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Critical Legal Issues: WORKING PAPER SERIES

THE MOUSE ROARS!
RHODE ISLAND HIGH COURT REJECTS EXPANSION OF PUBLIC NUISANCE

By
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TABLE OF CONTENTS

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On July 1, 2008, the Supreme Court of the nation's smallest state, Rhode Island, gave a loud and mighty roar as it rejected the use of public nuisance law as a means to sue manufacturers of lawful products. In so ruling, the Court conforms to the traditional role of judges presiding over common law controversies, and joined a growing list of other state supreme courts that have refused to enlarge the boundaries of this ancient tort.

I. BACKGROUND

Over the past twenty years, creative plaintiffs' counsel have sued product manufacturers under expansive "public nuisance" theories. They sought to recover monies spent to administer public health care programs and/or to abate health hazards and social problems allegedly caused by a wide range of products, including asbestos, guns, tobacco, lead paint and, most recently, fossil fuels that produce greenhouse gases and even subprime mortgages. All of these products

were lawfully placed into the stream of commerce or legally released into the environment through administrative permits.[1]

The most active litigation in this area over the past decade has involved lead paint. In such suits, public authorities argue that manufacturers of paint products sold many decades ago should be held liable for the acts of current property owners who negligently allow paint to deteriorate and become a health hazard. They argue that past marketing and selling of products provide a sufficient nexus to impose liability because it was "foreseeable" that future property owners would negligently fail to maintain the paint surface. In their eyes, the creation of the product was tantamount to the creation of the nuisance.

Rhode Island, where childhood lead poisoning has been a serious health issue for years, has been the epicenter of lead litigation. The state's Attorney General hired contingent fee plaintiffs' attorneys in 1999 to sue former manufacturers of lead pigment on the grounds that they, or their predecessors in interest, manufactured, promoted and sold lead for use in residential paints. Although the first trial ended with a hung jury, the case was retried three years ago on an expansive theory of "public nuisance." The plaintiff claimed that the "cumulative presence" of lead pigment in paints and coatings throughout Rhode Island was a "public nuisance" created and caused by manufacturers.

[1] *See* Richard O. Faulk and John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941 (2007).

In February 2006, a Rhode Island jury found three of the four companies liable for creating a "public nuisance."[2] A year later, the trial justice upheld the jury's liability verdict when he denied the defendant's motions for a judgment in their favor or alternatively a new trial. Through his jury instructions and post-verdict decision, the justice held that merely *manufacturing and marketing* a product is sufficient to impose liability on a defendant – even in the absence of product identification and any evidence of specific injuries attributable to a particular defendant.

This Rhode Island case has been in the national spotlight for the past three years for several reasons. First, the adverse judgment was the first time lead pigment manufacturers were found liable for problems allegedly caused by poorly maintained lead-based paint in privately-owned homes. Second, the alleged nuisance involved the entire state of Rhode Island, and commentators speculated that the requisite abatement would cost the defendants billions of dollars. Finally, the judgment represented the first time in common law history that a court allowed liability to be based upon *unidentified* ills allegedly suffered by *unidentified* people caused by *unidentified* products in *unidentified* locations. With these developments, Rhode Island product liability law was swallowed up by the amorphous concept of "public nuisance."

[2] *See generally*, Richard O. Faulk & John S. Gray, *The Mouse that Roared?: Novel Public Nuisance Theory Runs Amok in Rhode Island*, WASH. L. FOUND. (Mar. 2007) (Critical Legal Issues: Working Paper Series No. 146) (discussing the Rhode Island jury trial).

The defendants appealed and oral arguments were heard this past May by Rhode Island's Supreme Court. On July 1, 2008, in a unanimous opinion, the Court overturned the trial court's decision, holding after almost a decade of litigation that the trial justice erred in failing to dismiss the case at its outset. In its opinion, it unabashedly declared that the "state has not and cannot allege any set of facts to ... establish that defendants interfered with a public right or that defendants were in control of the lead pigment they, or their predecessors, manufactured *at the time* it caused harm to Rhode Island children."[3] While the court expressed its concern for children affected by "the poisonous presence of lead," it solemnly stated that "however grave the problem of lead poisoning is in Rhode Island, public nuisance law simply does not provide a remedy for this harm."[4]

Rhode Island was not the first state Supreme Court to reject the use of public nuisance claims against lead pigment manufacturers. Other states have either (i) deferred to comprehensive legislative initiatives designed to deal with the problem and declined to allow "end runs" around the legislative branch of government, or (ii) have rejected the use of "market share" liability to avoid the

[3]*Rhode Island v. Lead Indus. Assoc.*, --- A.2d ----, 2008 WL 2605396, *2 (R.I. July 1, 2008) (emphasis in original).

[4]*Id*.

requirement that plaintiffs identify the manufacturer of any lead paint or pigment found in the affected properties.[5]

Although Rhode Island's Supreme Court could have easily followed this reasoning without elaboration, the court instead derived its decision solely on its jurisprudential role as a common law court. At its essence, the court's decision finds that the expansive remedy plaintiffs sought was simply too drastic a departure from traditional common law. Applying the traditional reasoning of common law courts, and basing its decision on established – rather than expanded – Rhode Island common law, the court held that the state was unable to meet the essential elements of the tort of public nuisance. In particular, the state failed to establish that the defendant controlled the nuisance in the affected properties at the time children were harmed. Equally important, the state was unable to demonstrate that the alleged harm – childhood lead poisoning in private homes – constituted an interference with a "public right."

II. THE COMMON LAW DOES NOT EVOLVE UNPREDICTABLY AND EXPANSIVELY BY CREATING NEW CAUSES OF ACTION

The Rhode Island Supreme Court's decision is firmly grounded on its jurisprudential perspective. It took care to recognize its role as a "common law" court presiding over a claim that required a significant expansion of traditional

[5] *See* Richard O. Faulk & John S. Gray, *Judges Impose Reality Check on Public Nuisance Litigation*, 22 WASH. L. FOUND. 28 (July 27, 2007) (discussing *City of St. Louis v. Benjamin Moore & Co*, No. SC88230, 2007 WL 1693582 (Mo. June 12, 2007) (per curiam) and *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007)).

principles. Although innovation and creativity certainly have their place in the common law tradition, great changes – especially those which transform well-established causes of action – are justifiably rare. Judicial lawmaking typically involves "molecular motions," not revolutionary declarations.[6] Using this reasoning, the Rhode Island Court properly recognized that the wholesale transformation of "public nuisance" concepts to authorize a massive public health and environmental bureaucracy – answerable only to a single judge – required more rumination and digestion than the judiciary alone could prudently provide.

The Court recalled that, in the past, it certainly took "careful steps to refine the common law definition of public nuisance to reflect societal changes,"[7] but also acknowledged that those refinements were not sweeping changes. Instead, they arose from decisions that required the common law to be a "knowable judicial corpus" that "serves the important social value of stability."[8] Although "the common law does evolve," the Court stressed that the evolution takes place "gradually and incrementally and usually in a direction that can be predicted."[9] By emphasizing these principles, the Court reflected a concern that imposing potentially enormous, unanticipated, and effectively retroactive liability was

[6]*See Southern Pacific Co. v. Jensen*, 244 U.S. 205, 201 (1917) (per Holmes, J.) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions"). *See also,* Benjamin Cardozo, *The Nature of the Judicial Process* 113 (1921) (stating that courts make law only within the "gaps" and "open spaces of the law"). Neither Holmes nor Cardozo can be cited to support deliberate, large-scale reversals of doctrine in the name of public policy.

[7]*Rhode Island v. Lead Indus. Assoc.*, 2008 WL at * 12.

[8]*Id.* at *12.

[9]*Id.*

inconsistent with notions of constitutional fundamental fairness and due process – themes that were a prominent part of the defendants' briefing. Given these concerns, the Court was "particularly loath to indulge in the abrupt abandonment of settled principles and distinctions that have been carefully developed over the years."[10]

Rhode Island's Attorney General asked the Court to expand the scope of the concept of "public right" to encompass health hazards found in private dwellings – health hazards that did not exist when the product was sold or originally applied, but rather arose from neglect by third-party private landowners. This novel argument, which asserted that a "public nuisance" can exist in a *private* home, was rejected by the Court, which recognized that "[t]he term public right is reserved more appropriately for those indivisible resources shared by the public at large, such as air, water, or public rights of way."[11] According to the Court, expanding this definition,

> would be antithetical to the common law and would lead to a widespread expansion of public nuisance law that never was intended ... In declining to adopt such a widespread expansion of the law, we are mindful of the words of Edmund Burke that "bad laws are the worst sort of tyranny." ... The enormous leap that the state urges us to take is wholly inconsistent with the widely recognized principle that the evolution of the common law should occur gradually, predictably and incrementally. Were we to hold otherwise, we would change the meaning of public right to

[10]*Id.* (citing John T. Loughran, *Some Reflections on the Role of Judicial Precedent,* 22 FORDHAM L. REV. 1, 8 (1953)).

[11]*Id.* at *21 (citing *Chicago v. American Cyanamid Co.,* 823 N.E.2d 126, 139 (Ill.App.Ct.2005)).

> encompass all behavior that causes a widespread interference with the private rights of numerous individuals.[12]

The Court agreed with New Jersey's Supreme Court that such an expansion "would stretch the concept of public nuisance far beyond recognition and would create a new and extremely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance."[13] The Rhode Island Court noted that principles of judicial restraint

> prevent [courts] from creating a cause of action for damages in all but the most extreme circumstances[, and that generally] ... the creation of new causes of action is a legislative function. After all, the judiciary's "duty [is] to determine the law, not to make the law." To do otherwise, even if based on sound public policy and the best of intentions, would be to substitute our will for that of a body democratically elected by citizens of this state and to overplay our proper role in the theatre of Rhode Island government.[14]

These rulings demonstrate the Court's deep concern for the proper role of the judiciary – especially in areas where the legislature has already acted. In 1991 and during the pendency of the case in 2002 – Rhode Island's General Assembly enacted comprehensive legislation to address and remedy the state's childhood lead poisoning problem. The General Assembly "did not include an authorization of an action for public nuisance against manufacturers of lead pigments," which would have legislatively modified the common law of public nuisance – at least

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[12] *Id*. (citing in part, 1 Edmund Burke, The Works of Edmund Burke: With a Memoir, 318 (1860)).

[13] *Id*. (citing *In re Lead Paint Litig.*, 924 A.2d at 494).

[14] *Id*. at *3 (internal citations omitted).

with respect to the elements of control and public right.[15] Instead, the statutory remedies provided by the state's legislature focused on property owners, the parties in control of the lead pigment at the time it caused harm – in accord with the existing law of public nuisance "in this state and all other jurisdictions."[16]

Informed by these statutes, the Court concluded that the General Assembly, like the New Jersey legislature, did not intend to allow the problem to be simultaneously redressed by a "common law" program that, according to the jury instructions here, defined "public nuisance" in a vastly different manner than the traditional tort codified in the statutes. By making such a statement, the General Assembly made a policy choice to define public nuisance as a problem created by property owner neglect, as opposed to "approved use" of lead-containing paints. Moreover, the General Assembly's explicit "finding" that lead poisoning is the result of "approved use" of such products directly contradicts the contention that the manufacturers are responsible in tort. In a real sense, the General Assembly's legislative "codification" of public nuisance was the best evidence of how it envisions the tort should be applied at common law. Following common law tradition, the Court properly considered the entire legal environment surrounding this issue.

[15] *Id.* at *25 (referring to Lead Poisoning Prevention Act, R.I. GEN. LAWS § 23-24.6 (1991) and Lead Hazard Mitigation Act, R.I. GEN. LAWS § 42-128.1).

[16] *Id.*

III. SELLING GOODS DOES NOT CONSTITUTE A PUBLIC NUISANCE AS THAT TERM HAS BEEN UNDERSTOOD FOR CENTURIES IN ANGLO-AMERICAN LAW

After establishing its jurisprudential perspective, Rhode Island's Supreme Court focused on a single issue:

> Whether the trial court erred when it refused to dismiss the Amended Complaint and to grant judgment in favor of defendant on the ground that historic suppliers of lead pigments are not liable in public nuisance for claims of harm or risk of harm predicated on the existence of lead pigments in paints applied to Rhode Island buildings.

The Court began by reviewing the history of public nuisance at common law,[17] and as it developed in Rhode Island.[18] It recognized "three principle elements" essential to establishing a cognizable public nuisance claim:

> (1) an unreasonable interference;
>
> (2) with a right common to the general public;
>
> (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred."[19]

[17] *Id.* at *10-*11. The Court relied heavily on two scholarly articles, Richard O. Faulk and John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941 (2007), and Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741 (2003).

[18] *Id.* at *11-*12.

[19] *Id.* at *13.

Additionally, the Court held that defendants must be shown to have *caused* the public nuisance.[20] Although the Court did not state that it was necessary to identify a "specific location" for the dangerous condition, it noted that a specific identifiable location was "[a] common feature of public nuisance" and that "to date, the actions for nuisance in this jurisdiction have been related to land."[21] Although other issues were discussed, the Court relied upon only two elements – control and public right – to reverse the trial court's judgment.

A. Defendants Must Control the Public Nuisance at the Time of the Injury

At the outset, the Court held that, to prevail on a public nuisance claim, plaintiffs were required to show that the "defendant [had] *control* over the instrumentality causing the alleged nuisance *at the time the damage occurs*."[22] Characterizing control as a "time-honored element of public nuisance,"[23] the Court focused on the defendants' ability to prevent the damage, and held: "They must have, minimally, controlled the nuisance at the time of the damage."[24] Quoting the Supreme Court of New Jersey with approval, the Court agreed that "a

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[20] *Id.* at *17 (emphasis added) (noting that "[c]ausation [both actual and proximate cause] is a basic requirement in any public nuisance action; such a requirement is consistent with the law of torts generally").

[21] *Id.* at *19.

[22] *Id.* at *15 (emphasis in original).

[23] *Id.* at *16.

[24] *Id.* at *17.

public nuisance, by definition, is related *to conduct performed in a location within the actor's control*, which has an adverse effect on a common right."[25] Moreover, the Court recognized that "a product manufacturer who builds and sells the product and does not control the enterprise in which the product is used is not in the situation of one who creates a nuisance[,]"[26] because "[f]urnishing a product or instrumentality – whether it be chemicals, asbestos, guns, lead paint, or other products – is not the same as having control over that instrumentality."[27]

Lead paint does not become a health hazard until it is neglected by the property owners and begins to chip and peel. The ability to prevent the condition causing the harm and to abate the condition if it arises most naturally rests with the property owner.[28] The Court agreed, stating that the:

> defendants were not in control of any lead pigment at the time lead caused harm to children in Rhode Island, making the defendants unable to abate the alleged nuisance, * * * [and] the General Assembly has recognized defendants' lack of control and inability to abate the alleged nuisance[,] because it has placed the burden on landlords and property owners to make their properties lead safe.[29]

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[25] *Id.* at *13 (quoting *In re Lead Paint Litig.*, 924 A.2d 484, 499 (N.J. 2007) (emphasis added).

[26] *Id.* at *17 (quoting 2 *American Law of Products Liability*, §27:6 at 11 (3d 2006)).

[27] *Id.* (quoting Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 568 (2006)).

[28] "The essence of public nuisance law * * * is ending the harmful conduct. This is impossible for the manufacturer or distributor who has relinquished possession by selling or otherwise distributing the product." *Id.* (quoting *Gifford*, *supra* note *17*, at 820).

[29] *Id.* at *2.

The defendants' conduct as product manufacturers or promoters did not cause the alleged harm, and the State Attorney General's complaint failed to argue "any facts that would support a conclusion that defendants were in control of the lead pigment at the time it harmed Rhode Island's children."[30]

B. Harm Occurring in a Private Home is not a "Public Right" that Triggers Public Nuisance Liability

The Court next focused on whether the State's claims actually involved a "public right." For a nuisance to be "public," it "must affect an *interest common to the general public*, rather than peculiar to one individual, or several."[31] Focusing on the limited nature of the "interest common to the general public," the Court limited that interest to a "public *right*" and defined it as "an *indivisible resource* shared by the public at large, like air, water, or public rights of way."[32] The Court distinguished a "public right" from the broad, malleable, and public policy infused term "public interest" by stating:

> That which might benefit (or harm) "the public interest" is a far broader category than that which actually violates "a public right." * * * While it is in the public interest to promote the health and well being of citizens generally, there is no common law public right to a certain standard of medical care or housing.[33]

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[30] *Id.* at *22.

[31] *Id.* at *14 (citing *Iafrate v. Ramsden*, 190 A.2d 473, 476 (1963)) (emphasis added).

[32] *Id.* at 15 (quoting *Chicago v. American Cyanamid Co.*, 823 N.E.2d at 131) (emphasis added).

[33] *Id.* (quoting *Gifford, supra* note 17, at 815).

The Court noted that unlike an interference with a public resource:

> [t]he manufacture and distribution of products rarely, if ever, causes a violation of a public right as that term has been understood in the law of public nuisance. Products generally are purchased and used by individual consumers, and any harm they cause, ... is not an actionable violation of a public right. * * * The sheer number of [individual] violations does not transform the harm from individual injury to communal injury.[34]

Based on these requirements, the State Attorney General's allegation that "[d]efendants created an environmental hazard that continues and will continue to unreasonably interfere with the health, safety, peace, comfort or convenience of the residents of the [s]tate,"[35] failed to allege an interference with a public right. Generalized allegations of interference with the "health, safety, peace, comfort or convenience" of a large segment of the community is not, by itself, an interference with a public right.[36] The common law does not allow plaintiffs to turn societal problems into public nuisances unless they involve a condition the traditional common law of public nuisance was intended to address – an indivisible public resource such as air, land or water.

The Court stated that a products liability action is the proper means of commencing a lawsuit against a manufacturer who placed an unsafe product in

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[34] *Id.* (quoting *Gifford supra* note 17, at 817).

[35] *Id.* at *20.

[36] *Id.*

the "stream of commerce."[37] Public nuisance and products liability are two distinct causes of action "with rational boundaries that are not intended to overlap."[38] The Court added:

> Public nuisance focuses on the abatement of annoying or bothersome activities. Product liability law, on the other hand, has its own well-defined structure, which is designed specifically to hold manufacturers liable for harmful products the manufacturers have caused to enter the stream of commerce.[39]

The Court strongly cautioned that "these two causes of action remain just that – two separate and distinct causes of action."[40] It foresaw that, if the Attorney General's invitation to expand the law of public nuisance was accepted, it would "open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities."[41] As a result, Rhode Island, like other high courts that have considered this issue, rejected the trial court's dramatic expansion of the public nuisance common law. Instead, it held that both the responsible judicial expansion of the common law and the properly restrained role of the judiciary in matters of broad social policy

[37] *Id.* at 23-24 (noting that a public nuisance action bears a close resemblance to a products liability action, but it is not limited by the same strict requirements)

[38] *Id.* at 24.

[39] *Id.*

[40] *Id.* at 24-25.

[41] If allowed, "[a]ll a creative mind would need to do is construct a scenario describing a known or perceived harm ... that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born." *Id.* at *25 (citing *People v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192, 196 (N.Y.App.Div.2003).

required that the time-honored distinction between public nuisance liability and product liability actions be maintained.

CONCLUSION

Although the Rhode Island Supreme Court's conclusive rejection of "public nuisance" ends lead paint litigation in that state, the controversy continues elsewhere. Similar cases based upon public nuisance are pending in California and other states, not only involving lead paint, but also climate change caused by greenhouse gas emissions, groundwater pollution resulting from leaking storage tanks and other sources, and other contexts. Courts presiding over those controversies will surely be informed by the Rhode Island Supreme Court's reasoning, but its persuasive power in controversies other than product cases remains to be seen.

One suspects that the most persuasive portions of the Rhode Island ruling for courts handling other controversies are *jurisprudential* – for it was the *perspective* adopted by the Rhode Island Court that strongly guided its reasoning and, almost inevitably, produced its unanimous decision. By carefully recognizing and adhering to the traditional role of judges in our society, the Court demonstrated that the common law should not be used to achieve sweeping social changes. Instead, its role is to move incrementally in "knowable" and "predictable" directions to promote social stability.[42]

[42] *Id.* at *12.

There is wisdom in this perspective – great wisdom that is relevant to any common law controversy. In our complex and highly regulated democracy, where changes in our social fabric can produce myriad consequences, both intended and unintended, courts are wise to refrain from unilateral "public policy" adventures. Indeed, as the Restatement (Second) plainly warns, and as the Rhode Island Court recognized, unbridled creativity is especially dangerous in public nuisance litigation when the alleged "public right" is not defined by "established and recognized standards."[43] In the judicial sphere, broad "public policy" decisions do not originate spontaneously. Instead, such declarations must be plausibly derived from policies that originate *outside* the courtroom. As Justice Linde explained in his critical article: "[T]he explanation must identify a public source of policy outside the court itself, if the decision is to be judicial rather than legislative. A court may determine some facts as well or better than legislators, but it cannot derive public policy from a recital of facts."[44]

The Rhode Island Supreme Court's decision is consistent with this great common law tradition and should, therefore, set a persuasive perspective for

[43]"The Restatement (Second) warns against any such departure from the common law, noting that 'if a defendant's conduct in interfering with a public right does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established and recognized standard.'" *Id.* at *23 (*citing* RESTATEMENT (SECOND) OF TORTS, Sec. 821B, cmt. e).

[44]Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 Val. U. L. Rev. 821, 852 (1994). ("Style shapes how a court functions as well as how it is perceived. The decisive difference, to repeat, is that legislation is legitimately political and judging is not. Unless a court can attribute public policy to a politically accountable source, it must resolve novel issues of liability within a matrix of statutes and tort principles without claiming public policy for its own decision. Only this preserves the distinction between the adjudicative and the legislative function.").

other courts considering similarly sweeping requests. Whatever the alleged "public right" may be, it must be derived from "established and recognized standards" – as opposed to the ingenuity and imagination of advocates. Other creative public nuisance lawsuits, such as those regarding climate change problems, have already failed,[45] and similar results can be anticipated for other claims that seek relief for violations of rights which are inadequately defined. In that sense, the mainstream perspective of the Rhode Island Supreme Court offers "bright line" guidance for resolving future controversies.

[45]In such cases, courts have refused to exercise jurisdiction because the controversy cannot be resolved according to pre-existing standards. *See e.g.*, Order Granting Defendants' Motion To Dismiss, *California v. General Motors Corp.*, No. 06-05755 (N.D. Cal. filed Sept. 17, 2007) (finding that "injecting itself into the global warming thicket at this juncture would require an initial policy determination of the type reserved for the political branches of government"); *see generally*, Richard O. Faulk and John S. Gray, *Stormy Weather Ahead? The Legal Environment of Global Climate Change*, available at http://works.bepress.com/richard_faulk/.