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## Forgive Me, Daughter

Impressed by their piety, courts have permitted the Amish to live outside the law. But in some places, the group's ethic of forgive and forget has produced a plague of incest—and let many perpetrators go unpunished.

By Nadya Labi

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# Time Bomb at Mauna Loa

Environmental laws fought off hazards like pollution over the last generation. But what about the more urgent challenges of the next?

By Bill McKibben

AS I SIT DOWN TO WRITE, UNSETTLING news comes across the wires that the carbon dioxide recorder on the side of Hawaii's Mauna Loa volcano is registering something odd.

This is one of the most important scientific instruments on earth, and perhaps in earth's history. Charles Keeling, a young researcher from Scripps Institution of Oceanography, set it up in 1958 after he and a colleague had begun calculating how much excess carbon could be absorbed by the oceans. Keeling and his partner found that the oceans were not the endlessly reliable carbon sinks that scientists had long imagined. Instead, they were already saturated with CO<sub>2</sub>, which meant that the gas was probably accumulating in the atmosphere. The simple instrument atop Mauna Loa soon revealed they were correct. Year after year, the atmospheric concentration of CO<sub>2</sub> climbed by 1.3 or 1.4 or 1.5 parts per million. It is this fairly steady upward curve that underlies all we have come to fear about global warming. It is the global signature of an advancing crisis.

Now it appears the bad news may be getting worse. For reasons that are still unclear, in the past two years, the CO<sub>2</sub> concentration measured at Mauna Loa has risen more sharply, by more than two parts per million. This is the first increase of that magnitude in consecutive years, and no one is quite sure why it has happened. Consumption of fossil fuel hasn't jumped quickly enough to account for the increase, and there hasn't been a weather event like El Niño, which spurred increases

in CO<sub>2</sub> concentration in past years. Instead, some scientists have speculated that we may be seeing the first sign of the breakdown in the natural system the earth has for absorbing the gas. As the earth's temperature rises, vegetation may absorb less carbon, speeding up the warming. Keeling is in his 70s now, and after 46 years of monitoring the planet's carbon pulse, he is worried. As Tom Burke, visiting professor at Imperial College-London and former special adviser to the last Tory environment minister, put it, "We're watching the clock and the clock is beginning to tick faster, like it seems to before a bomb goes off."

All of this means that Richard J. Lazarus, a professor of law at Georgetown, could not have picked a better time to publish his new opus, *The Making of Environmental Law*. It appears that the questions facing environmental regulators are about to get much more pressing. As the heat rises, we need to know whether the architecture of environmental law built since 1970 is a sturdy enough platform on which to rest our hopes of, well, survival. Lazarus doesn't come out strongly either way. Instead, he makes a case for both possibilities.

*THE MAKING OF ENVIRONMENTAL LAW* has two strengths, one conceptual and the other historical. What makes environmental law different from other legal fields is that it deals in different scales of time and space. Parts-per-million measurements of carbon dioxide—an odorless, invisible, and nontoxic gas—mean nothing until they are entered into a computer

model that can predict the consequences of the heat-trapping capability of those molecules. Even so, those consequences, distant in time and global in effect, challenge any traditional notions of injury and redress. And carbon dioxide is relatively simple compared to, say, the operation of endocrine-disrupting hormones, which may or may not be reducing sperm counts worldwide. The epidemiology is so subtle that creating laws to tackle these problems is enormously challenging. "Underlying interactions can elude ready observation because they occur either over huge spatial dimensions, or, conversely, only microscopically," Lazarus writes. Not only that, but they also often involve thresholds. Pushing CO<sub>2</sub> concentrations past a certain unknown point does not yield steady and linear increases in temperature, but rather potentially wild perturbations, as ocean currents shut down or permafrost suddenly thaws. We won't know for sure until we get there.

Humans are constantly changing the world around them; the hope of environmental law, argues Lazarus, is to control the pace of that change so that it does less damage. Yet we're now conducting, in essence, experiments in which the entire planet serves as a test tube, and experiments, by definition, are unpredictable. Pity the lawmaker.

Even as science pushes us to pay attention to scales and natural phenomena we can't easily comprehend with our hominid hard-wiring, Lazarus points out that our culture ever more effectively disconnects us from the real world. The emergence of the virtual world of the Internet, he writes, helped erode contact with the physical world. And globalization made place almost irrelevant. Meanwhile, the rapid pace of life—Lazarus cites everything from how hastily stockholders turn over shares to how quickly athletes leave college for the pros—makes it ever more difficult to perceive environmental decay. None of this is new. But it's worth noting the particular problem it raises for environmental protection, which, as Lazarus points out, is "the functional equivalent of a long term investment."

THOUGH LAZARUS GIVES TOKEN NODS to early environmental prophets like George Perkins Marsh, Aldo Leopold, and Rachel Carson, his book begins where it should, with the astounding wave of environmental laws that came out of the Nixon Administration in the early 1970s. The National Environmental Policy Act, which forced all government planners to take environmental questions into account, was signed into law on the first day of the decade. Before 1970 was over, the federal Environmental Protection Agency had been created and the Clean Air Act had been written, authorized, and enshrined in the statute book. And that was just the beginning: Lazarus provides a staggering chart of all the major laws that came into being in the decade, an almost unimaginably ambitious and bipartisan legislative blitz.

Lazarus does a great service by demonstrating that it wasn't any love of the earth that prompted Richard Nixon to sign the early environmental legislation. Instead, "everything was politics" for the man who would infamously be photographed strolling along the California beach in his dress shoes. The Santa Barbara oil spill and the Cuyahoga River blaze occurred just after Nixon's inauguration in 1969, and he began to worry that Democrats might seize upon these events in the midterm elections. He also had his eye on Ed Muskie, the environmentally-minded senator from Maine, as a possible opponent in 1972.

Congress, for its part, was scared into action when a series of incumbents were targeted by environmentalists and defeated in the wake of the first Earth Day in 1970. And so the avalanche of law-making began. It didn't take long for Nixon to tire of anything green. By 1971, he was privately telling a group of visiting auto executives that ecologists were "enemies of the system" who wanted Americans to "go back and live like a bunch of damned animals." But the public had been sold on the environmental idea, and Presidents Gerald Ford and Jimmy Carter continued to sign the legislation that Congress steadily sent them. The Carter Administration was symbolically capped by the signing of the

Superfund law, which established corporate liability for hazardous waste sites. (Lazarus, notably, helped litigate the first case on behalf of the federal government that established liability standards under the new legislation.) By now, those early laws all seem uncontroversial—and effective. They cleaned up the worst of the smog over our cities, and made it possible once more to swim and fish and drink water from many of our rivers.

Largely because of that initial success, in the decades that followed, environmental law proved sturdier and more enduring than its opponents imagined it would. Lazarus efficiently shows how Reagan's Sagebrush Rebellion, with its demand that states be left alone to regulate their lands as little as they pleased, didn't succeed in changing any of the underlying laws. Indeed, the ludicrous overreaching by James Watts, then secretary of the interior, on behalf of the mining and drilling industries, spurred renewed interest in groups like the Sierra Club. Even the Gingrich revolution didn't succeed in halting the triumphant march of environmentalism. "Environmental law," writes Lazarus, with the excusable tone of a proud parent, "has been remarkably successful as it has evolved from a radical intruder into an essential element of a mature legal system in a democratic society."

AND YET THIS SURFACE SUCCESS MASKED deep and dangerous shifts. As Lazarus notes, environmental protection was becoming a more divisive and even polarizing political issue. Taken as a whole, Congressional voting patterns appeared to be about as green as ever in the 1990s, but only because a sharp spike in Democratic support for environmental legislation compensated for the degree to which Republican support tanked. Gone, for the most part, are the Rockefeller Republicans who had viewed conservation as part of their patrician heritage.

This leads to what Lazarus calls, in a short but powerful chapter, the current "Republican moment." All the levers of Washington power are now held by a party that rejects any new environmental

initiatives and has countenanced the erosion of the old ones. In light of that new order, Lazarus is, significantly, unwilling to predict that the framework of environmental law will continue to prove as resilient as in the past. What happens next will depend on how much environmental backsliding voters will tolerate. Without real public outcry, the damage is likely to be deep—and, as Lazarus notes, the GOP has become expert at managing the spin, repackaging environmentally damaging laws under titles like "Clean Skies" or "Healthy Forests." If the federal retrenchment succeeds, further progress in environmental protection will depend on state and local lawmakers. That trend is already in evidence, as California, under Republican Governor Arnold Schwarzenegger, flirts with regulating automobile mileage, and as New York, under Republican Governor George Pataki, sues to hold Midwest utilities accountable for sulfur and nitrogen pollution.

But though the current standoff makes prognosis murky, it seems to me that we can say with some certainty that the current set of environmental laws is insufficient for the emerging set of global environmental problems we face. And that is because the way Americans thought about pollution when the Clean Air Act was passed doesn't correspond neatly with the new physical realities.

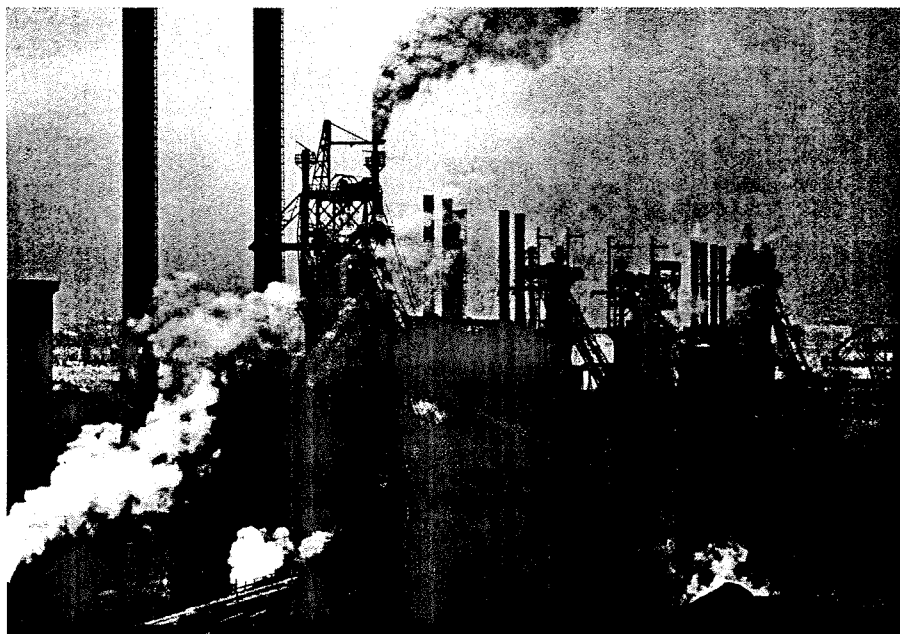
For instance, we are used to seeing pollution as a sign that something has gone wrong. If the air is dirty, there must be a missing scrubber on a smokestack or a drainpipe that needs a filter. It was relatively easy to pass laws about such omissions, and though the affected industries didn't welcome the cost of meeting new standards, the reforms were almost always cheaper and easier to implement than experts had foreseen. With smog blanketing Los Angeles and with the relatively small costs of improving the air hidden in the costs of a new car, who really wanted to take a public stand against catalytic converters? Not that many people, as it turned out.

But increasingly, the dangers that present themselves are different. Global warm-

ing comes not from malfunctioning factories and cars, but from technology that's working well, at too high a volume. CO<sub>2</sub> was always considered a byproduct of a clean-burning engine. To date, the Environmental Protection Agency hasn't even recognized carbon dioxide as a pollutant, and the federal government is trying to block California from doing so. And while there are solutions to global warming, like wind power, mass transit, smaller houses, and reining in suburban sprawl, there's far less political will to undertake them than there was to require catalytic converters, because these solutions will require changing habits in ways that will be both economically and psychologically expensive. The researcher and eco-statistician Lester Brown recently calculated that if all Americans a decade hence got gas mileage comparable to today's hybrid and efficient Toyota Prius, we could cut gas consumption by 50 percent without changing anybody's driving habits. But that would mean giving up big SUVs. I have a hybrid and I love it, but I doubt if any politician could pass a law requiring everyone to have one. And a 50 percent reduction is only a start—the evidence shows we need much deeper cuts in fossil fuel consumption across the board to make global warming merely miserable rather than catastrophic.

And we need them around the world as well. Smog in Los Angeles could more or less be addressed at home; if the Cuyahoga River was going to be cleaned, federal legislation and local enforcement were up to the task. But the scale of environmental damage now makes such solutions inadequate. Acid rain crosses regional boundaries without action under the federal clean air laws because the Midwestern states and the major utility companies have mustered their political strength and have fought the Northeast to a draw. The tie goes to the polluters, who have managed to fend off requirements for new scrubbers.

More broadly, in the face of global problems, the American political system is utterly failing. The withdrawal of the United States from the Kyoto accords was an announcement that our politics are too immature and insular to cope with



A blaze of the oily surface of the Cuyahoga River in 1969 helped spur Richard Nixon to sign the environmental laws of the 1970s. Furnaces like this one on the banks of the river were spewing pollution 20 years earlier.

the rising international cry for stronger laws. It was simple for the Republican right to scapegoat the treaty as another attempt by foreigners to hamstring our dynamic economy, making it too hot for anyone, including Bill Clinton and Al Gore, to handle. Sign on and we'll all be driving Yugos, opponents said. Lazarus argues that the best hope for effective international legislation lies in bodies that are "responsive to the very different distributional perspectives toward environmental protection held by developing versus developed nations." That is, real progress on global warming demands figuring out ways to let poor nations use more energy for necessities while we use less for luxuries. True enough, but if Washington can't manage the competing demands of Ohio and New England, it may be a while before it joins in any real treaty-making with Bangladesh.

IN AN ELEGIAC CONCLUSION, LAZARUS talks about "the graying of the green," a phrase that refers not only to the aging of the various laws but also to the men and women who fought to enact them. He concludes that, among other things, it was their fervent love for the world around them that motivated the enormous undertaking of building the corpus of environmental rules and regulations. "Pragmatism is an essential element in effective lawmaking, but it is no substi-

tute for passion and moral commitment," he writes. In this he is absolutely correct. It would be easy to accuse Lazarus of copping out at several places in this book, given his unwillingness to predict whether environmentalists will fight off the efforts to weaken the law or build the global institutions that would move it to the next necessary level. But that's because prediction waits upon events. The question Lazarus leaves us with is whether the moral commitment he writes about will re-emerge with sufficient force to produce a new generation of lawyers and laws dedicated to protecting the environment.

It is hard not to see that passion waning. The 2004 presidential debates occurred in the weeks when the new spike in CO<sub>2</sub> concentrations made the news, yet the subject scarcely came up. The burst of enormous emotional energy, the flood of metaphors and images that presaged the lawmaking of the 1970s appears to have burned out and lost most of its residual power. New environmental law, then, probably awaits new environmental anger, which awaits strong signals from the natural world. Those are coming, and when they arrive, I fear they will make the blazing Cuyahoga River look like a firefly in a cave. ■

**Bill McKibben** is a scholar in residence at Middlebury College and the author of *The End of Nature*.