

ENVIRONMENTAL LAW REVIEW

INTRODUCTION

AN INTRODUCTION TO THE VERMONT LAW REVIEW SECTION ON DEVELOPMENTS AND ISSUES IN ENVIRONMENTAL LAW

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INTRODUCTION

Only a reader who has not visited Vermont Law School would ask the question: Why is the Vermont Law Review setting aside an environmental law section in its journal?

The law school sits on the banks of the White River—a winding water road for free wheeling trout and the newly restored Atlantic salmon. The Green Mountains, complete with hilltop farms, frame South Royalton, the quiet Vermont village which warily hosts the school. Whether it is the morning mists on the green hills, the spectacular golden and red sugar bushes of an autumn afternoon, or the blue-white snowy cold of a winter's night, Vermont reminds us all, minute by minute, why we strive to protect the environment.

It was Vermont's beauty which attracted the environmental law teachers—David Firestone, Norman Williams, Edward Kellogg, and Steven Dycus—who helped establish the Environmental Law Center ten years ago. More recent arrivals, Douglas Costle, our Dean and former EPA Administrator, and Sheldon Novick, former EPA lawyer and author of several books on the environment, as well as a host of visiting environmental and land use lawyers, were also lured here by the Vermont mystique. But it is the

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annual crop of law students committed to environmental law, lobbying for environmental legislation, assisting in environmental law cases, writing and editing law review articles and notes, and organizing recycling programs, who are the ultimate bounty of Vermont's environment.

The continued awareness of Vermont's natural beauty infuses its laws and shapes the way both faculty and students view environmental law. Most environmental law reviews and scholars across the country begin with environmental law problems—the threats to the environment. This is to be expected in an urbanized and industrialized world which abounds in toxic waste, putrid streams, and polluted air. This "urban" approach to environmental law gradually obscures the visibility of environmental ideals. Environmental law becomes merely the task of the manipulation of bureaucratic rules.

Vermont Law School's environmental law scholars and students keep their eyes fixed on the environmental ideals which make the game worth playing. By environmental legal ideals, I do not refer to clean air, pure water, or the control of soil pollution and erosion. Such a prosaic statement of environmental objectives, although important, fails to offer any moral justification. Nor does it offer answers to such practical questions as: How clean is clean? What costs should be borne to clean up the air and water?

I.

The collective environmental ideals to which I am referring have strong rhetorical appeal to motivate our collective actions. These ideals have the power to generate legal principles for determining the manner of their achievement. Several of these environmental ideals are described below.

A. *Respect for Nature*

Take, for example, the nebulous ideal of respect for nature. This respect involves acknowledgement that non-human nature may have implicit values, purposes, and feelings which are deserving of protection. This ideal has been studied in many philosophical works.¹ The workings out of the ideal have been illustrated by

1. See generally ALDO LEOPOLD: *THE MAN AND HIS LEGACY* (Tanner ed. 1987); P. TAY-

Keith Thomas who offers a cultural history of our attitudes toward animals.² At a more specific level, Tom Regan explores the different current ethical quandaries encountered by efforts to respect the animate environment.³ Respect for nature finds expression in wilderness protection, endangered species, and anti-cruelty-to-animals laws. Such respect is also the basis from which some environmental lawyers argue that "trees should have standing," just like people, in courts of law. All of these laws express the conviction that nature has value, in and of itself, and that nature demands respect. One recent example of respect for nature in Vermont is the current debate over animal legholds used by Vermont trappers. Groups favoring the banning of leghold traps are fighting against hunters and trappers who want to use the legholds. Another example is the recent denial or rejection of permits for developments which threaten deer grazing areas.

B. The Protection of Nature's Beauty

Some environmental ideals are central themes in American culture. One such ideal, easily studied in Vermont, is the protection and enforcement of scenic beauty. This beauty is variously described either by an appeal to traditional landscapes or by ideals such as "harmony." Many of the environmental classics are devoted to sensitive descriptions of scenic beauty.⁴ Some of the foremost environmental law scholars, such as Joseph Sax, have explored how to protect beauty by law.⁵ Highway beautification, descriptions of scenic vistas, and ridgetop protection are just a few of the myriad of laws passed to protect scenic values. Vermont is currently locked in a struggle over the extent to which development should be curbed to preserve scenic views. Seeking to design unambiguous standards for protection of such scenic views is a major challenge for Vermonters.

LOR, RESPECT FOR NATURE (1986).

2. See generally K. THOMAS, *MAN AND THE NATURAL WORLD* (1983) (Thomas reports that the family trees of certain English families included wild animals—such as the earl of Northumberland, who claimed descent from a bear that had "ravished" his grandmother).

3. See generally T. REGAN, *THE CASE FOR ANIMAL RIGHTS* (1983).

4. See, e.g., E. ABBEY, *DESERT SOLITAIRE* (1968); P. MATHIESON, *THE SNOW LEOPARD* (1978); J. MICHENER, *CHESAPEAKE* (1978).

5. J. SAX, *MOUNTAINS WITHOUT HANDRAILS* (1980).

C. "The Simple Life"

Environmental themes may be important in American culture, but they are often less than central to modern American life. David Shi has recently traced the history of the ideal of "the simple life."⁶ Perhaps a more pragmatic expression of the concern for "the simple life" is a current item high on the agenda of the Environmental Law Center—the study of part-time farming.⁷ Although such an ideal seems to fit the Vermont culture, it appears to conflict with the dominant American urban culture. Recently, laws have been proposed to encourage part-time farming and existing laws have been roundly criticized for supporting large-scale agribusiness. In Vermont, the ideal of the family farm and the simple rural life is a vibrant force, despite the gradual erosion of agriculture as an industry and the gradual urbanization of the state.

D. Health, Security, and Protection of the Vulnerable

Environmental ideals are not discrete bundles of hopes and desires; they are intertwined with broader goals in American life. Thus, although the protection and enhancement of environmental health is an important current priority,⁸ this priority is intertwined with our general pursuit of security⁹ and the protection of vulnerable groups such as children and the aged.¹⁰ Food and drug regulations, pesticide controls, occupational health programs, and safe drinking water protection comprise part of a complex legal regime for promoting environmental health. The central issues in this field include how to measure and regulate risks, and what level of protection should be given to especially vulnerable groups such as the aged and the sick. Vermont has recently adopted new health and water laws embodying the notion that the public should not be exposed to unreasonable risks and that it should be given information about certain risks.

6. D. SHI, *THE SIMPLE LIFE* (1985).

7. See generally W. BERRY, *THE UNSETTLING OF AMERICA: CULTURE & AGRICULTURE* (1977).

8. See, e.g., R. DUBOS, *MAN ADAPTING* (1965); L. KASS, *TOWARD A MORE NATURAL SCIENCE* (1985); P. STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* (1982).

9. See M. DOUGLAS & A. WILDAVSKY, *RISK AND CULTURE* (1982).

10. See R. GOODIN, *PROTECTING THE VULNERABLE* (1985).

E. *Holding the Environment in Trust*

Some of the ideals explored at the Environmental Law Center are admittedly ambiguous. The Center and its staff have always been deeply interested in the notion of holding the environment in trust. The trust concept is central to environmental protection.¹¹ Contained within the trust concept are the notions of fiduciary responsibility of a trustee, obligations to future generations,¹² and managing the commons.¹³ Each of these elements is the subject of a vast legal and philosophical literature.

The trust concept is a difficult one since it is not clear to what extent, if at all, we should depend upon an unelected trustee. It is also not clear what our obligations to future generations are, and how trusts and common property should be managed. The common law of public trust, the statutes placing the environment in trust, and the many private trusts are the legal vehicles for establishing both public and private trusts. At a legal level, Vermont has depended upon both public doctrine and private trusts to protect the environment. Critics, both in and out of Vermont, have launched vigorous attacks on such trusts as contributing to a "new feudalism," tying up valuable lands needed for other purposes.

F. *An Ecologically Sound "Community"*

There are other "comrade principles" in American culture—principles which can buttress central environmental ideals. These principles include the strengthening of a sense of community,¹⁴ the encouragement of civic participation,¹⁵ and the nonlitigious resolution of disputes.¹⁶ Recent laws strengthening local protection of the environment, facilitating citizen participation in environmental decision-making, and supporting alternative dispute resolution of environmental conflicts exemplify the spirit of communitarianism. Several environmentalists have argued that only by

11. See B. BARBER, *THE LOGIC AND LIMITS OF TRUST* (1983); J. SAX, *DEFENDING THE ENVIRONMENT* (1971).

12. See *OBLIGATIONS TO FUTURE GENERATIONS* (R. Sikora & B. Barry eds. 1978).

13. See generally *MANAGING THE COMMONS* (G. Hardin ed. 1977).

14. See, e.g., M. BOOKCHIN, *TOWARD AN ECOLOGICAL SOCIETY* (1980); K. LYNCH, *THE THEORY OF GOOD CITY FORM* (1981); A. SPIRN, *THE GRANITE GARDEN* (1984).

15. See, e.g., R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, *HABITS OF THE HEART* (1985).

16. See generally L. BACOW & M. WHEELER, *ENVIRONMENTAL DISPUTE RESOLUTION* (1984).

strengthening local controls can the environment be protected. Within Vermont, there remains a lively interest in strengthening local government and its tradition of the town meeting. Yet, some are arguing that strengthened state initiatives are needed, even though they may have the consequence of weakening local government and citizen participation.

G. *New Ideals from Ecology*

We are witnessing the emergence of environmental ideals which, although the product of a long history of environmental thought,¹⁷ have also been recently shaped by the new science of ecology.¹⁸ The fundamental problem is one which requires making a transition between biological concepts and legal ideals. Such concepts as "carrying capacity," "natural boundaries," "bio-region," and "diversity" are now making their way into legal language. One idea closely related to the notion of a viable ecological order is a recycled society.¹⁹ In Vermont and nationally, recycling programs, protection of specific ecosystems,²⁰ and environmental impact statements required by law express modern ecological ideals.

H. *Environmental Justice*

Underlying all of these ideals, values, principles, and priorities is the notion of environmental justice. Particular inquiries into environmental justice include: explorations of the way in which criminal laws can properly be used to promote environmental protection (retributive justice), the role of common law torts²¹ (corrective justice), the way in which prices can be set and workplaces and products described to reflect their environmental costs²² (exchange justice), and the distribution of the costs and benefits of environmental policies (distributive justice). Since standards of general justice are seldom agreed upon, articulating any fair standard of

17. See C. GLACKIN, *TRACES ON THE RHODIAN SHORE* (1967).

18. See D. WORSTER, *NATURE'S ECONOMY* (1977).

19. See generally K. VALASKAKIS, P. SINDELL, J. SMITH & I. FITZPATRICK-MARTIN, *THE CONSERVER SOCIETY* (1979).

20. For example, wetlands, mountains, and barrier beaches all constitute specific ecosystems.

21. For example, appropriate common law tort actions include nuisance, negligence, and strict liability approaches to protection of the environment.

22. Right-to-know laws are an example.

environmental justice is even more difficult.²³ A study of the enforcement of environmental laws is currently under way both nationally and in Vermont, and it is raising fundamental issues regarding standards of environmental justice.

II.

How does an awareness of these ideals guide the study and action in the environmental law field?

First, the legal process itself is viewed as the progressive clarification of these environmental ideals. For example, we in Vermont are currently seeking to clarify what it means to hold the environment in the public trust. In a case now before the Vermont Supreme Court, a major waterfront development on Lake Champlain is being challenged by those who believe such a development contravenes the public trust doctrine. Our students study the workings of this doctrine in several courses. In addition, faculty and students have helped with the legal briefs in the case.

Second, a vivid consciousness of environmental ideals makes us aware that there are many legal and non-legal avenues to reaching these ideals. One need not depend upon the tradition and paradigm of environmental law by which Congress enacts a law, and a bureaucracy develops a plan and the regulations to implement it. These regulations are then enforced by technicians, and the regulations, in turn, are challenged in administrative hearings and in the court.

If we keep in mind our environmental ideals, each stage of this paradigm is drawn into question. For example, rather than hold the environment in trust by statutes and regulations, we can hold the environment in trust through private trust agreements or the common law. Rather than depend upon large bureaucracies to protect our environment, we need to explore the viability of decentralized bio-regional organizations, such as river basin councils or agricultural cooperatives, organizations which incorporate ecological ideals into their very definition. Rather than rely upon bureaucratic regulations alone, we must empower local communities and organizations by means of incentives to respond environmentally on their own. Instead of depending upon courts and administrative agencies to resolve environmental disputes—a resolution which fre-

23. See generally J. HOCHCHILD, *WHAT'S FAIR* (1981).

quently impedes progress towards the realization of viable environmental ideals—we can explore alternative dispute resolution techniques for handling our environmental fights.

Third, an awareness of environmental ideals and the array of strategies needed to realize them makes an entire new set of legal materials relevant to the study of environmental law. The traditional “legal telescope” for peeping at the law is the appellate court case. However, the proper scholarship to the study of new ways of achieving environmental ideals requires that one study trust agreements, development contracts on negotiation and mediation proceedings, the legal workings of bio-regional organizations, the internal functioning of environmental auditing units within corporations, and so forth. In a sense, such a study is a return to legal realism—a study of the way law really works in the community. Unlike legal realism, however, this study is guided not by the spirit of skeptical debunking, but by an idealism carefully grounded in the living law of the community.

CONCLUSION

Environmental law, as studied in Vermont, can be an exercise in “experimental jurisprudence.” By “experimental jurisprudence,” I mean the careful evaluation of the workings of existing legal institutions to protect the environment and the deliberate design of new institutions which, in turn, are to be evaluated. The size of Vermont, the tractability of her environmental problems, and the accessibility of her legal and community institutions offer the opportunity for law students along with persons in other disciplines, to carefully evaluate the workings of her old laws and new programs. This exercise in “experimental jurisprudence,” which is desperately needed in the environmental law field, focuses upon legal research and evaluation by measuring the ways in which legal institutions achieve or fall short of their objectives, and these objectives must be understood and evaluated in the light of our tradition of environmental ideals.