup> the Clean Water Act defines “pollutant” to include biological material, rock, sand, and heat,<sup>207</sup> all of which occur naturally both in and out of waterways. While each of these phenomena can potentially disrupt an aquatic ecosystem, each is also a naturally occurring component of those ecosystems. Though standing jurisprudence (including *Laidlaw*) has long acknowledged that threatened harm is sufficient for citizen suits,<sup>208</sup> it does not acknowledge that such an admission throws the meaning of the term pollutant, as well as the stated aim of the Clean Water Act, into flux. Furthermore, if the determinative criterion for designating pollutants were the potential to cause harm, the definition would encompass virtually everything—both human-made and naturally occurring.<sup>209</sup>

A phenomenon becomes a pollutant only if it disrupts the functioning of a given system. Even then, it becomes a pollutant only from the point of view of that particular system. As we saw in *Animal Dreams*, one system might view sulfuric acid as harmless or even beneficial, while another would classify it as a dangerous pollutant. Consequently, attempts to legislate for pollutant-free waterways are destined to fail. These attempts will also create imbroglios like the one in *Laidlaw*, where the Court found the defendant liable for an admittedly harmless discharge of pollutants even though a harmless pollutant amounts to a contradiction in terms. This situation arose because a supposedly objective definition of a contingent term (pollutant) was inserted into a statute designed to protect an equally mutable concept (the environment). This is

<sup>205</sup> See Fletcher, *supra* note 11, at 264–65.

<sup>206</sup> See *supra* note 141 and accompanying text.

<sup>207</sup> 33 U.S.C. § 1362(6) (2000).

<sup>208</sup> See, e.g., *Laidlaw IV*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)); *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 155–61 (4th Cir. 2000) (*en banc*) (following *Laidlaw* to find that affiant sufficiently alleged injury when defendant's alleged NPDES violations *threatened* the environmental quality of water adjoining affiant's property, even though plaintiff may not have produced sufficient evidence to prove actual harm).

<sup>209</sup> While a pollutant may cause harm only in certain concentrations and, thus, there might not be harm from a discharge that failed to reach that concentration, this simply underscores the nebulosity of the term. If pollutants are classified based on their *potential* to cause harm, then all things are pollutants to varying degrees. This would be an impossible standard around which to craft laws. For example, the goal of the Clean Water Act—the elimination of pollutants in the nation's waterways, see 33 U.S.C. § 1251(a) (2000)—becomes completely meaningless.

an example of the law using the rhetoric of science to lend an air of objectivity to its provisions. In short, it is what I call a Galileo Problem.

Galileo Problems come from grafting a veneer of objectivity onto products of human thought and language. Galileo's views implicitly demonstrated that the laws of astronomy were not divine, immutable, and objective, but actually contingent, knowledge-based, and normative. This precipitated a crisis of faith in the legitimacy of the law.<sup>210</sup> Systems and environments can affect no pretense of objectivity.<sup>211</sup> Consequently, harm to any given system is subjective and context-dependent and can only be defined within that narrow context. Any attempt to broaden the meaning of harm to encompass multiple systems inevitably dilutes the term beyond the point of utility.

*Laidlaw* illustrates this nicely. Harm, for purposes of the Clean Water Act, arises from the discharge of pollutants into waterways. "Pollutant" is context-dependent and is no longer referential absent a showing of harm. But under *Laidlaw*, discharging pollutants into waterways is not necessarily harmful, nor must a discharge be harmful to be actionable. It follows then that a substance need not be harmful to be a pollutant under the statute. Yet, pollutants are harmful by definition. If a pollutant need not cause harm, then it seems that anything at all could be a pollutant (and indeed, under the statute's definition, this is very nearly the case). Thus, any discharge of anything by anybody into the vicinity of a waterway theoretically falls under the regulatory aegis of the Clean Water Act and potentially requires a permit. Furthermore, a citizen may prosecute any failure to adhere to discharge limits so long as that citizen believes that the discharge could cause or has caused harm. This is, of course, an impossible scenario and not the intended consequence of the *Laidlaw* decision.<sup>212</sup>

In light of the foregoing, it becomes clear that the Fletcher method of determining standing by assessing whether the injury alleged is a type the statute was designed to prevent will not wholly resolve the standing issue in the environmental arena. Without further clarification of the meaning of "pollutant," it does no good to decree that discharges of pollutants into waterways are the type of injury that the Clean Water Act was designed to prevent; the statement is meaningless. States will have no guidelines upon which to base their permitting processes, and citizens

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<sup>210</sup> As one commentator rhetorically asks, "Is the court [that judged Galileo] right or wrong? . . . Since justice speaks performatively and since what it says begins suddenly to exist by the sole fact that it says it, since justice gives rise to jurisprudence in any case, what indeed does it matter . . . to be wrong or right?" SERRES, *supra* note 8, at 82.

<sup>211</sup> See *supra* note 162 and accompanying text; GREGORY BATESON, STEPS TO AN ECOLOGY OF MIND 454-55 (1972) (discussing the notion that "territory" is a series of maps and representations created by observers; territory, the thing itself, can never be seen. "All 'phenomena' are literally 'appearances.'").

<sup>212</sup> See *Laidlaw IV*, 528 U.S. at 183-84 (comparing plaintiff's allegations of harm to those found inadequate in previous cases).



will have virtually unfettered ability to contest actions by entities that impact waterways. This is precisely the type of administrative bedlam envisioned by the dissent.<sup>213</sup>

C. *Solving the Galileo Problem—A New Rhetoric of  
Environmental Protection*

1. *The Well-being of the Social System as the Criterion for Injury*

How can this Galileo-based problem of legal terminology and application be resolved? I suggest that, using Judge Fletcher's elegant framework as a starting point, it becomes possible to craft a flexible and therefore functional definition of harm that facilitates the operation of the Clean Water Act and its sister statutes.

The legal system is a sub-system designed to maintain the health and continued survival of the larger social system. Laws, as products of the legal system, are enacted in furtherance of that goal.<sup>214</sup> All systems, including the social system, share the twin imperatives of self-reproduction and self-preservation.<sup>215</sup> Perhaps the best way to measure legal harm is to determine whether the disturbance complained of negatively affects the social system's health and longevity.

The goal of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>216</sup> The statute identifies the interposition of pollutants into those waters as negative and mandates their elimination in order to ensure, among other things, that fish, shellfish and wildlife can thrive, as well as to enhance recreational opportunities.<sup>217</sup> To achieve that goal, the Act allows for citizen suits in the event of any type of violation, regardless of whether the illicit behavior causes actual harm to the environment.<sup>218</sup>

<sup>213</sup> See *id.* at 201–02 (Scalia, J., dissenting).

<sup>214</sup> Some critics maintain that the legal apparatus serves to perpetuate its own legitimacy and ossifies rather than enables the social system. According to Robin West, the legal system—

through its symbols, language, arguments, and general control over the means of normative legal discourse—creates in the citizenry what the critics sometimes call “clusters of beliefs” in the overriding legitimacy of the social structures of empowerment and disempowerment that constitute the larger society of which the legal system is only a part . . . . The result is that the vast bulk of the particular rules and the process of the extant system that govern our behavior are seen as morally legitimate—as in accord with our moral beliefs. Meaningful criticism of law against truly independent moral standards is thereby frustrated.

ROBIN WEST, *NARRATIVE, AUTHORITY & LAW* 5–6 (1993).

<sup>215</sup> See PAULSON, *supra* note 146, at 121–27.

<sup>216</sup> 33 U.S.C. § 1251(a) (2000).

<sup>217</sup> *Id.* § 1251(a)(1–2).

<sup>218</sup> See *supra* note 34 and accompanying text.

The breadth of citizen suit authority suggests that the statute's drafters were as concerned with the integrity of the statutory regime as with the abatement of imminent threats to the nation's waterways. From a systems theoretical perspective, this is quite reasonable. The system functions by eliminating threats to itself. Those threats need not be ecosystemic; they can also arise when system components break the rules (as codified by the legal system) through which the system functions. Laws that are neither obeyed nor enforced undermine societal expectations of expectations and imperil the system's functioning. For example, if one cannot expect motorists to stop for red lights, there is little reason to have red lights. Without them, chaos would soon engulf the streets. Motorists would drive blindly into intersections until a new traffic regime was codified and everyone once again adhered to a common set of norms.

The traffic analogy carries over into environmental law. Neither the federal government nor individual states have the resources to enforce every environmental law in every instance. As a result, they enforce selectively, focusing on only the most egregious violations.<sup>219</sup> This selective enforcement means that regulated entities would have little to fear if their violations did not reach a level where they became an agency priority. Given the breadth and scope of environmental laws, this would mean that the laws would be breached more often.<sup>220</sup> Citizen suits have traditionally filled this enforcement gap.<sup>221</sup>

The rationale for citizen suits is the same as that for state enforcement actions. There need not be an actual and quantifiable injury for a law to be enforced. Rather, when the law is not enforced, the law itself is threatened and that threat in turn imperils the system and all its components. The drafters of the Clean Water Act (and other environmental stat-

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<sup>219</sup> See Adler, *supra* note 28, at 49.

<sup>220</sup> This is arguably the case now. According to one survey, only thirty percent of corporate counsels felt it was possible for their companies to comply fully with state and federal environmental laws. See *id.* Some would argue, as Adler does, that the inability of regulated entities to comply with the various environmental laws, coupled with the ease with which citizens can file suit, makes for a haphazard enforcement regime that does little to protect the environment. See *id.* at 59–62. However, Adler's contention that citizen suits lie at the root of the problem (and that the *Laidlaw* framework further undermines the goal of environmental protection by easing standing requirements) does not address what I believe to be the real issue—the irrelevance of injury to the plaintiff and the amorphousness of harm to the environment. Neither forms an effective criterion for standing. Adler argues that citizen suits are often driven by special interests rather than a desire to benefit the environment and that *Laidlaw*'s holding will only exacerbate this phenomenon. See *id.* at 59. However, as discussed above, benefit (and harm) to the environment is subjectively determined and inherently variable. Restricting citizen access to the courts will not change that. All it will do is enhance the ability of violators to flout the law. If there is a problem with the current regulatory regime, (and few would deny that it is a ponderous and byzantine set of laws), it would seem more efficient to focus on making the laws more coherent and effective rather than hamstringing citizen enforcement capabilities.

<sup>221</sup> See Sunstein, *What's Standing After Lujan?*, *supra* note 11, at 165 (noting that Congress has used the citizen suit as "a mechanism for controlling unlawfully inadequate enforcement of the law").

utes) were clearly aware of this possibility and created a private right of action to help contain it.

Applying this perspective to *Laidlaw*, Friends of the Earth could have argued that Laidlaw's actions threatened the social system by poisoning the river in a manner proscribed by the Clean Water Act. Laidlaw could have responded that its discharges were negligible, the river's biotic health unimpaired, and the system's smooth functioning never endangered. In addition, Laidlaw's violations were redressed by a state enforcement action and the payment of a fine. Consequently, according to Laidlaw, there would be neither need nor basis for further litigation.

Faced with these facts, the Court should have little trouble finding that the suit is viable and that plaintiffs should prevail. Polluted waterways threaten the longevity and self-reproductive capacity of the system.<sup>222</sup> The Clean Water Act was enacted to protect the system from just these types of dangers and creates rules governing acceptable levels of discharge.<sup>223</sup> Under the Act's standards, a substance that causes no harm under certain conditions may nonetheless be regulated if its discharge poses a threat to the system's welfare.<sup>224</sup> This method conforms with an approach that classifies pollutants according to their potential to cause harm to a given system. Though mercury may not cause discernible damage at low concentrations, it remains appropriate to regulate its discharge because it is toxic to marine life (and humans) and can bio-accumulate. Consequently, its presence threatens the system's ability to survive and self-reproduce. If multiple regulated entities exceeded their discharge limits, the resulting mercury concentrations in the river could threaten the integrity of the ecosystem as well as the health of the people who use the river. Thus, the system itself faces peril.

When Laidlaw's mercury discharges exceeded permitted levels, it created a threat to the system as well as an impediment to the system's goal of attaining and maintaining clean water and a smooth functioning regulatory apparatus. Laidlaw's actions therefore negatively impacted the system's health and reproductive capability. Therein lies the harm. The

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<sup>222</sup> When the Senate Conference Committee was considering the bill creating the Clean Water Act, Senator Muskie referred to water pollution as "a cancer" that "[w]e have ignored for so long that the romance of environmental concern is already fading into the shadow of the grim realities of lakes, rivers and bays where all forms of life have been smothered by untreated wastes, and oceans which no longer provide us with food." LEGISLATIVE HISTORY, *supra* note 107, at 161–62.

<sup>223</sup> *See id.* at 164 (noting that the statute's statement of goals, including the elimination of discharges of pollutants, is "not merely the pious declarations that Congress so often makes in passing its laws" but is rather "literally a life or death proposition for the Nation").

<sup>224</sup> *See, e.g.,* Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 160 (4th Cir. 2000) (*en banc*) ("The Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III standing requirements . . . . Threatened environmental injury is by nature probabilistic. And yet other circuits have had no trouble understanding the injurious nature of risk itself.").

Clean Water Act allows for a private right of action to redress that harm. Consequently, Friends of the Earth's citizen suit seems perfectly appropriate. It should not be necessary to show that Laidlaw's actions caused a measurable degradation of the ecosystem nor injury to a particular person in order for the suit to lie.

An analysis based on a determination of whether the system is threatened will likely allow standing for virtually any allegation of statutory violations, assuming the statute at issue has a citizen suit provision. Such a result seems both reasonable and beneficial.<sup>225</sup> The citizen suit is designed to enable citizens to function as private attorneys general. Public attorneys general are charged with protecting the system from threats born of violations of the law. To prosecute a case, they need show no more than that an actionable transgression occurred. The basis for legal action lies in the law violated and the nature of the transgression. The same reasoning should carry over to citizen suits. The current doctrine requires plaintiffs to allege injury to themselves despite the statute's focus on the environment, and the Fletcher framework would require potential litigants to allege injury of a type that the statute was designed to prevent (thereby necessitating an unwieldy inquiry into the type of injury alleged). In contrast, the system-based approach eliminates the need for an injury analysis by making it implicit. A threat or injury to the legal system constitutes a threat or injury to all components of the social system. If the threat is actionable under a statute containing a citizen suit clause, then a citizen may bring suit to redress it.

This approach does not run afoul of Article III since it too involves a case or controversy, injury, and a method of redress. Under this approach, however, courts would no longer be able to bar suits on the grounds that plaintiffs have not alleged adequate injury to themselves. Instead, the harm to the system would suffice and the suit could be adjudged on its merits.

## 2. *Diligent Enforcement*

The only remaining obstacle to justiciability lies with the fact that Laidlaw's actions already were the subject of an enforcement action by the state. In light of the suit and subsequent settlement between Laidlaw and the DHEC, the question becomes whether the system's health and longevity is threatened by a violation that has already been the subject of an enforcement action. The statute's language suggests otherwise; it bars citizen suits that follow state actions.<sup>226</sup> We must consider whether the facts of the case are such that the injury alleged continues to threaten the

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<sup>225</sup> The workability of this scenario is predicated on well-drafted, workable statutory definitions. *See supra* note 212 and accompanying text.

<sup>226</sup> *See* 33 U.S.C. § 1365(b)(1)(B) (2000).

system's health and longevity and therefore whether the injury remains of the type that the statute was enacted to prevent.

The Court squarely and correctly addresses this issue. Laidlaw's permit violations occurred both before and after FOE filed suit. The suit was filed after the state reached its settlement with Laidlaw.<sup>227</sup> It is therefore possible to conclude: (1) that the state enforcement action was not diligently prosecuted, as the Act requires;<sup>228</sup> and (2) that the ongoing violations posed a continuing threat to the health and integrity of the system. Furthermore, vigorous enforcement (as opposed to imposing a token fine and exacting a pledge to do better) will likely deter similar activities by other entities, thereby protecting the system from future threat.<sup>229</sup> Consequently, the injury alleged by FOE was of the type the statute was designed to prevent and the Court correctly sustained the plaintiff's verdict.

### 3. *Summary: A Long-term Solution to a Long-term Problem*

The crucial differences between the Court's method for adjudicating environmental disputes and the one presented here are that under the proposed framework, (1) statutes' stated goals of environmental protection take precedence over what are often contrived or ancillary injuries to plaintiffs; (2) unwieldy and extraneous standing inquiries become unnecessary; and (3) the relevant terminology gains coherence, which in turn brings the concept of "environmental protection" into focus. Environmental protection is less about preserving nature than about acknowledging the interrelatedness of systems and environments. Because the boundaries between system and environment shift constantly, the notion of environment must remain forever in flux. The key to environmental protection therefore lies in eschewing rigidly defined boundaries and rules and instead adopting norms capable of responding to changing conditions. In this sense, the social system's imperative of self-preservation impels it to act as its own environmental protection agency.<sup>230</sup>

A scheme like the one just described would constitute a significant departure from the status quo. At present, both the legal system and the larger notion of environmental protection lack structural integrity. The majority opinion in *Laidlaw* is but one example of a widespread tendency—as evidenced by the Trail Smelter Arbitration and *Animal Dreams* examples—to create laws and regulatory frameworks based on supposedly objec-

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<sup>227</sup> *Laidlaw IV*, 528 U.S. 167, 178 (2000) (noting that after FOE commenced its action, Laidlaw violated the mercury discharge limits thirteen times, as well as committed twenty-three other violations).

<sup>228</sup> See *Laidlaw I*, 890 F. Supp. 470, 498 n.1 (D.S.C. 1995); *Laidlaw IV*, 528 U.S. at 167.

<sup>229</sup> See *Laidlaw IV*, 528 U.S. at 185–86.

<sup>230</sup> See generally Timothy Luke, *On Environmentality: Geo-Power and Eco-Knowledge in the Discourses of Contemporary Environmentalism*, *CULTURAL CRITIQUE* 30, 57–82 (1995).

tive definitions of subjective concepts like harm, pollution, and environment.

Within the social system, language presents choices and possibility while law provides the delimiting force that narrows possibility and solidifies expectations.<sup>231</sup> But if language is used to present false choices, as with the majority's opposition of injury to the plaintiff versus harm to the environment, the law's authority is undermined, the shared expectations of expectations that enable the system's functioning are crippled, and a legitimation crisis becomes inevitable. In *Laidlaw*, the Court avers that all that need occur for standing is for the plaintiff to *believe* she has been injured. That formulation, though well intentioned, cannot long survive. Because of its ruling, the Court faces the daunting prospect of having to select which types of perceived injuries enable standing under the various environmental statutes—an overwhelming and constantly evolving task.

The net result of this untenable state of affairs is that societal expectations *vis-à-vis* environmental protection are eroding. This erosion does not stem solely from the *Laidlaw* opinion but rather from an overall lack of discipline and clarity in the rhetoric of environment and environmental protection. This imprecision generates false oppositions that present false choices. Consider, for example, a President and Congress arguing about whether to open the Arctic National Wildlife Refuge to oil exploration *or* to continue our national dependence on foreign oil. In the Northwest, the false oppositions are between salmon and prosperity, or owls and timber. In the Midwest, debates over corporate average fuel economy pit the viability of the auto industry against increased fuel efficiency for motor vehicles. These types of choices, though specious, are omnipresent.

False choices arise as much from linguistic subjectivity as from ideological differences. The inability to see past the rhetoric to imbedded inconsistencies within the debate comprises a root cause of our environmental dilemma. A workable template for "environmental protection" must allow for the fact that many of the key terms in the debate—including environment and protection, as well as harm and pollution—lack consensus definitions. The goal, however, should not be defining these terms; their meaning is intertwined with their subjectivity. Instead, we must acknowledge that subjectivity is inherent within both the language and the human condition. This requires crafting laws that allow for linguistic uncertainty and for the shifting nature of norms and expectations. The alternative involves drafting and interpreting laws in a manner that defies an essential component of the human experience. The latter method has been the policy up to now. It is time for a new approach.

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<sup>231</sup> See LUHMANN, *supra* note 13, at 82.

D. *Postscript: NEPA and the Rhetoric of Environmental Protection*

As the preceding discussion has shown, pollutants cannot be eliminated; the goal itself is meaningless. One system's pollutant is another's necessity. It is therefore understandable that courts get tangled in discussions of harm and the intent and coverage of the various environmental protection laws while the statutes' varied language creates serious difficulties for enforcement and judicial review. Statutes do exist, though, wherein the language of subjectivity is woven into the text. One of the better examples of this is NEPA.<sup>232</sup> Though strictly procedural in nature and thus often emasculated in its application, NEPA contains language that is admirably precise in its acknowledgment of the subjectivity of harm and in its attempts to articulate contexts and benchmarks through which to measure that harm.

Though it lacks the statutory means to enforce its stated goals,<sup>233</sup> NEPA nevertheless makes it a matter of policy for federal agencies to use all practicable means to administer federal programs in the most environmentally sound manner possible.<sup>234</sup> This proviso resembles language in most other environmental statutes and is too general to be meaningful. However, subsequent language clarifies its intent. For example, NEPA speaks of the need to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings,"<sup>235</sup> to "preserve important historical and cultural aspects of our national heritage,"<sup>236</sup> to "enhance the quality of renewable resources,"<sup>237</sup> and to "achieve a balance between population and resource use."<sup>238</sup> This language lays out the systemic priorities the statute seeks to protect and provides the rhetorical tools with which to do so.

Returning to the *Animal Dreams* example, one can readily see how the Black Mountain Mining Company could argue that damming the river

<sup>232</sup> 42 U.S.C. §§ 4321–4370 (2000).

<sup>233</sup> NEPA requires any proposed federal action to be evaluated for its environmental impact. *See infra* note 240 and accompanying text. Once the study has been prepared, however, there is no mechanism under NEPA through which to evaluate the merits of the proposed action in light of its anticipated environmental impact.

<sup>234</sup> *See* 42 U.S.C. § 4321:

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

<sup>235</sup> *Id.* § 4331(b)(2).

<sup>236</sup> *Id.* § 4331(b)(4).

<sup>237</sup> *Id.* § 4331(b)(6).

<sup>238</sup> *Id.* § 4331(b)(5).

and destroying Grace would be “safe” and “productive.”<sup>239</sup> However, it is hard to imagine the company straight-facedly maintaining that the dam would preserve important historical and cultural aspects of our national heritage. It also seems unlikely that the company could persuade a court that the dam would enhance the quality of renewable resources, or achieve a balance between population and resource use. Consequently, if held to the standards enumerated in NEPA, the Company’s dam proposal would die on the vine.

NEPA requires that agencies proposing actions evaluate potential environmental consequences.<sup>240</sup> The Council on Environmental Quality (“CEQ”), whose primary function is to advise the President on environmental matters,<sup>241</sup> has stated that these evaluations must consider public health, unique features of the region, precedential effect of the action, and any anticipated controversy.<sup>242</sup> If the Trail Smelter tribunal had evaluated these factors, it almost certainly would have concluded that the damages incurred by the local population in Washington were cognizable. The acid rain and acid fog generated by the smelter fumes posed a health risk that should have been evident even in 1938, and the pollution also severely affected the region’s unique features (e.g., the farmland of the Columbia River basin). Moreover, the precedential effects of a ruling that denied the existence of damages except as might be measured in monetary terms were foreseeable and considerable. Finally, the controversy arising from the smelter’s emissions was already present and clear.

The language in NEPA is useful because it is flexible and provides a basis to demarcate systemic goals. These goals are norms—expectations of expectations, and shared visions of how things ought to go. The norms of preserving esthetically and culturally pleasing surroundings, protect-

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<sup>239</sup> See *supra* note 196 and accompanying text.

<sup>240</sup> See 42 U.S.C. § 4332(2) (2000). That evaluation can and often does take the form of an Environmental Impact Statement. *Id.* § 4332(2)(C):

The Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the federal government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, [and]
- (iii) alternatives to the proposed action . . . .

<sup>241</sup> See *id.* §§ 4342–4344. The CEQ is a creation of NEPA. Its interpretations of the statute are entitled to substantial judicial deference. *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1978).

<sup>242</sup> See 40 C.F.R. § 1508.27(b)(1)–(10) (2003); see also Dinah Bear, *NEPA at 19: A Primer on an ‘Old’ Law with Solutions to New Problems*, 19 *Envtl. L. Rep.* 10060, 10064 (1989) (discussing factors an agency should consider to determine whether a proposed action has ‘significant effects’ for NEPA purposes).



ing the public health and geographically unique features, and avoiding controversy govern the statute's interpretation while remaining adaptable to changes in circumstance. This language outlines a normative framework through which the statute can function and allows its interpreters to gauge the severity of any alleged injury by measuring it against systemic priorities. This goal-driven flexibility enables the legal system to articulate expectations while allowing them to shift within established parameters.

The flexibility of the language employed in NEPA is broadly applicable within environmental law even as its terms remain subject to debate. Disputants may contest, for example, whether a given action deleteriously impacts public health, an issue that readily lends itself to litigation and judicial resolution. Contrast this with *Laidlaw*, where the parties could not agree on whether harm occurred, and if so, to whom or to what. Faced with all this uncertainty, the *Laidlaw* Court decreed—in contravention of the statute—that the issue of whether the waterway had been harmed was all but irrelevant to whether plaintiffs could sue. In addition, despite the lack of reference in the statute to the well-being of citizens bringing suit, the Court nevertheless determined that the viability of the lawsuit hinged on the plaintiffs having suffered injury. This type of scenario, wherein the Court loses sight of a statute's goals because of an uneasy relationship with Article III, would be less likely to occur under a regime where the statutory language did not pretend to objectivity, but instead acknowledged the influence of the social system on both its creation and interpretation.

## VI. CONCLUSION

Environmental law differs in fundamental respects from laws based on traditional property interests. So too must the rhetoric in which such laws are framed. Current standing doctrine has no place in environmental jurisprudence, where injury to the plaintiff has little relevance. A case like *Laidlaw*, where the Court finds itself adjudicating an issue that has no connection to the governing statute (in addition to making no sense), underscores an incoherence that endangers the larger goal of environmental protection. The problem of standing for citizen suits raised by *Laidlaw* is but a symptom of a larger problem arising from the use of contingent language to set supposedly concrete goals. As the Trail Smelter Arbitration and *Animal Dreams* examples demonstrate, such attempts cannot succeed and can severely undermine the integrity of the legal system. They merely exacerbate a Galileo Problem based in entrenched notions of valuation drawn from traditional property-based norms.

Since both harm and environment are subjectively determined, the goal of environmental protection must be flexible and similarly subjective. The common denominator among the multiple perspectives is member-

ship in the social system. Each entity and component system shares the imperative of maintaining the smooth functioning of the social system. Norms are constructed and statutes enacted to further that goal. Rather than relying on an unworkable notion of standing to determine the viability of a cause of action, courts should consider whether the injury complained of is of the type the statute seeks to prevent *and* whether it threatens the health and longevity of the social system. This framework satisfies the dictates of Article III while enabling the legal system to respond to both the contingency of language and the flexibility of norms. Therefore, contrary to the infamous sentence from *Laidlaw* with which this Article began, the relevant showing for purposes of Article III need be *neither* injury to the plaintiff *nor* harm to the environment. Instead, the viability of citizen suits should derive from the ambit of the statute and its role in maintaining the well being of the social system.