Climate Change and Human Rights

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Introduction

When I chose as the theme for this special edition of the Journal, the theme “The Influence of International Human Rights Law: Looking Back and Looking Forward”, my main objective was to find a suitably generic rendering of “human rights” such that no article of interest would be excluded. Now that I find myself trying to reclaim my foolish promise to Dr. D’Souza, the general editor of the journal, that I would write a short piece on climate change and human rights, the looking forward and back has particular relevance.

Just as climate change has assumed a role as one of the principal threats to life, liberty and the pursuit of happiness for future generations, ascertaining the relationship between human rights protections and the protection of and respect for the environment necessitates a journey backwards. This journey must survey the emergence of international human rights law and the development of international instruments directed to protecting the environment. Future well-being, however, is likely to require structures and doctrines in which both human rights law and environmental law find synergies with one another by which both human rights and a healthy environment, on which such rights ultimately depend, can both be ensured.

When the extreme urgency of the threat of climate change is factored in, the need for new structures and new doctrines may go beyond a simple combination of what is presently offered by the respective jurisprudence of human rights and environmental protection.

The Origins of Human Rights Law

During the Second World War, the actions carried out by fascist regimes in Europe created a desire among certain people to put in place an international system to prevent

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1 The progenitors of modern human rights ideas, of course, go back well beyond World War II. They include natural law theory and its idea of natural rights; previous statements of fundamental rights such as the English Bill of Rights (http://www.constitution.org/eng/eng_bor.htm) in 1689; the United States Declaration of Independence (http://www.archives.gov/exhibits/charters/declaration_transcript.html) in 1776 and the French Declaration on the Rights of Man and Citizen (http://www.historyguide.org/intellect/declaration.html) in August 1789; and the philosophical writings of Thomas Paine, John Stuart Mill and GWF Hegel; as well as the campaigns to abolish slavery as [2013] J. JURIS 305
such atrocities from reoccurring. The debate in the United Kingdom was kicked along by HG Wells’ publication in 1939 of a draft Declaration of the Rights of Man.\textsuperscript{3} The draft, after contributions and comments by various colleagues of Wells, including AA Milne, JB Priestley and Kingsley Martin, was published by Penguin as The Rights of Man or What are We Fighting For.\textsuperscript{4} The book became a best seller and was translated into 30 languages.

The influence of the campaign in which HG Wells provided a leading part led to President Roosevelt’s famous Four Freedoms Speech delivered on 6 January 1941 in which he spoke of “freedom of speech and expression … freedom of every person to worship God in his own way … freedom from want … and … freedom from fear”.\textsuperscript{5} The speech remained influential as part of allied war aims and the allied efforts to establish the United Nations at the close of the war.

The Charter of the United Nations, signed on 26 June 1945, while the war in the Pacific yet raged, made express reference to human rights in a number of places. The preamble included in the purposes of the new organisation the reaffirmation of “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”. Importantly, article 55 of the Charter imposed an obligation on the UN to promote “universal respect for, and

\textsuperscript{2} The concept of acts against the law of nations was part of international law well before the end of World War II. As Professor Boudreau points out in an earlier edition of this Journal, Raphael Lemkin took his tireless campaign against what became known as genocide to the League of Nations and was ultimately successful in the adoption of the text for the Genocide Treaty, one day before the Universal Declaration of Human Rights. See Thomas Boudreau, The Law of Nations and John Locke’s Second Treatise: the Emergence of the Fiduciary Legal order during World War II (2012) J. Juris. 285 at 335 and http://www.preventgenocide.org/lemkin/madrid1933-english.htm (accessed 2 September 2013).

\textsuperscript{3} A copy may be found at http://www.voting-ukscientists.com/sankey.html (accessed 21 August 2013)

\textsuperscript{4} An excellent discussion of Wells’ work on and philosophy of human rights may be found in John Partington, Human Rights and Public Accountability in HG Wells’ Functional World State, at http://www.academia.edu/400254/Human_Rights_and_Public_Accountability_in_H_G_Wells_Functio nal_World_State (accessed, 21 August 2013)

\textsuperscript{5} The full text of the speech may be accessed at http://www.fdrlibrary.marist.edu/pdfs/fftext.pdf (Accessed 21 August 2013) and a recording of the relevant extract of the speech is at http://www.youtube.com/watch?v=5iHKtrirjY (accessed 21 August 2013). See also James Kimble, Seton Hall University, Franklin D. Roosevelt, 1941 State of the Union Address ("The Four Freedoms") (6 January 1941), at http://archive.vod.umd.edu/citizen/fdr1941int.htm (accessed 21 August 2013)
observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.

The pursuit of that obligation by the nations of the world has resulted in the negotiation and ratification of many treaties. The primary and masterful articulation of the multi-layered content of human rights was achieved in Universal Declaration of Human Rights (“the UDHR”) declared by the General Assembly on 10 December 1948. The 30 short articles of the Declaration have, with the treaties to which they gave birth, provided “a common standard of achievement for all peoples and all nations” and those who adopted the Declaration have committed themselves to strive “by progressive measures … to achieve their universal and effective recognition and observance”.

The UDHR, however, does not mention the environment.

**The Origins of International Environmental Protections and the Links to Human Rights**

Modern concerns with protection of the environment are generally traced to the early 1960s. The inspirational event is often identified as the 1962 publication of Rachel Carson's *The Silent Spring*.

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9 Ibid, page 4, paragraph 8: “From the 1960s to the present, the modern environmental movement has transformed our relationship with the environment”.

10 Reflections on Carson’s legacy, 50 years after the publication of *Silent Spring* are contained in Culver, Mauch and Ritson, editors, *Rachel Carson’s Silent Spring: Encounters and Legacies*, in Rachel Carson Centre Perspectives, 2012, no. 7 at [http://www.carsoncenter.uni-muenchen.de/download/publications/perspectives/2012_perspectives/1207_silentspring_web_color.pdf](http://www.carsoncenter.uni-muenchen.de/download/publications/perspectives/2012_perspectives/1207_silentspring_web_color.pdf) (accessed 22 August 2012). Interestingly, for this essay, Jenny Price, in the opening chapter of the collection, identifies that a negative aspect of Carson’s heritage is the tendency of the environmental movement to emphasise concern for scenic environments over environmental justice, especially, as environmental damage affects the poor and disadvantaged.

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The values let loose in the 1960s led to concern for international action in the next decade. On 5 June 1972, the United Nations Conference on the Human Environment commenced.\textsuperscript{11} The first international conference produced the first international instrument to link human rights and the environment. The final Declaration of the Stockholm Conference,\textsuperscript{12} in its preamble, observed that “Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights [including] the right to life itself.”\textsuperscript{13}

And principle 1 is expressed in terms which not only links fundamental rights to a quality environment but includes the right to a quality environment as integral to those other expressed rights: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”.

The nations of the world came together again, twenty years after the Stockholm Conference, to discuss the environment and the place of humans in it. The Conference took place from 3-14 June 1992 at Rio de Janeiro and the result was another declaration, simply called the Rio Declaration on Environment and Development.\textsuperscript{14}

The links between human rights and the environment were re-emphasised at the Rio Conference. Principle 1 of the Declaration states: “[Human beings] are entitled to a healthy and productive life in harmony with nature.” Principle 10 develops the idea of procedural human rights concerning the environment: “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities”.

Professor Shelton has examined the developing links between environmental concerns and human rights principles. She suggests that three broad approaches can be discerned. The first, exemplified by the Stockholm Declaration, a “classically human rights


\textsuperscript{13} Ibid, preamble, paragraph 1.

approach” describes protecting a quality environment as a precondition to enjoyment of human rights, especially, the rights to life and health. The second, in respect of which the Rio Declaration is prominent, conceives of the link between human rights and environmental protection as concerning the provision of procedural rights to members of the public. And the third approach is described by Professor Shelton as integrative in that human rights and environmental protection are seen as indivisible and inseparable with the result that a right to an environment of a particular quality is seen as an independent substantive right.15

Unfortunately, as Professor Shelton points out, protection of this substantive right to a healthy environment is found mainly in national constitutions and regional human rights and environmental treaties16 and not in international law. This is in part the dilemma that clouds the way ahead for effective action at an international level to prevent or mitigate climate change.

**The Threat of Climate Change**

Most discussion of the effect on human rights of anticipated climate change draws upon the Fourth Assessment Report17 of the International Panel on Climate Change (“the IPCC”).18 Professor Shelton draws attention to impacts of climate change on the rights to life, health, water, food, a means of subsistence, and culture.19 Professor Shelton draws attention to harm caused by climate change to fresh water resources, ecosystems, food and other agricultural products, coastal systems and human health.20

The Office of the United Nations High Commissioner for Human Rights (“UNHCHR”), in a 2009 report, drew attention to the following predicted impacts in the 4AR on weather patterns: contraction of snow covered areas and of areas of sea ice; sea level rise and higher water temperatures; increased frequency of hot extremes; heavy

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16 Ibid
20 Ibid

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precipitation events but with increases in areas affected by drought; and increased intensity of tropical cyclones, typhoons and hurricanes.\textsuperscript{21}

The UNHCHR drew attention to the disproportionate impact of climate change affecting poorer regions and countries.\textsuperscript{22} This unequal burden is the subject of express provision in the United Nations Framework Convention on Climate Change (“UNFCC”) where article 3 notes that countries should respond to the need to protect the climate “on the basis of equity” and that certain developing countries are “particularly vulnerable to the adverse effects of climate change”.\textsuperscript{23}

Professor Shelton notes likely decreases to agricultural production in Africa due to water shortages; up to one billion people facing water shortages in Asia by the 2050s and likely resultant population displacement within and across national borders.\textsuperscript{24}

Climate change, through sea level rise, threatens the habitability and territorial existence of a number of low-lying island states.\textsuperscript{25} Newspaper articles suggest that the IPCC is, in its Fifth Assessment Report, about to take a stronger view about the likelihood and amount of sea level rise, this century.\textsuperscript{26}

**Recent Developments: the Report of the UNHCHR**

In December 2005, a case was launched by a group of Inuit living in the Arctic in the Inter-American Commission on Human Rights (“the IACHR”) claiming that their human rights were violated by the United States’ failure to reduce its emissions of greenhouse gases.\textsuperscript{27} The relief sought included a request that the IACHR prepare a report “declaring that the United States is internationally responsible for violations of


\textsuperscript{22} Ibid, paragraph 10

\textsuperscript{23} These passages from the UNFCCC are noted, ibid, paragraph 11. The text of the UNFCCC is at http://unfccc.int/resource/docs/convkp/conveng.pdf (accessed 23 August 2013)

\textsuperscript{24} Op. cit. footnote 15, page 7

\textsuperscript{25} Op. cit. footnote 21, paragraph 40


\textsuperscript{27} The petition is at http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf (accessed 23 August 2013)
rights affirmed in the American Declaration of the Rights and Duties of Man28 and in other instruments of international law and recommending that the United States ... adopt mandatory measures to limit its emissions of greenhouse gases and cooperate in efforts of the community of nations ...”29

In a letter dated 16 November 2006, the IACHR advised the petitioner’s lawyer that it would “not be possible to process your petition at the moment” because the information provided in the petition “does not allow us to determine whether the alleged facts would tend to characterise a violation of rights protected by the American Declaration”.30

A different approach was taken during 2007 by the Republic of the Maldives.31 In November 2007, the Maldives convened a meeting of the Association of Small Island States (“AOSIS”)32 which decided to request the UNHCHR to conduct a study of the relationship between climate change and human rights.33 The advocacy resulted, on 28 March 2008, in resolution 7/23 of the Human Rights Council (“the HRC”) which requested the UNHCHR to “conduct ... an analytical study of the relationship between climate change and human rights”. The resolution also encouraged States to “contribute to the study”.34

The report of the UNHCHR is dated 15 January 2009.35 It documents likely impacts of climate change on the human rights to life, adequate food, water, health, adequate housing, and self-determination.36 The report also documents the particular vulnerability of, and the resultant more acute impacts experienced by, the specific groups identified as women, children and indigenous peoples.37 Two effects identified as impacting upon the

29 Ibid, page 7
31 The history of events in this section has drawn extensively on the work of John H Knox, Henry C Lauerman Professor at Wake Forest University (http://law.wfu.edu/faculty/profile/knoxjh/: accessed 23 August 2013) who has been both an active player and chronicler of those events.
32 http://aosis.org/about-aosis/ (accessed 23 August 2013)
35 Op. cit. footnote 21
36 Op. cit. footnote 21, pages 8 - 14

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human rights of people affected are displacement of people from their normal places of residence and work and the creation of conflict and security risks.\textsuperscript{38}

Despite finding serious and significant implications of climate change for the human rights of individuals and groups, the report declines to find whether those impacts can be characterised as “human rights violations in a strict legal sense”. The report points to obstacles to such a conclusion in the form of difficulties in sorting out and attributing causation in respect of particular impacts.\textsuperscript{39}

The report does, however, identify multiple obligations in responding to climate change in respect to which failure would amount to violations of human rights. These include a failure to protect against foreseeable risks.\textsuperscript{40} The report also identifies the need to continue to comply with obligations under the International Convention on Economic, Social and Cultural Rights (“ICESCR”)\textsuperscript{41} in circumstances where climate change has diminished available resources including the need to comply with the non-discrimination law principle of human rights law and the need to make efficient use of available resources to ensure that nobody’s access to resources falls below a minimum level consistent with compliance with the particular human right.\textsuperscript{42}

The report also identifies a need both under the UNFCCC and under human rights law, akin to Professor Shelton’s second human rights approach,\textsuperscript{43} to ensure access procedural rights including rights to information and participation in decision making about the environment.\textsuperscript{44}

The report also identifies a number of bases in human rights law to posit an obligation on nation states to cooperate with others to address effectively the problems arising from climate change.\textsuperscript{45} Last, the report identifies the principles of intergenerational equity and the precautionary principle as arising from the UNFCCC but also being recognised by human rights treaty bodies as being relevant to and reflected in the human rights principles of equality and non-discrimination.\textsuperscript{46}

\begin{footnotes}
\item \textsuperscript{38} Op. cit. footnote 21, pages 18 - 22
\item \textsuperscript{39} Op. cit. footnote 21, page 23, (paragraph 70)
\item \textsuperscript{40} Op. cit. footnote 21, page 24, (paragraphs 72-74)
\item \textsuperscript{41} http://www.un-documents.net/icescr.htm (accessed 23 August 2013)
\item \textsuperscript{42} Op. cit. footnote 21, page 25, (paragraphs 75-77)
\item \textsuperscript{43} Op. cit. footnote 15
\item \textsuperscript{44} Op. cit. footnote 21, pages 25 - 26, (paragraphs 78-79)
\item \textsuperscript{45} Op. cit. footnote 21, pages 27 - 28, (paragraphs 84 - 85)
\item \textsuperscript{46} Op. cit. footnote 21, page 29, (paragraphs 89 - 91)
\end{footnotes}
In one of the later paragraphs of the report, the UNHCHR identifies one of the great contributions that human rights law can make to the responses to climate change. Climate change threatens to beget crisis and emergency. As the report notes, human rights values can “usefully inform debates on equity and fair distribution of … burdens” and can “focus attention on how a given distribution of burden affects the enjoyment of human rights”. The phrase of the preamble to the UDHR still rings true: “a common standard of achievement for all peoples and all nations”.

Recent Developments: Knox’s Assessment

Professor Knox supports the report’s conclusion that, although climate change, itself, may not be a breach of human rights, nation states have duties to protect against the impacts of climate change. Professor Knox also identifies the report’s conclusions that states have extra-territorial duties to respond to climate change as likely to be controversial both legally and political. He points out that few states had, in their submissions, addressed the issue of extra-territorial obligations apart from the Maldives which had urged such a finding based on the right to self-determination; the text of the ICESCR; and the ICCPR. The ICCPR is thought generally to be restrictive, in respect of extra-territorial application of its obligations which, according to the text, apply only to “to all individuals within its territory and subject to its jurisdiction”. The Maldives argued, however, that the drastic nature of climate change meant that the individuals living in small island states affected by climate change were under the “effective control” of those states who were responsible for causing the harm.

In particular, Professor Knox fastened on to the report’s finding of a human rights obligation on nations to cooperate to preserve human rights from the effects of climate change. Professor Knox saw this finding as providing “a basis for applying the human rights environmental jurisprudence to climate change”.

Recent Developments: The Response of the HRC

The UNHCHR report was received by the HRC on 15 January 2009.

49 See article 1 of the International Covenant on Civil and Political Rights (“the ICCPR”)
51 Article 2, ICCPR
Three years later, on 19 March 2012, the HRC decided to appoint an independent expert on “the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment”. The study is to be conducted in cooperation with government, private and international institutions. The study is to address the “human rights obligations, including to the enjoyment of a safe, clean, healthy and sustainable environment” and to advise concerning “best practices relating to the use of human rights obligations and commitments to inform, support and strengthen environmental policymaking”.

In July, 2012, perhaps, not surprisingly in the light of his work in the area, Professor Knox was appointed to a three year term as the independent expert.


On Christmas Eve, 2012, Professor Knox presented the first of his reports to the HRC. In this “preliminary report”, the independent expert examined various ways in which existing human rights, such as the right to life, the right to health and the right to privacy, had been found to be violated by serious damage to the environment. The preliminary report also noted the benefit of a human rights based approach in ensuring better policy making in the environmental field with one result being the development of procedural rights (rights to information and to participate in decisions) developing with, alongside and apart from substantive rights.

The independent expert stressed the need for conceptual clarity to be developed about the way in which human rights and environmental rights support and overlap one another. The report pointed to, as a subject for future examination, the potential human rights of future generations (inter-generational equity) and the application of

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55 Ibid, paragraph 2 (a)
56 Ibid, paragraph 2 (b)
58 Op. cit. footnote 8
59 Op. cit. footnote 8, pages 7-9, paragraphs 18-24
60 Op. cit. footnote 8, pages 9-12, paragraphs 25-33
61 Op. cit. footnote 8, pages 13-14, paragraphs 40-43
62 Op. cit. footnote 8, page 17, paragraph 54
human rights obligations to particularly pressing problems, including climate change.\(^{63}\)
The report discussed but took little further\(^ {64}\) the issue of obligations of states in respect of trans-boundary impacts of damage to the environment.\(^ {65}\)

The report identifies many issues concerning human rights obligations relating to a safe, clean, healthy and sustainable environment but it remains, very much, a preliminary report.

**Where to from here**

In a world where the threat of climate change seems not only clear and present but of enormous proportions,\(^ {66}\) human rights jurisprudence offers different things to the politics of finding an appropriate response to the threat.

The equality principle of human rights jurisprudence\(^ {67}\) allows environmental devastation (including that wrought by climate change) to sound not only as an injury to Mother Earth but also to those usually already disadvantaged persons most affected by the changes.\(^ {68}\) Human rights jurisprudence allows concerns for the environment to be also reflected as concerns for environmental justice.

As pointed out by the preliminary report of the independent expert,\(^ {69}\) human rights jurisprudence aids best practice policy making in the environmental field by developing rights to information and rights to public participation in decision making. In this way, human rights jurisprudence assists in preventing government decision making in respect of climate change from remaining or becoming decision making by private, profit oriented interests.\(^ {70}\)

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\(^{63}\) Op. cit. footnote 8, page 17, paragraph 53
\(^{64}\) Than did the report of the UNHCCR report (Op. cit. footnote 21)
\(^{65}\) Op. cit. footnote 8, page 16, paragraphs 47-48
\(^{67}\) Op. cit. footnote 47: for a simple expression of the equality principle, see articles 1, 2 and 7 UDHR as well as the Preamble.
\(^{68}\) A discussion of the impact on already vulnerable groups may be found in Op. cit. footnote 8, page 15, paragraphs 44-46
\(^{69}\) See footnote 60
Human rights principles can also assist in ensuring that any emergency responses that do emerge to climate change take into account the rights of persons affected by the response as well as the impacts of climate change. Human rights law may help prevent the sort of displacement that has routinely occurred in the name of industrialisation as hydroelectric dams are built at the cost of the people who live in the upper catchments of the dammed rivers.  

It might also be hoped that the processes of the international human rights institutions might reinforce the often stuttering and staggering processes of the processes designed to develop an international policy response to climate change through the structures of the UNFCCC. However, the period of in excess of three years between the report of the UNHCHR to the HRC and the appointment of Professor Knox as an independent expert is not encouraging in this respect. It indicates that no greater sense of urgency is emanating from the international institutions whose role is to promote respect for human rights.

It may be concluded that the work on linking the effects of climate change to human rights obligations is useful and constructive. It is unlikely, however, to prove a silver bullet to ease the political obstruction that has so far slowed down or prevented effective responses to the threat of climate change.

Afterword: Some Lateral Thinking

In a 2011 essay, Burns H Weston and David Bollier sought to set out a conceptual pathway ahead in respect of the objective of halting on-going destruction of the environment, including climate change. The pathway seeks to combine human rights theory with new ways of governance.

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71 For a recent example, see http://www.irrawaddy.org/archives/42771 (accessed 27 August 2013)
The authors urge, after a survey of the existing state of a developing human right to a clean environment, the infusion of intergenerational environmental rights and jurisprudence relating to the rights of nature.

The authors urge the need for a reframing of contemporary, market based economic theory where value is measured by its price in the market. At the same time, the authors urge, at least as a partial alternative to contemporary, state/market international governance, a form of commons and rights based governance. This is expressed as analogous to the right set out in article 28 of the UDHR, namely, an entitlement to “a social and international order in which the rights set forth this Declaration can be fully realised”. The emerging right is expressed as a “human right to commons- and rights-based ecological governance”.

The bulk of the balance of the essay draws on scholarship that reframes economics, history and jurisprudence so as to challenge the market as the natural measure of value and centralised state politics as the natural form of governance. Commons governance is seen to have a long and distinguished history and to be emerging across a broad area of human activity including ecological management and forms of internet knowledge sharing. In its survey of jurisprudence, the essay places emphasis on vernacular law and public trust doctrine as well as a broadly imagined human rights jurisprudence.

Apart from its impressive scholarship, the essay offers an exciting and dramatically different way of imagining the politics of preventing climate change. For present purposes, it provides a strong indication that there are alternatives to simply trusting in existing processes to produce the urgent changes needed to combat the threat constituted by climate change. Continuing to press the HRC; treaty committees and other UN institutions to produce an effective and workable human right to a clean environment is one alternative to just relying on the processes of the UNFCCC.

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75 Op. cit. footnote 74, page 26
76 Op. cit. footnote 74, page 31
77 Professor Boudreau also, in his article in this journal, drew attention to the importance of the international law of the commons to conceptualising ways to approach the prevention of climate change: (2012) J. Juris. 285 at 338.
78 Op. cit. footnote 6
79 Op. cit. footnote 74, page 47
80 Op. cit. footnote 74, page 82: “the instinct to establish commons may be a deeply rooted aspect of humanity”.
81 Op. cit. footnote 74, page 101
82 Op. cit. footnote 74, page 139
83 Op. cit. footnote 74, page 146
Existing processes, both human rights based and through the UNFCCC, need to be pursued with vigour.

However, the deficiencies of the existing system also need to be challenged by challenging the values and assumptions that contribute to those deficiencies. That requires scholarship and imagination across a range of disciplines.

Professor Weston and Mr. Bollier point the way to how such challenges can be mounted.