VI. Coda

We hope we have sketched a persuasive vision for commons- and rights-based ecological governance, one that can at least begin to get us beyond the impasse that conventional political and economic thinking have imposed. More to the point, we hope we have outlined a *practical pathway* for moving forward, one that addresses ecological (and social) problems in an integrated and effective way and thus responds realistically to the mounting calls for a paradigm shift that can help save our planet and life upon it.

Still, it remains unclear how exactly this vision might be made real. How might we begin to migrate from "here" to "there"? It may appear optimistic or naïve to expect that the State, already deeply indentured to the neoliberal Market order, would wish to help establish and maintain commons, let alone a vibrant Commons sector. Why would the guardians of the current State/Market wish to dismantle or modify the current system?

The answer is: they don't. But as the folk wisdom says: "Nature always bats last." Systems of governance that can no longer deliver on their cherished mythologies and flout Nature's order have been known to disappear. At a certain point—sooner than later, we fervently hope—the merits of embracing the positive, constructive agenda of the Commons will be seen as more attractive than desperate attempts to salvage a profoundly flawed paradigm. The dysfunctionalities of existing systems of government and law cannot be denied, repressed, or finessed forever.

In the face of a global political economy that refuses to curb its material appetites and admit the reality of biophysical limits, it is no exaggeration to say that the fight for a new ecological governance system is tantamount to a fight for human survival. It comes as no surprise, therefore, that with ecosystems collapsing and economic woes deepening, public demands for systemic change will intensify. Even now, governments and international bodies realize that their future legitimacy will depend upon effective governance, social fairness, and popular trust, all of which are now in short supply.

It might be claimed that commons- and rights-based ecological governance is a utopian enterprise. But the reality is that it is the neoliberal project of ever-expanding consumption on a universal global scale that is the utopian, totalistic dream. It manifestly cannot fulfill its mythological vision of human progress through ubiquitous market activity. It simply demands more than Nature can deliver, and it inflicts too much social inequity and disruption in the process. The first step toward ecological sanity requires that we recognize our myriad ecological crises as symptoms of an unsustainable cultural, socioeconomic, and political worldview.

Our first aspiration, then, is that this essay may provoke a focused dialogue on the merits of a commons- and rights-based framework of ecological governance and the virtues of re-imagining the role of the State and Market as part of a new State/Market/Commons triarchy. We are especially interested in joining a dialogue with potential partners, whether

they be individual commoners, non-governmental organizations, governments, academies, faith-based institutions, or foundations. We have established the Commons Law Project for this very purpose: to help continue the needed dialogue and deliberation, to marshal resources, and to advance creative policy thinking and activism about the Commons, ecological survival, and human rights.

Shifting paradigms is never easy, especially when it implicates the many everyday elements of people's lives. In the course of human history, it is unlikely that *any* society, let alone all of humanity, has been forced to face as many complex, transformational challenges, in such a foreshortened period of time, as we do today. The shift to ecological wellness will entail epochal shifts in law, business practices, personal lifestyles, cultural attitudes, and, of course, worldviews about nature and humanity and governance institutions.

The way forward, therefore, must be "polychromatic," with multiple, eclectic nodes of transformational change. It will not be a centrally coordinated and implemented process, but one that is driven by countless players around the world, and in different resource domains, with different cultural perspectives. State Law must surely play a significant role in this transition and at all levels from local to global. The social change needed will require also active forms of Vernacular Law, working in tandem with supportive State Law whenever possible.

But in truth, though formal and informal legal arrangements created specifically to promote and protect the environment are indispensable components of a comprehensive strategy for the realization of commons- and rights-based ecological governance and the regeneration of the right to environment within it, they are by no means the only components—indeed, not even the most effective or important in many instances. As several times previously noted, the actualization of our vision for effective and just ecological governance will require broad and deep social change, and for this is needed far more than legal institutions and procedures. The road ahead will be not unlike the 19th Century struggle to abolish slavery and render it illegal, against the full weight of similarly twisted, powerfully contentious moral and economic worldviews. Abolitionist William Lloyd Garrison spoke of the necessity of dismantling the "higher than the Alps" ethical establishment of his day "brick by brick, and foot by foot, till it is reduced so low that it may be overturned without burying the nation in its ruins."[632] We must do the same with the present-day State/Market ideology that doggedly resists constraints upon the unfettered use of private property; and for this we must invoke all manner of non-violent strategy, extra-legal and quasi-legal as well as legal, including the active engagement of all manner of civil society everywhere.

Discounting revolutionary and other tumultuous times, history has shown that political cultures will absorb a new set of values and practices if they are allowed to engage in a cycle of peaceful activism structured to fulfill their high aspirations. Enacting a few laws is not enough; the entire gamut of what legal and political science scholars call policy- and decision-making functions must be put into play if, over time, a society is going to succeed at metabolizing the new worldview and ethos. Here, based on previous transformations in

[632] WILLIAM LLOYD GARRISON 54 (George M. Frederickson ed., 1968) *quoted in* RODERICK FRAZIER NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS 212 (1989).

societal values, we outline a multifaceted typology of seven of these functions that modern society must undergo if it is to realize new forms of commons- and rights-based ecological governance—and in so doing, regenerate the human right to a clean and healthy environment. We do not presume that our catalogue reflects an always-precise, exclusive fit; it is intended, rather, to be heuristic, suggestive, *not* definitive— and a tool for plotting a course forward.

First there must be the means for ***information-retrieval and dissemination,*** so that research into Commons and State/Market ecological governance can be done. We must initiate and strengthen research methodologies (case studies, correlation studies, experimental studies, prototypes, etc.) and develop monitoring and surveillance systems that can assess the performance of different systems of ecological governance. There must also be curricular initiatives (from K-12 to college-level course to adult education), new mass-media programming and new sources of scientific and technical information made available to ecological commons.

Second, ***the means to promote and advocate*** commons- and rights-based ecological governance at all levels must be developed. These capacities certainly must be cultivated in the emerging Commons sector and in human rights and environmental advocacy circles. But they must also include new administrative, financial, and logistical support within such bodies as the U.N., U.N. Environment Programme, the International Labor Organization, the International Monetary Fund, the World Bank, the Office for the High Commissioner for Human Rights (OHCHR), the free trade agreements (FTAs), regional human rights systems and other relevant inter-governmental organizations (IGOs). There must be new forms of collaboration between the State and commons, nongovernmental organizations, and civil society actors, including private-sector lobbies. And the State itself must provide commoners with platforms and opportunities to learn from each other and to participate in State policy-making that affects their interests

A third function that must be addressed: ***prescriptive initiatives*** that identify and mandate life-sustaining natural resources and ecosystems as commons. State institutions, both national and international, must assist in the effective and humane management of such commons through regulations, legislation, and agreements, and through corporate and industry codes of cooperative conduct. In particular, they must support initiatives to establish a recognized human right to commons/rights-based ecological governance, and help to define or determine the precise meaning and intent of this right. More broadly, they must support all human and environmental rights prescriptions that support commons.

The ***ability to invoke the law*** to protect ecological commons is vital. Thus a fourth function entails the initiation, strengthening, and expansion of complaint procedures (including shareholder and tort actions) that can protect commons/rights-based ecological governance. NGOs must be competent to monitor the implementation of commons/rights-based principles and to challenge perceived violations. Commons and commoners must be able to access justice institutions to redress perceived State or Market violations of their rights.

The will to apply and enforce the law is a fifth function that is critical to the new paradigm of ecological governance. The State must ratify and enforce international law-

making instruments directed at establishing and protecting ecological commons and commons/rights-based ecological governance projects and systems. This requires new, strengthened, and/or expanded law enforcement mechanisms and procedures. Economic strategies should be fostered, such as consumer boycotts, economic embargoes, and trade sanctions in support of commons/rights-based ecological governance projects and systems.

The ***termination of regressive public policies and laws*** is a sixth important function. Thus, legal systems that impede the establishment or effective operation of commons/rights-based ecological governance should be repealed. Private contractual and other arrangements that interfere with commons/rights-based ecological governance should be intercepted and cancelled.

Finally, seventh function that must be developed are systems for ***appraisal and recommendation of Commons policies***. Managements must be capable of comparing the short- and long-term effectiveness of Commons versus State/Market governance in protecting natural resources and ecosystems. The means for reforming misguided or unsuccessful practices must be available, along with the ability to make concrete recommendations for enhanced performance. In the new triarchical governance of State, Market, and Commons, those people who need to understand the theory and practice of commons in general (ecological or otherwise)—e.g., families, teachers, legal and public health specialists, environmental and human rights experts, corporate and labor personnel, governmental and intergovernmental officials, and others—must be provided the means for education and training about commons- and rights-based ecological governance. At the broadest, transformational level, however, strategies must be developed—for households, workplaces, public media, and other venues—to transform the myths and values that shape how people think and act relative to the natural environment, and toward those who seek to protect and enhance it (ecological commoners, for example). We need new types of broad and deep education to promote stewardship of Nature rather than simply economic and technological mastery of it.

In sum, a strategy worthy of commons/rights-based ecological governance requires the instigation of a multitude of mechanisms and techniques—from systematic research and documentation, to education and schooling, to domestic legislative programs, to national and international enforcement measures, to long-term initiatives of social transformation—and on all fronts at all levels, from the most local to the most global. It also must engage all elements of society (individuals, families, communities, academic institutions, trade unions, business enterprises, faith-based groups, non-governmental organizations and associations, government agencies, intergovernmental organizations). Perhaps most importantly, it must always proceed self-consciously and proactively, and with imagination and energy, if the rights that attend ecological well-being are to be secured.

Human rights have been a persistent theme throughout this essay, and for good reason. They provide a strategic pathway to the regeneration of the right to environment in the Commons renaissance and an indispensible element in the governance of any one commons. Also, human rights have a deep and powerful role to play in advancing a new, more integrated vision of ecological stewardship, sustainable economics, and commons-based governance. We made these critical points in Section III.C, above. Shifting the ecological governance paradigm via human rights, we argued, unleashes the power to assert

maximum claims on society and valorizes environmental well-being as indispensible to human dignity. It challenges statist and elitist agendas, and carries with it a sense of legal and political entitlement on the part of the rights-holder and duties of implementation on the part of the rights-protector. The commons paradigm itself has deep roots in human rights as a body of legal and moral advocacy—while also bringing forward additional advantages: a venerable body of historical law, a distinct analytic and popular discourse, and a rich inventory of functional models. We believe this is an attractive framework for re-imagining the world and thereby addressing myriad ecological challenges more effectively.

Invariably, however, there will be skeptics and naysayers who question the credibility not only of the vision we have outlined, but, as well, the rights-based strategy we advocate. However manifest the virtues of a human rights approach to the matter of ecological governance, conceptual barriers and psycho-social resistance not infrequently thwart human rights agendas—testimony, of course, to the potential of human rights law and policy in the first place.

Five arguments against invoking human rights are conspicuous: the claimed immutability of state sovereignty, the claimed sanctity of corporate sovereignty, the claimed irrelevance of public international law to private actors, the claimed indeterminacy of human rights, and the claimed absence of human rights theory. In our highly interdependent and interpenetrating world, it is hard to take the first three of these claims seriously, especially when applied to the global environment. They therefore need not be contested here.[633] The last two, however, are less obviously fallacious and thus merit at least brief rebuttal.

Rebutting the Claimed Indeterminacy of Human Rights

Some scholars criticize the language of human rights as lacking conceptual clarity, noting that there are conflicting schools of thought as to what constitutes a right and how to define human rights.[634] For this reason, they claim the concept to be Aindeterminate@ and therefore distrust its capacity to address Areal world@ social ills effectively or at all.[635] They observe that there are many unresolved theoretical questions about rights: Awhether the individual is the only bearer of rights@ (in contradistinction to such entities as families; groups of common ethnicity, religion, or language; communities; and nations); Awhether rights are to be regarded as . . . constraints on goal-seeking action or as parts of a goal that is

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633 *But see* Burns H Weston & Mark B. Teerink, *Rethinking Child Labor: A Multifaceted Human Rights Problem*, *in* CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 3, 12-15 (Burns H. Weston ed., 2005), where these claims are contested at some length (albeit, obviously, in the context of combating child labor).

634 For an insightful account, with discussion of other views, see ALAN GEWIRTH, THE COMMUNITY OF RIGHTS (1996).

635 The concept of indeterminacy has been much discussed in several modern approaches to language and literature, contending that the meaning of a text never can be fully determined because its author=s original intention is subject to the unfixed nature of the author=s makeup and experience, because it is the consequence of the particular cultural and social background of the reader, and because language itself generates its own meaning over time. This contention, Michael Freeman points out, is prominent particularly when it comes to concepts such as Ahuman rights@Cabstract, oftentimes ambiguous, and therefore Aa challenge@ to the philosophical discipline of conceptual analysis, which Acan seem remote from the experiences of human beings.@ FREEMAN, *supra* note 311, at 2.

to be promoted@; Awhether rightsCthought of as justified entitlementsCare correlated with duties@; and, not least, Awhat rights are understood to be rights to.@[636] A certain level of well-being? A certain access to certain resources in one=s life pursuit? A certain quality of opportunity in that pursuit? The relatively recent debate over AAsian values@ and its underlying tension between cultural relativist and universalist approaches to human rights make clear that all this questioning is no idle intellectual chatter.[637] It is very much present in the political arena as well, and thus serves as a possible explanation for resistance to a rights-base approach to ecological governance.

The claimed indeterminacy of Ahuman rights,@ however, is less problematic than sometimes perceived. The core of the human rights concept is as well defined and clearly articulated as any social or legal norm, a fact proven by the numerous widely accepted human rights norms increasingly enforced.[638] Moreover, even conceding that unresolved theoretical issues relating to human rights remain, this fact does not of itself detract from the broadest and most effective actualization of the fundamental principles and values on which there is virtually universal agreement—for example, the human right to a clean and healthy environment.

Thus, while the concept or language of rights, like most legal language, sometimes suffers ambiguity, it is not to be discarded in the struggle for a clean and healthy environment simply for this reason. Rather, as with any human—incomplete and imperfect—system, one must make use of those elements that are established and effective while working to improve and clarify those that remain vague or incomplete, just as we do all other legal norms as a matter of course all the time.

Rebutting the Claimed Absence of Human Rights Theory

Perhaps the most confounding of the alleged unresolved theoretical issues about human rights is the claimed absence of a theory to justify human rights in the first place.[639] In the presence of ongoing philosophical and political controversy about the existence, nature, and application of human rights in a multicultured world, a world in which Christian natural law justifications for human rights are now widely deemed suspect or obsolete, one must exercise caution when adopting a human rights approach to social policy lest one be accused of cultural imperialism. It is not enough to say, argues Michael Freeman, that human beings possess human rights simply for being human, as does, for example, the 1993

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636 Martha C. Nussbaum, *Capabilities, Human Rights, and the Universal Declaration, in* WESTON & MARKS 25, 26-27, *supra* note 317.

637 On cultural relativism versus universalism in human rights law and policy, see Burns H. Weston, *The Universality of Human Rights in a Multicultured World: Toward Respectful Decision-Making, in* WESTON & MARKS, *supra* note 317, at 65; _____, *Human Rights and Nation-Building in Cross-Cultural Settings*, 60 ME. L. REV.1 (2008).

638 *See, e.g.,* Burns H. Weston, *Human Rights*, ENCYCLOPÆDIA BRITANNICA (15th ed., 2005 printing), *available at* Britannica Online Encyclopædia, http://www.britannica.com/EBchecked/topic/275840/human-rights (accessed June 1, 2011).

639 The late philosopher Richard Rorty, for one, contended that there is no theoretical basis for human rights on the grounds that there is no theoretical basis for any belief. *See* Richard Rorty, *Human Rights, Rationality, and Sentimentality, in* ON HUMAN RIGHTS 116, 126 (Stephen Shute & Susan Hurley.eds., 1993)

Vienna Declaration and Programme of Action, which proclaims that A[h]uman rights and fundamental freedoms are the birthright of all human beings.@[640] Writes Freeman: AIt is not clear why one has *any* rights simply because one is a human being.@[641]

We do not disagree. But neither do we accept that there exists no theory to justify human rights in our secular times, ergo no theory to justify a human rights approach to the environment and its governance. The concept of human rights is or can be firmly established on sound theoretical grounds.

First, there is the proposition, formally proclaimed in both the 1948 Universal Declaration of Human Rights and the yet more widely adopted—and revalidating—1993 Vienna Declaration, that human rights derive from "the inherent dignity . . . of all members of the human family"[642] or, alternatively, from Athe dignity and worth inherent in the human person.@[643] While this proposition informs us little more than the assertion that human rights extend to human beings simply for being human, it does point the way. Unless one subscribes to nihilism, it is the human being's inherent dignity and worth that justifies human rights. Of course, the obvious question remains: how does one determine the human being's inherent dignity and worth?

Noteworthy in this regard is the work of Martha Nussbaum and Amartya Sen on Acapabilities and human functioning.@ In their search for a theory that answers at least some of the questions raised by rights talk, they have pioneered the language of Ahuman capabilities@ as a way to speak about, and act upon, what fundamentally is required to be human—Alife,@ Abodily health,@ Abodily integrity,@ Asenses, imagination, and thought,@ Aemotions,@ Aaffiliation@ (Afriendship@ and Arespect@), Aother species,@ Aplay,@ and, not least, Acontrol over one=s environment@ (Apolitical@ and Amaterial@).[644] While Nussbaum and Sen do not reject the concept of human rights as such[645]—indeed, they see it working hand in hand with their concept of capabilities, jointly signaling the central goals of

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[640] *Vienna Declaration and Programme of Action of the World Conference on Human Rights*, U.N. Doc. A/Conf.157/24. At20-46 (June 5, 1993), *reprinted in* 32 ILM 1661 (1993) and 3 BASIC DOCUMENTS III.U.2, *supra* note 9 [hereinafter AVienna Declaration@].

[641] FREEMAN, *supra* note 311, at 60-61 (emphasis in original).

[642] UDHR, *supra* note 151, at prmbl., para. 1.

[643] Vienna Declaration and Programme of Action, prmbl., para. 2., June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) (Oct. 13, 1993), at 20-46; *reprinted in* 32 I.L.M.1661(!993) and 3 BASIC DOCUMENTS, *supra* note 13, at III.V.2.

[644] *See* Nussbaum, *supra* note 636. *See also* Amartya K. Sen, *Equality of What?* (Stanford University, Tanner Lectures on Human Values, 1979). For another early advocacy of a capabilities approach to human rights, see Bernard Williams, *The Standard of Living: Interests and Capabilities, in* AMARTYA K SEN, THE STANDARD OF LIVING 94 (Tanner Lectures on Human Values, Geoffrey Hawthorn ed., 1989). *See also* THE QUALITY OF LIFE (Martha Nussbaum & Amartya K. Sen eds., 1993).

[645] In her essay linking the capabilities approach with the 1948 UDHR, Nussbaum acknowledges that the language of rights retains an important place in public discourse, providing a normative basis for discussion, emphasizing the importance and basic role of the entitlements in question and people=s choice and autonomy, and establishing the parameters of basic agreement. *See* Nussbaum, *supra* note 636, at 59.

public policy—they propose emphasis on human capabilities as the theoretical means by which to restore Athe obligation of result@ and thereby move the discussion from the abstract to the concrete without having to rely on controversial transempirical metaphysics to cut across human differences.[646]

A theory of human rights can be found, we believe, in the idea of necessity driven by enlightened self-interest. A just society, whether operating across space or time or both, and which presumably all but the most miscreant want, requires rights as a matter of necessity to guarantee its possibility. And to ensure its probability (or "compliance pull"), it must be defined by values freely and equally chosen by its members in rational contemplation of the self-interest—*their* self-interest—that inheres in mutually tolerant and reciprocally forbearing attitudes and behaviors. But in the "nasty, brutish, and short" Hobbesian world in which most humans believe they live, enlightened self-interest can greatly motivate respect for others. It is, indeed, sufficient in this regard, for this is the lesson that many evolutionary scientists are coming to embrace—that "our ability to cooperate goes hand in hand with succeeding in the struggle to survive . . .," as Martin Nowak puts it.[647] Darwinian competition notwithstanding, we are more likely to survive and thrive if we honor the values that underwrite human rights law and policy in its most inclusive aspect. What goes around comes around, as they say, and a public order of human dignity marked by the widest possible shaping and sharing of basic human rights, without discriminations irrelevant to merit, is a society more likely to flourish—or, more to the point given our present circumstances, survive.

One further justificatory note. Such a society can be validated by intellectual constructs in an imagined Lockean "initial position"—as in the Rawlsian "veil of ignorance" construct, for example, akin to Immanuel Kant=s Acategorical imperative.@[648] But we believe a preferable, more straight-forward approach would be simply to postulate a just society as an empirically measurable, verifiable preference in the here and now—i.e., *sans* contrivance—when it is inclusively determined in the inclusive interest.

In any event, however enunciated or substantiated, the necessity idea comes down to a kind of share-and-share-alike Golden Rule, as intimated above, anchored in respect and driven by self-interest as well as empathetic altruism by all humans, present and future, to satisfy the fundamental requirements of socioeconomic and political justice—the minimum conditions of what it means to be human, the minimum conditions for a life of human

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[646] This line of theoretical argument, interestingly, parallels the very reason why the Commons is empowering in contemporary times: it enables individuals, as members of communities, to participate in the fulfillment of their own, most fundamental human needs and capabilities, at a time in history when a Leviathan State/Market has arrogated such functions to itself, often to the detriment of commoners. This is not to say that the modern Market and State do not need to play important (but different) roles; it is to say that human existence and the Commons are more intimately bound up with each other as a matter of historical experience, and that re-validating the Commons is more likely to empower basic human capabilities and human functioning, if not grander, more elevated human aspirations as well.

[647] MARTIN A. NOWAK (WITH ROGER HIGHFIELD), SUPER COOPERATORS: ALTRUISM, EVOLUTION AND WHY WE NEED EACH OTHER TO SUCCEED xvi (2011).

[648] *See* JOHN RAWLS, A THEORY OF JUSTICE §§ 1-4,9. 11-17, 20-30,33-35, 39-40 (1971).

dignity in a clean, healthy, ecologically balanced, and sustainable environment. In the words of former U.N. High Commissioner for Human Rights Louise Arbour, A[h]uman rights are not a utopian ideal. They embody an international consensus on the minimum conditions for a life of dignity.@[649]

On final analysis, then, there is no good theoretical reason why a human rights strategy should not be pursued and, as we have seen, many good theoretical reasons why it should. There remains, to be sure, the haunting question of whether the present world order has the political will to attend to the important work of enacting and enforcing laws and policies that can help save Planet Earth. But that key issue is one of moral and political choice; and that choice is, to us, obvious. When joined to the struggle against contaminating, degrading, and otherwise abusive treatment of the natural environment, human rights can be a uniquely powerful tool in achieving as well as informing ecological governance in the common interest.

We come, then, to the end—and the beginning. If we are truly going to regenerate the human right to a clean, healthy, ecologically balanced, and sustainable environment, we must gird ourselves for the ambitious task of imagining alternative futures; mobilizing new energies and commitments; deconstructing archaic institutions while building new ones; devising new public policies and legal mechanisms; cultivating new understandings of human rights, economics, and commons; and, perhaps most daunting of all, reconsidering some deeply rooted prejudices about governance and human nature. An appropriate beginning is to (1) endorse Bolivia's Nature's Rights initiative at the United Nations; (2) press for an equivalent initiative recognizing the ecological rights of future generations; (3) press for a U.N. Security Council or General Assembly resolution declaring the atmosphere a global commons; and (4) press for a U.N. General Assembly resolution declaring the procedural human right of everyone to commons- and rights-based ecological governance. But time is short. We cannot delay. Seamus Heaney says it just right:

> Two sides to every question, yes, yes, yes . . .
> But every now and then, just weighing in
> Is what it must come down to . . .[650]

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[649] Statement by Ms. Louise Arbour, High Commissioner for Human Rights, to the Open-Ended Working Group Established by the Commssion on Human Rights to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights, Jan. 14, 2005, http://www.unhchr.ch/huricane/huricane.nsf/newsroom (accessed Aug. 31, 2011).

[650] *Weighing In*, *in* SEAMUS HEANEY, THE SPIRIT LEVEL 22–23 (1996).