SPEAKING (VERMONT) TRUTH TO (WASHINGTON) POWER*

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Let me first bid good evening to alums, friends, coworkers in the environmental vineyards, the deans, and trustees. Tonight we gather to celebrate the 25th anniversary of the Environmental Law Center. It is fitting that those assembled in this audience include such people such as Governor Kunin, Doug Costle, Dick Ayres, Tom Jorling, and our own Karin Sheldon—all of whom have made major contributions to the national environmental movement over the years. The Center is part of that movement, drawing strength from it and hopefully contributing something to it.[1] It is that contribution in the past, present, and future that I wish to talk about here this evening.

It is a special honor to speak at a lecture named for Norman Williams. "Norm" brought me to Vermont Law School. I can remember my first visit—standing on a snowy sidewalk on a cold winter's night in South Royalton. I asked (with all the ignorance of a Connecticut flatlander), "Norm, besides Exit 2 on Route 89, where am I?" "Standing tall in two feet of very cold snow," he answered authoritatively (as only Norm could do). "Dick you're now standing in Vermont—the nearest thing on this earth to heaven" (I'm not sure I believed him at the time, but I've grown wiser with the years). I have grown to love Vermont's mountains and valleys, rivers, small towns, and, yes, even her change of seasons and winters.[2] I know that many of you share that love.

Norman Williams was a significant figure in American land use law. He was a premier scholar as evidenced in his five volume work, *American Land Planning Law*, and he fought for the reform of land use laws across

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* These footnotes are intended to direct the reader to the literature underlying the comments as well as provide qualifications for what is obviously a broad brush treatment of the topic. The title of "speaking truth to power" is not original with me, but is the title of several books, including ANITA HILL, SPEAKING TRUTH TO POWER (1997), and AARON WILDAVSKY, SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS (1979).

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1. I implicitly reject the understanding of our Environmental Law Center as merely a specialization of law, i.e., environmental law. It is more than that. It is law serving an identified public purpose, i.e., the protection and enhancement of nature.

2. Most law schools, in order to preserve their national and international status, fail to identify their mission with where they are located; they wish to avoid being seen as merely "local" law schools. Although Vermont Law School offers a national and international curriculum, it also seeks to identify with its Vermont location. In so doing, it is recognizing the importance of "place" in its life and thought. *See* EDWARD S. CASEY, GETTING BACK INTO PLACE: TOWARD A RENEWED UNDERSTANDING OF THE PLACE-WORLD (1993).

the nation. In seeking that reform, he sought changes at the state level,[3] since he was deeply suspicious of the competency of federal courts and legislatures to manage land use in America.

Two of his contributions are most relevant to my presentation tonight: first, his advocacy in the New Jersey Supreme Court against exclusionary zoning in the *Mount Laurel* case—an advocacy which inspired others such as Anya Yates to follow in his footsteps. Another contribution was his book, *Vermont Townscape*, which revealed how important Vermont's fields and mountains were to the beauty of her towns and their way of life.[4]

These contributions were part of Norm's fight for inclusive and sustainable communities. He fought against segregation and for inclusion: against the segregation of low income persons in Mount Laurel's zoning law and for the inclusion of nature in a legal regulation of Vermont's cultural landscape. Norman delivered Vermont's message of truth to the nation: *the segregation of both people and nature is part of a common problem within our society and its legal system.* "Law in the service of inclusive sustainable communities based upon working landscapes" might have been Norman's "mantra." It is this truth which I wish to discuss with you tonight.

THE SEGREGATION OF PEOPLE AND NATURE

I wish to introduce the notion that both people and nature can be segregated—separated off from our community, and that we should pursue the integration of both people and nature as a joint enterprise.[5] Unfortunately, both people and nature may appear to threaten us. Hence they often are denied the fundamental recognition and respect which they deserve.

Both are too often walled off in our minds, hearts, and ways of life. Robert Frost put it best when he wrote:

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3. State and local community was important to Norman Williams. His volumes on land planning law show an acute sensitivity to the different state settings and traditions of law.

4. In addition to this book, Norman published studies of aesthetic standards for land use, and was chairman of the Vermont Design Issues Study Committee which published ELIZABETH COURTNEY, VERMONT'S SCENIC LANDSCAPES: A GUIDE FOR GROWTH AND PROTECTION (1991).

5. The notion of exclusion of people is well developed in a social context and there is much literature on the topic. Less well known is the literature of exclusion of nature in nature writing; for one of many examples is RODERICK NASH, WILDERNESS AND THE AMERICAN MIND (1967), which demonstrates how, in our history, we feared and hence shut out the wilderness. Similar attitudes may be found toward forests and wetlands. The identification of both nature and people in the act of inclusion may be found in the works dealing with "primitivism." *See* MARIANNA TORGOVNICK, GONE PRIMITIVE: SAVAGE INTELLECTS, MODERN LIVES (1990).

> When we locked up the house at night,
> We always locked the flowers outside
> And cut them off from the window light.[6]

The respect due both people and nature comes not only from seeing the value of both, but also understanding how both contribute to the common good which links us to one another.[7] Law can either buttress the "lock up" of people and nature in a futile effort to protect us, or it can help to break down those walls and integrate both persons and nature within the community.

The federal government has unwittingly continued to foster both social and environmental segregation in America. In contrast, Vermont has a long history of commitment to the elimination of segregation, both social and environmental. As such, Vermont offers a living example of the effort to create inclusive and sustainable communities.[8]

Vermont's ideals and her way of life as reflected in her cultural landscape offer a unique role for Vermont Law School and its Environmental Law Center. *That role is to help Vermont to continue to improve upon her tradition of inclusive sustainable communities and help to deliver Vermont's message of inclusive and sustainable communities to the nation and the world.*

If this is the soul of Vermont's Environmental Law Center, what is its "soulcraft?"[9] How might it help to deliver the message?

- First, it might strengthen appropriate laws and devise new laws within Vermont, thus helping it to serve as an example to the nation;[10]
- Second, it must educate would-be lawyers and policy makers to pursue not merely environmental law but environmental law in accordance with a state, a national and international agenda of promoting inclusive and sustainable community;[11]

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6. ROBERT FROST, *Locked Out*, *in* COMPLETE POEMS OF ROBERT FROST 169 (1949).

7. It is this common good, both shared and distributive, which lies at the heart of community and has been well articulated. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

8. I have tried to describe Vermont's effort in detail in my two volume RICHARD O. BROOKS, TOWARD COMMUNITY SUSTAINABILITY: VERMONT'S ACT 250 (1996, 1997).

9. I have taken the word "soulcraft" not to suggest any religious mission, but rather to suggest that the Center's activities are not merely instrumental, but should embody the values they seek in the very means they adopt.

10. Such an effort requires a complete view of the Vermont community, analogous to that offered of Montana, in THOMAS POWER, LOST LANDSCAPES AND FAILED ECONOMIES (1996).

11. To my mind, our Center should seek to update and apply, within Vermont, the role of the attorney as a public policy professional as articulated in the writings of Harold Lasswell, Myers

- Third, Vermont must push the federal government to recognize a public agenda for sustainable and inclusive communities;[12]
- Fourth, the Center must continue to articulate the unique legal rationale necessary to support such an agenda;
- Finally, the program must support community–based institutions which seek to create and serve sustainable inclusive communities.

AN EXAMPLE OF VERMONT'S ROLE

Let me illustrate with a court case from the field I now teach—air pollution law. The case is *Vermont v. Lee Thomas, EPA Administrator*.[13] As we know, Vermont has pure clean air sparkling on a sunny winter's day. This clean air is not merely the accidental result of Vermont's low population and rural economy, but also stringent Vermont air pollution laws controlling sulfates and coal burning power plants.

On the other hand, Vermont's air is threatened with sulfates and ozone (as well as mercury) from the power plants of the Midwest, and the cars of urban industrial states of the East. In 1985, Vermont sued EPA seeking to force the administrator to accept Vermont's own air pollution strategy and require the eight upwind states to adopt haze regulations to prevent the impairment of air quality in Vermont in general and the Lye Brook Wilderness in particular. In effect, Vermont was delivering a message to the nation, the polluting states, and the polluters within those states.

Note that Vermont "walked the talk," adopting stringent regulations itself. Vermont's concerns were much deeper and wider than simply the health of her citizens. In addition to the health impacts of the pollutants, Vermont's plan embraced concerns about the dying spruce and the acidified lake. Vermont was also concerned about the visibility of the air itself, not only in the wilderness but in the everyday vistas which are part of Vermont's way of life. Vermont was not afraid to recognize that visibility has significant aesthetic value. Third, the suit was seeking to have EPA

McDougal, Bruce Ackerman, and Anthony T. Kronman. *See, e.g.*, Harold Laswell & Myers McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943); BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984); ANTHONY T. KRONMAN, THE LOST LAWYER (1993).

12. The important matter here is to carefully ground the more general statutes and common law doctrines to assess and guide their contributions towards the creation of sustainable communities. This requires a careful knowledge of community in general and our community in particular, as well as an ecological and economic grasp of sustainability.

13. Vermont v. Thomas, 850 F.2d 99 (2nd Cir. 1988).

take the law seriously—a law which requires the states to comply with the visibility plan requirements and to honor the Vermont approach.

With this lawsuit, Vermont was indeed speaking truth to Washington's power regarding nature. And she has continued to do so as evidenced by the recent lawsuits seeking to protect nature against the effects of out-of-state created acid rain and global warming.

THE FEDERAL TREATMENT OF NATURE

Why does Vermont have to speak the truth to Washington's power? Why and how does the federal government segregate? Why does the federal government need lessons from Vermont?

The story begins a long time ago.[14] In the eighteenth century (and earlier!) we began with Native Americans, segregating them (when we weren't slaughtering them). At the same time, there began the widespread abuse of nature, as Crevecour's letters documented. In the later part of the nineteenth century, with economic growth at full tilt and the outpouring of Afro-Americans to the cities of America after the Civil War, we in America continued segregation of nature and people. Blacks found themselves herded into the tenements of northern (and southern) cities. At this time, we began to segregate nature from "the spoils of progress." Federal law placed selected parts of nature into "off limits" parks and national forests and reservations. At the same time, we opened up vast lands for economic exploitation.

The great naturalists of the era, Henry David Thoreau, Aldo Leopold, and John Muir tried to remind us that we were part of nature's community. In the words of Muir, "When we try to pick out anything by itself, we find it hitched to everything else in the universe."[15] In the words of Leopold:

> All ethics so far evolved rest upon a single premise: that the individual is a member of a community of interdependent parts.
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> The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land.[16]

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14. I am painfully aware that this rhetorical sketch of the national exclusion of people and nature is woefully inadequate. I can simply refer the reader to the massive literature on the historical treatment of nature cited in RICHARD O. BROOKS ET AL., LAW AND ECOLOGY: THE RISE OF THE ECOSYSTEM REGIME (2002).

15. JOHN MUIR, MY FIRST SUMMER IN THE SIERRA 211 (1911).

16. ALDO LEOPOLD, SAND COUNTY ALMANAC 203–04 (1966). For a critique of the Leopoldian view of community, see LYNTON KEITH CALDWELL & KRISTIN SHRADER-FRECHETTE, POLICY FOR LAND: LAW AND ETHICS (1993).

American society and the federal government ignored Leopold's message and proceeded to distribute land and natural resources, treating nature as a bundle of private commodities to be freely exploited. Our present national mining laws, which continue to permit mining in wilderness and national forests, are legacies of this age.

At the turn of the twentieth century, our cities received floods of immigrants, many of whom were placed in ghettoes. It is a dirty little secret of land use law that we legally buttressed this segregation with the first zoning laws taken from Germany. These laws were enacted to protect New York's Fifth Avenue businesses from the immigrant populations living nearby. Thus, land use controls, the predecessors of many of our environmental controls, helped to segregate the newcomers.

In the early years of the twentieth century, there were some lonely voices who recognized the social and environmental costs of our urban civilization. Patrick Geddes, the early advocate of garden cities, Lewis Mumford, author of *The Culture of Cities*, and Frederick Law Olmstead, the designer of great city parklands, urged that cities and nature not be separated. Unfortunately their message was largely ignored.

In the middle of the twentieth century, a sea change was taking place. With the help of federal highway subsidies, people moved to suburbs, in what was to be an ultimately frustrated search for pure air and water. This movement buttressed the patterns of segregation. A civil rights movement began which challenged segregation and advanced a community-based ideal of integration which found expression in *Brown v. Board of Education.* A new faith in the power of national public policy arose, taking root in both Washington and in the philosophies of law in our nation's law schools[17]

My professional life was shaped by this period in American History. I joined the New Haven renewal effort—a combination of urban renewal and social/economic, anti-poverty, "Great Society" efforts to remake the American city and provide opportunity for jobs and education for minorities. Although this program did more good than its critics claim, it is true that the program produced unrealistic expectations that federal subsidies could counter the forces of the nation's economy.[18] In the 1960s, Mollie and I witnessed the failure of these programs evidenced by the riots and troops stationed on the corners of New Haven's streets (the scene was

17. For a superb history of this development in legal education, see KRONMAN, *supra* note 11.

18. For a recent history of this program and its effects, see DOUGLAS W. RAE, CITY: URBANISM AND ITS END (2003). The history of the community development programs of this era is set forth in WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW BUSINESS AND THE NEW SOCIAL POLICY (2001).

in some ways eerily similar to the recent scene at the inauguration here in Washington).

In any case, the concentrated mission of the urban community development programs was ultimately dissipated; our nation is now witnessing the final "unfunding" of these programs in the current federal budget. A similar fate may await the environmental movement.

The segregation of people and nature at mid-century and in the 1960s was not rectified by national urban programs which followed in the late 1960s. The ill-fated new towns program launched in 1970 was a weak effort at imitating the English garden cities program, which sought to reintroduce nature with greenbelts encircling new towns—towns which were to disperse the population across the nation.[19] The American program lacked the federal funding and commitment, and operated largely as a subsidy for large scale developers.

The lessons of these failures, along with Vietnam, were not ignored. Senator William Fulbright, in his book of the time, *The Arrogance of Power*, documented the limits of American federal power. The so-called "best and the brightest"[20] who had designed or implemented these programs along with the Vietnam War took refuge in the foundations of academia, but continued to dream that federal power could solve our nations's ills.

With each failure in federal policy, we Americans begin anew. And so, in 1970, with the advent of Earth Day, a federal Environmental Protection Agency was cobbled together and new major legislation was adopted—the Clean Air Act and then the Federal Water Pollution Control Act were passed to countervail the power of large corporations and government itself, both of which were polluting our landscape.

At this period of my professional life, I joined "the war to protect the environment." I represented a group of suburbanites, who, instead of finding sylvan fields in suburbia when they left the city, discovered nuclear power plants, built near their homes on Long Island Sound both in Connecticut and Long Island. Although I like to think that I, along with many others, helped to slow down the rush to an ill-considered adoption of nuclear energy, I also learned from a year of litigation that the vaunted

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19. I participated in this program, at least indirectly, through work with the new town of Columbia (which was not federally funded). I wrote about this experience in RICHARD OLIVER BROOKS, NEW TOWNS AND COMMUNAL VALUES: A CASE STUDY OF COLUMBIA, MARYLAND (1974).

20. This is, of course, a reference to Halberstam's history of the Vietnam war. *See* DAVID HALBERSTAM, THE BEST AND THE BRIGHTEST (1983).

federal laws were not much help, and the federal agencies were even less helpful.[21]

Part of the problem with the federal environmental laws at this time was that they segregated nature in new and different ways. They sliced and diced it into water, air, land, and endangered species and seasoned them with a variety of difficult-to-digest regulations. Nature as we experience it in our lives, living in a landscape fashioned out of mountain and watershed ecosystems, was reduced to a variety of complex legal categories that ignored the interdependence of nature's parts and obliterated any whole view of its values.

VERMONT'S ANSWER TO THE FEDERAL SEGREGATION OF PEOPLE AND NATURE

What has been Vermont's role in this history of segregation of peoples and nature, and how can Vermont and Vermont Law School help in the process of desegregation? It might seem the height of chutzpah to claim that lily-white Vermont is and has been an agent for integration, but this is what I am indeed suggesting.[22]

Let me begin with some Vermont history. The story begins with Vermont's early stand on behalf of abolition of slavery in 1775—yes, 1775! Vermont adopted the first constitutional language of abolition.

Vermont took a similarly bold approach in relation to the environment. Vermont's stand against slavery was accompanied by a unique constitutional clause emerging out of the mists of English history[23] and first adopted in 1777. The clause provides that:

> The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, and in a like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly.[24]

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21. I sought to document this in an article in the Connecticut Law Review at the time, entitled "Millstone Two and the Rainbow". Richard O. Brooks, *Millstone Two and the Rainbow: Planning Law and Environmental Protection*, 4 CONN. L. REV. 54 (1971).

22. I am fully aware that I am idealizing Vermont here. For a more "unvarnished view," see MICHAEL SHERMAN ET AL., FREEDOM AND UNITY: A HISTORY OF VERMONT (2004). An environmental history of Vermont has been set forth in JAN ALBERS, HANDS ON THE LAND (2000).

23. The history of this clause, which can be found in some other state constitutions of the time, was the reaction to the enclosure of forests in England. An earlier history of the same phenomenon occurred much earlier in English history when the barons objected to the King's forest and river exclusions, which were to be prohibited by the Magna Charta.

24. VT. CONST. ch. 2, § 67.

The significance of this clause lies not only in the recognition of Vermont's natural resource economy, but the rights of her citizens to have access to nature's economy. In short, Vermont's people are not to be segregated from Nature. This provision has been more recently upheld to establish a public trust in Vermont's natural resources which is now recognized in her statutes and regulations.

Skipping almost a century, our Vermont history might usefully turn to the work of Vermont's own George Perkins Marsh. In 1864, in the midst of the Civil War, five years after Darwin's *Origin of the Species* and about the time Thoreau was researching the dispersal of seeds, Marsh, a Vermont lawyer and a world diplomat, wrote an American classic: *Man and Nature*. He wrote it partly in response to Vermont's own abuse of nature. In Marsh's words:

> The ravages committed by man subvert the relations and destroy the balance which nature had established between her organized and her inorganic creations; and she avenges herself upon the intruder, by letting loose upon her defaced provinces destructive energies . . . .[25]

Aside from being one of the first to recognize the importance of environmental abuses in America and the world, Marsh viewed these abuses with an ecological vision. This means that the problems of the land, that is, the erosional decimation of forest, farmland, and mountain slopes, (whether due to urbanization or farming and forest practices) were interconnected with the pollution of streams, depletion of soils, and even changes in the weather. For Marsh, uses of the land was part of the ecology of nature, not to be separated from uses of water or air!

As the ecologist Frank Golley has put it, "[c]learly, the ecosystem . . . has provided a basis for moving beyond strictly scientific questions to deeper questions of how humans should live with each other and the environment."[26]

Equally important, Marsh made his discoveries both in Vermont and around the world. Vermont was not a unique Garden of Eden, but a place where the workings of man upon nature could be seen most clearly. In the late nineteenth century, Vermont, with her lumber-filled rivers, ravaged

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25. GEORGE PERKINS MARSH, MAN AND NATURE 42 (David Lowenthal ed., Harvard Univ. Press 1974) (1864)

26. FRANK BENJAMIN GOLLEY, A HISTORY OF THE ECOSYSTEM CONCEPT IN ECOLOGY: MORE THAN THE SUM OF THE PARTS 205 (1993).

forests, over-grazed fields, and nascent industry, was the proverbial canary in the mine. Marsh viewed the control of these abuses to be part of man's struggle with nature. Having lived in Vermont, he knew that man and nature did not live in gracious harmony, despite the rhetoric of many current environmentalists. In his words, the task "is to become a co-worker with nature in the reconstruction of the damaged fabric."[27]

By the beginning of the twentieth century, Vermont became increasingly sensitive to the importance of controlling the exploitation of her environment, perhaps, in part, because the protection of the environment was important to her natural resource and tourist industries. (These industries, along with education, are the dominant industries today.) Hence, in the early twentieth century, Vermont was already well on its way to fashioning policies for community sustainability with conservation measures in water, forests, and game laws.

It was only a half century later that Vermont and the nation began to truly understand the dimensions of the problem of segregating man and nature. The central scientific discovery of the middle of the twentieth century was the advent of the science of ecology—set forth by Eugene Odum and built upon the recognition of a web of interacting biotic and abiotic nature.[28] This discovery found symbolic expression twenty years later in photographs from space of the blue green earth. The photographs captured the luminous value of earth, and the obvious unity and precariousness of its global environment.

The science of ecology entered Vermont through the back door—through the work of the great planner, Ian McHarg. In McHarg's classic, *Design with Nature*, a method of land use planning was advanced which sought to understand the ecological settings of cities. (In the 1960s, McHarg completed an elegant ecological study of Washington, D.C.) McHarg's ideas found a home in Vermont's interim capability and development plan in Act 250.

Vermont supplemented this ecological assessment with a unique vision of its own working landscape, set forth by resolution in the laws of Vermont. This resolution reads in part:

> Products of the land and the stone and minerals under the land, as well as the beauty of our landscape are principal natural resources of the state. Preservation of the agricultural and forest

27. MARSH, *supra* note 25, at 35.

28. Ross Virginia, Ross Jones, and I tried to trace this history of ecology in relation to environmental law in RICHARD O. BROOKS ET AL., LAW AND ECOLOGY: THE RISE OF THE ECOSYSTEM REGIME (2002).

> productivity of the land, and the economic viability of agricultural units, conservation of the recreational opportunity afforded by the state's hills, forests, streams and lakes, wise use of the state's non-renewable earth and mineral reserves, and protection of the beauty of the landscape are matters of public good.[29]

This resolution has been given life by the careful work of Act 250 district commissions and an environmental board that has made decisions about specific projects by assessing whether they are compatible with the requirements of sustainability set forth in the criteria of the law. In so doing Vermont fulfilled the words of John Brinkerhoff Jackson:

> No group sets out to create a landscape, of course. What it sets out to do is to create a community, and the landscape as its visible manifestation is simply the by product of people working and living, . . . always recognizing their interdependence.[30]

Again, it is important to remember that creating community has social dimensions as well as environmental dimensions. Thus, Vermont has most recently expanded its community and recognized its interdependence by adopting the Civil Union legislation—once again speaking truth to power by refusing to exclude a group of people who belong to our Vermont community.

VERMONT SHAPES FEDERAL LAW

Based upon Vermont's own unique desegregated way of life and law, Vermont Law School has a unique platform on which it might shape federal law. The origin of Vermont Law School's Environmental Law Center was, in part, an outgrowth of the national environmental movement, but it initially drew its strength from Vermont's heightened consciousness of the environment and the laws to protect it.

The early teachers and scholars in the program—Norman Williams, Ed Kellogg,[31] and others—focused largely upon Vermont laws as examples for the nation. Thus, the important aspect of the Center's educational program

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29. VT. STAT. ANN. tit. 10, § 6042 note (Utilization of Natural Resources) (2004).

30. JOHN BRINCKERHOFF JACKSON, DISCOVERING THE VERNACULAR LANDSCAPE 12 (1984).

31. Edward Kellogg, in addition to teaching the first Population and Law course, taught in the field of historic preservation and published a major work in the field of historic preservation. Some of his students, including Robert McCullough, have continued his teaching and published excellent works in the field. *See* ROBERT MCCULLOUGH, THE LANDSCAPE OF COMMUNITY: A HISTORY OF COMMUNAL FORESTS IN NEW ENGLAND (1995).

was and continues to be the education of law students and environmental leaders to extend federal laws to embrace sustainability first learned and made legal in Vermont.

Many of our graduates, then and now, yearn to remain in Vermont after graduation, and some have done so. But whether remaining in Vermont or going elsewhere, many of our graduates have made these national environmental laws work across the nation and in Vermont. In so doing, they have helped Vermont and the nation to face (if not control) the forces of population, market, and technology. These forces are well illustrated in Vermont. Without being alarmist, Vermont faces at the present time the prospects of factory farms, big box stores, four lane highways, nuclear waste storage, large resorts, and genetically altered seed; all are knocking on the door of a land designed by nature for a better fate.

Two recent examples of Vermont Law School graduates at work are relevant here. The first is Chris Killian, who, along with others, has managed to extend the total maximum daily load system of the Clean Water Act to cover the cumulative impact of storm water discharges of the shopping centers in South Burlington. The other graduate is Geoffrey Hand, who recently helped to revivify the National Environmental Policy Act to stop, at least momentarily, the heedless momentum toward the circumferential highway in Burlington.

To my mind, it is these activities by which Vermont and the law school make a contribution to national environmental policy—it speaks truth to Washington's power by demonstrating how federal laws can be extended and transformed to protect sustainable communities.

THE RETHINKING OF LEGAL RATIONALES

Another contribution of Vermont truth to Washington's power is the fashioning of a unique rationale for the laws which prevent the segregation of both people and nature. The current dominant rationale for the protection of minorities and nature is a rights-based approach. The rights of blacks, gays, and women are to be accorded protection; the rights of endangered species and persons affected by pollution are to be implemented.[32] Such a rights-based approach is based upon a tacit individualism which fails to capture the ways in which environmental

32. The rights-based approach is set forth in RODERICK FRAZIER NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS (1989), which explores the rights of nature as the climax of the gradual expansion of human rights.

values are part of a community way of life.[33] It also fails to highlight the ecological setting of threatened species and polluted persons.

Vermont courts have offered another way of understanding these social and environmental issues. Through the remarkable jurisprudence of Vermont, beginning with the *Brigham* school-funding case[34] and extending through the civil unions *Baker* opinion,[35] courts have articulated a community-based jurisprudence. A similar communal approach pertaining to the environment can be found in Vermont's Act 250 as set forth in Judge Oakes's remarkable opinion in the *Southview Associates* case.[36] These opinions view the problem of minorities and nature as a problem of exclusion. They propose legal rationales for including minorities and nature in Vermont's way of life.

In the *Brigham* case, the court found that Vermont's financing of public education violated the Vermont Constitution's provisions regarding public education and the distribution of common benefits. The language of the common benefits provision reads:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . . .[37]

The court traced this provision and the corresponding educational provisions to the civic republican past of Vermont and found the substantially equal educational opportunity to rest upon the need to insure an educated citizenry for the functioning of self rule and the common good.

In the famed *Baker* case, the court rejected a rights-based approach and once again turned to the common benefits clause. The court found that the prohibition of same sex unions operated to exclude persons with different sexual orientations from the common benefits and protections incident to marriage.

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33. There is a massive literature on community; some of that literature finds the people's relationship to nature as important within community. For an interesting interdisciplinary approach to an ecological knowledge of nature and the relationship of that knowledge to the economic, political, and social aspects of community, see JOHN S. DRYZEK, RATIONAL ECOLOGY: ENVIRONMENT AND POLITICAL ECONOMY (1987). The field of human ecology has sought to bridge the natural and social worlds of the community. *See, e.g.*, FREDERICK STEINER, HUMAN ECOLOGY: FOLLOWING NATURE'S LEAD (2002).

34. Brigham v. State, 166 Vt. 246, 692 A.2d 384 (1997).

35. Baker v. State, 170 Vt. 194, 744 A.2d 864 (1999).

36. Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84 (2nd Cir. 1992).

37. VT. CONST. art. VII.

In both cases, the court responded to the State's failure to recognize poor children seeking an education and same sex couples seeking legitimate unions by *including* them within the shared common benefits and way of life of Vermonters. In the *Southview Associates* case, Judge Oakes takes a similar approach to the inclusion of nature within Vermont's way of life. In *Southview*, the issue was whether or not the protection of a deeryard under Vermont's Act 250 would deprive a developer of due process and equal protection as well as failing to provide just compensation. Although the court holding found no "physical taking" and the other claims were not ripe for determination, Judge Oakes took the opportunity to expand upon his view of the matter.

Oakes carefully portrayed the important role which deer have played and continue to play in Vermont life and its hunting culture. He described how the deeryards in general—and this deeryard in particular—were important to the life of the deer. He then systematically reviewed planning provisions in Act 250 to show how its provisions operated to protect Vermont against the incursion of forces of land development threatening Vermont's environment. He delineated how Act 250 district citizen commissions and the Environmental Board carefully review specific projects in light of both social and environmental criteria which reflect Vermont's landscape. He explained how the wildlife and scenic protection criterion would, in this case, protect "wildlife habitat" which was a "necessary" part of Vermont's way of life.

But Judge Oakes went beyond such a description of Vermont law to show how the Vermont deer-habitat policy was neither arbitrary nor capricious under federal substantive due process. In doing so, he found that the provision and its application served the common benefit of the State as a whole. Here we see nature, in the form of deer and their habitat, being included in the Vermont way of life.

VERMONT'S SUSTAINABLE COMMUNITIES

Finally, Vermont Law School and its Environmental Law Center have and should continue to be the proponent for sustainability at the local level. In the early years, the Center has served the myriad of community groups which help to create and govern Vermont's working landscape.[38] I can

38. The terms "working landscape" and "cultural landscape" are important to understand in order to practice environmental law. The working landscape refers to the ways in which the economy, both past and present, has shaped our environment; historical ecology has been the discipline important to gaining that understanding. William Cronon's books, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (1983), and NATURE'S METROPOLIS: CHICAGO AND THE GREAT

recall our litigation on behalf of Rutland's neighborhood to stop an ill-advised incinerator project.

In the 1980s, Vermont's Environmental Law Center turned to the nation, inviting national figures to trod upon its admittedly small stage. Doug Costle, Jonathan Lash, Pat Parenteau, Karin Sheldon, and Celia Campbell-Mohn[39] brought with them a national reputation and focus. And the Center has adopted a more national focus, both in teaching and research.

Recently, however, I sense a new turn at the Center—a turn towards a more local and state-focused agenda. We see Pat Parenteau in his clinic offering services to Vermont communities such as Florence, Vermont, which is confronting serious mining and waste disposal problems. To cite another example, Kinvin Wroth has presently turned his attention to Vermont's land use laws and the workings of Act 250 and the newly expanded Environmental Court.

In our recent book, *Law and Ecology*, Ross Virginia, Ross Jones, and I identified a world-wide group of institutions which we called "ecosystem regimes." These are mixed private/public organizations that focus their effort upon selected ecosystems of our state, nation, and world. As fish stocks are depleted, agricultural land degraded, rivers and lakes polluted, forests stripped, and mountains leveled, ecosystem regimes have risen to protect and manage unique places, endangered species, and important natural resources.[40]

Thus, fish management commissions, watershed councils, land trusts, lake associations, coastal management organizations, and many others have multiplied in number and kind especially during the past twenty years. These are unique organizations which face serious organizational problems. They need legal help, both in structuring themselves to be effective and in conducting their business. This task seems to me to be a unique niche for Vermont's Environmental Law Center. But such an effort will require serious strengthening of our curriculum in exploring the role of profit and nonprofit institutions in the environment.

WEST (1991), exemplify this work. On the other hand, "cultural landscape" refers to how we see the landscape through our culture. Here, the history of environmental literature and painting is particularly important. *See* LAWRENCE BUELL, THE ENVIRONMENTAL IMAGINATION: THOREAU, NATURE WRITING, AND THE FORMATION OF AMERICAN CULTURE (1995).

39. Celia Campbell-Mohn is well known for her book entitled *Sustainable Environmental Law*. CELIA CAMPBELL-MOHN, SUSTAINABLE ENVIRONMENTAL LAW: INTEGRATING NATURAL RESOURCE AND POLLUTION ABATEMENT LAW FROM RESOURCES TO RECOVERY (1993).

40. The notion of ecosystem regimes draws upon two recent bodies of thought—Oran Young's articulation of "resource regimes" in his book of that title, and Elinor Ostrom's studies of commons organizations. *See* ORAN R. YOUNG, RESOURCE REGIMES: NATURAL RESOURCES AND SOCIAL INSTITUTIONS (1982); ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990).

Although this effort should not be limited to Vermont, we have in Vermont an excellent opportunity. Four major ecosystems are particularly important in and near Vermont. They are the northern forest, Lake Champlain and Connecticut River Watershed, and the mountain spine of our State. Understanding these four ecosystems provides a basis for moving beyond scientific questions into deeper questions of how humans should live with one another and their environment. Organizations for three of these ecosystems have been established to plan and sustain their environments.[41] At the present time, Janet Milne and her colleagues are studying the ecosystem regimes of the mountain areas, Pat Parenteau's clinic is providing legal services to the Connecticut River Watershed, and Kinvin Wroth and Marc Mihaly's incipient Land Use Institute may also channel legal services to assist ecosystem regimes.

INTERESTING OBSTACLES

Our Center faces some important problems in confronting the agenda I have identified here. First, like most environmentalists, we have tended to downplay the very real costs of environmental protection. Yet we must confront the problem of economics, not ignore it. We must not blindly trumpet cost-oblivious regulations which ignore their impacts upon the poor, minorities, and the average citizen of the community.[42]

Second, we environmentalists must give up our automatic turn to the federal government to resolve environmental problems. We must face up to the need for constructing a viable Federalism which, while not offering pollution havens for a race to the bottom, nevertheless permits states, including Vermont, to fashion their own unique environmental solutions.[43] Third, we must turn our attention to the ways in which environmental concerns can properly be implemented within the workings of our economy—in agriculture, forestry, mining, tourism, and in industry as a whole.[44] Rather than focusing upon how we can simply block such necessary activities, we must engage in the alternative dispute resolution which fashions sustainable solutions. Fourth, since energy lies at the base

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41. There are also elegant writings on these systems. *See, e.g.*, TERRY OSBORNE, SIGHTLINES: THE VIEW OF A VALLEY THROUGH THE VOICE OF DEPRESSION (2001) (meditating on the upper Connecticut River Valley).

42. One of the most thoughtful authors on the economics of environmental protection is MARK SAGOFF, PRICE, PRINCIPLE, AND THE ENVIRONMENT (2004).

43. For one of the most thoughtful short essays on Federalism with relevance to the environment, see ROBERT M. HUTCHINS, TWO FACES OF FEDERALISM (1961).

44. The integration of environmental protection with industrial activities has acquired the name of "industrial ecology."

of all environmental problems, we must construct a proper interdisciplinary curriculum and conduct economically and ecologically grounded research in sustainable energy policies—both in the use and production of energy.[45]

Finally, we must recognize that economic and market tools have arrived as an important part of environmental policy. We must help students to carefully examine the extent to which environmental public markets can be successfully adopted without removing the needed stigma of polluting activities and preventing the necessary participation of the community in governing our environment.[46]

CONCLUSION

In last Sunday's *New York Times*, there was an article which bemoaned the future of the environmental movement. I believe Vermont has the answer to such a silly worry. That answer lies in the fact that Vermont speaks the truth to Washington's power. That truth is the law and policy of inclusion of both people and nature in sustainable communities.

Vermont illustrates that inclusion in its way of life. It works to push federal policy to fully recognize both people and nature. It offers a unique legal rationale for inclusion. And it promises to offer future services to the community-based ecosystem regimes.

Let me conclude with one final story. Recently Vermont, along with seven other states, brought action against Midwest utilities for their emissions of carbon dioxide contributing to the global warming of our climate. The claim was based upon legal allegations of public nuisance and *parens patriae*. A public nuisance is the interference with a right *common* to the general public. *Parens patriae* is the political community's sovereign claim to natural resources. In the case filed, Vermont is claiming that the damage of global warming is a harm to our community and its natural resources. Vermont Law School graduates Eric Tritrud and Ron Shems are important attorneys in these and related suits. They are continuing the tradition of speaking Vermont's truth to national power. What more could we ask?

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45. The works of Lovins remain classics in the field. *See, e.g.*, AMORY B. LOVINS, SOFT ENERGY PATHS: TOWARD A DURABLE PEACE (1977).

46. The application of market techniques to the environment requires an in-depth knowledge of the market system itself—its advantages and drawbacks. Such knowledge is provided in CHARLES EDWARD LINDBLOM, THE MARKET SYSTEM: WHAT IT IS, HOW IT WORKS, AND WHAT TO MAKE OF IT (2001).