Law and the Environment

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BOOK REVIEW


Since one of the attributes of the "post-industrial society"\(^1\) is the compression of events along a temporal axis, it should not come as a surprise to attorneys that the stately historic evolution of common law doctrine has become somewhat frantic of late, especially in regard to doctrines that concern technological developments. While we have not yet experienced "instant common law," the trend is certainly in that direction. In large measure, of course, this is not because the internal dynamic of the law has mutated; instead, it expresses the legitimate function of the legal process in dealing with and reflecting real world developments. As the latter accelerate and produce the compressed impacts we have come to call crises, the legal mechanism, as one of the social "support systems,"\(^2\) must respond accordingly.

Another notable aspect of our modern culture is its synthetic quality. Everything is "plastic" rather than natural, the complaint reads. Along with manufactured and manipulated wants and expectations, developed and nurtured by the advertisers and the media, we might expect to observe the appearance of "synthetic law," readily produced according to the blueprint specifications of specialized interests in the technological area. Of course, one's jurisprudential outlook will determine one's interpretation of the origin and functions of laws; in my opinion, older legal doctrines were often created and nurtured in correspondence to the needs of identifiable social interests. However, legal novelties, like technological ones, may have a considerably greater impact today than in earlier times, and we may be in a better position to observe the process by which such doctrines are created and developed.

Environmental law is a relatively new area of interest and may be suspect as being both instant and synthetic. While Law and the Environment is a unique and important work in this area, unfortunately it does little to allay such doubts.

In September 1969, a conference on the legal aspects of environmental control was convened at Airlie House in northern Virginia by

\(^1\) The phrase may have originated with Bell, Notes on the Post-Industrial Society (pts. 1-2), Pub. Interest, Winter 1967, at 24; Pub. Interest, Spring 1967, at 102.

the Conservation Foundation and the Conservation and Research Foundation. Most of the attorneys, law professors, and conservationists who were involved with questions of environmental law at that time attended, and the present book consists essentially of the record of the conference proceedings, both commissioned papers and discussion sessions.

Interdisciplinary activities, although au courant, present several considerable difficulties. One of the more obvious of these problems is that relating to communication. The first hurdle is to facilitate interaction among the participants themselves, but after these individuals have been playing the game for a while they may have begun to assimilate enough of each others' jargon to make the process feasible. When the product of an interdisciplinary session is sent forth into the world, however, its message must be carefully tailored to preconceived groups of potential recipients if it is to be understood by any.

It is difficult to identify the composition of the expected readership of Law and the Environment. Conference papers inherently appeal to fairly limited and discrete audiences. They usually present illustrations of what specialists in the field are doing, and as such are of primary interest to other specialists. Thus, they presuppose some shared background to serve as a framework for the more technical matters they deal with. In the present instance, one wonders whether a reader without some legal knowledge as well as environmental savvy can handle the material in the book. While the work has intrinsic merit as a historical record, the question must be raised—in spite of the phenomenal increase in public concern about these issues—whether the conference participants did not largely exhaust the potential audience subset that could comprehend the subject matter fully.

A paper such as David Sive's "Securing, Examining and Cross-Examining Expert Witnesses in Environmental Cases" will be incomprehensible to the general membership of his own Sierra Club. To make such a statement is in no way meant to denigrate the importance of this article, either as a contribution to legal scholarship or as practical assistance to the litigating environmental attorney. Sive has, of course, written about this field for the layman and lectured extensively to many groups, but on such occasions he chooses his specific topics and words accordingly.

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3 P. 48. This article is also printed in 68 Mich. L. Rev. 1175 (1970).
4 For example, Sive, The Environment: Is It Protected by the Bill of Rights, Civil Liberties, April 1970, at 3.
Other examples can be given. Two articles are of interest solely to persons concerned with law school curricula, a rather specialized involvement. James Krier has written a piece about the crucial issues of burden of proof, but my teaching experience indicates that this is a difficult and technical topic for laymen. Berlin, Roisman, and Kessler attempt to expand the notion of the public trust, basing their paper on the recent major work by Joseph Sax on this topic, but it is still a sophisticated, if not esoteric, endeavor.

Some of the papers are more suitable for the novice. Harold Green provides a general perspective and Louis Jaffe deals with standing, managing to avoid a rehash of the large literature that has emerged on this doctrine. My colleague E. F. Roberts introduces philosophical considerations in a paper covering the constitutional dimensions of the movement’s activities. Baldwin presents a case study to illuminate the political machinations that invariably accompany environmental controversies. And James Moorman avowedly directs his attention to the needs of the general bar. Finally, if the layman is still bewildered, the book includes a valuable bibliography.

The transcript of the discussion sessions is excellent, but here it is keenly evident that the reader must have a broader legal background than that provided by the papers. That is, the give-and-take cannot be fully appreciated if one’s knowledge of the field is limited to the covers of the book.

6 Environmental Litigation and the Burden of Proof, p. 105.
7 Law in Action: The Trust Doctrine, p. 166.
9 The Role of Government in Environmental Conflict, p. 235.
10 Standing To Sue in Conservation Suits, p. 123.
11 The Right to a Decent Environment: Progress Along a Constitutional Avenue, p. 194.
12 The Santa Barbara Oil Spill, p. 5. This article has been somewhat revised to reflect passage of the Water Quality Improvement Act of 1970, 33 U.S.C.A. §§ 1161-71 (1970).
13 Outline of Federal Environmental Law for the Practicing Lawyer, p. 182. It is worth noting here that one of the projects that has developed from the Airlie Conference is the publication of the Environmental Law Reporter by the Environmental Law Institute in Washington. The Reporter is more than just a newsletter and a record of cases, legislation, and administrative activity; it also attempts to digest current pending litigation, a service of potentially great import in a field that is developing so rapidly. Its materials for January 1971 include an updated version of Moorman’s presentation.
14 P. 375.
15 Pp. 67, 248, 337.
**The Time Factor**

*Law and the Environment* is a “Polaroid” photo of the environmental law movement as of September 1969. To a certain extent, we may color it sepia-tone and place it in our memory album because it has been overwhelmed by the rush of subsequent events. Since that conference, the movement has come a long way, through good times and bad: the National Environmental Policy Act of 1969\(^\text{16}\) has been passed (providing, *inter alia*, for the establishment of the Council on Environmental Quality (CEQ)\(^\text{17}\) and requiring the preparation and filing of “environmental impact” statements\(^\text{18}\)) and perhaps undermined;\(^\text{19}\) the Water Quality Improvement Act of 1970\(^\text{20}\) has been enacted and attempts to rationalize such problems as oil pollution\(^\text{21}\) and the stubborn refusal of the Atomic Energy Commission to consider questions of thermal pollution due to the operations of its licensees;\(^\text{22}\) its companion statute, the Environmental Quality Improvement Act of 1970,\(^\text{23}\) provides strengthened staff support for the CEQ; most—but not all—regulatory authority has been shifted, in a major reorganization, to a new bureaucratic entity, the Environmental Protection Agency;\(^\text{24}\) an appellate court has refused to accept the standing of a major conservation group in a public interest lawsuit;\(^\text{25}\) and there is a reported decision that accepts, in passing, the idea of a constitutional right to a healthful and clean environment.\(^\text{26}\) These are only some of the developments on the federal level. The movement is proceeding apace in the state houses and localities as well.

The book attempts, through the use of footnotes, to keep the reader abreast of some of these changes. One cannot dam Heraclitus’s river, however, especially at floodtide. Undoubtedly, the editors and


\(^{17}\) Id. §§ 4341-47.

\(^{18}\) Id. § 4332.

\(^{19}\) See N.Y. Times, Nov. 14, 1970, at 23, col. 1. There have been other reports of the law apparently being ignored. But as this review was being written, the Council on Environmental Quality proposed rules that might end many such evasions. 56 Fed. Reg. 1998 (1971).


\(^{21}\) Id. § 1161.

\(^{22}\) Id. 1171. See also New Hampshire v. AEC, 406 F.2d 170 (1st Cir. 1969), *cert. denied*, 395 U.S. 962 (1970).


contributors to this volume realize this situation better than the reviewer does; the Airlie Conference was designed to marshal mutual support and exchange strategies at a particular moment in the development of the law, not to produce an environmental hornbook. But the inevitable conclusion is that the book that was produced is less valuable today than it would have been if published immediately after the meeting, and its worth will unfortunately continue to lessen as time passes.

THE SELF-SERVING ASPECT

Much, if not most, of legal scholarship is not disinterested. Attorneys do not have to undertake their research and writing under the guise of "objectivity" which supposedly governs work in the academic social science disciplines. A legal author is apt to have gained his knowledge about the subject of his article by being involved in actual disputes concerning the issues it presents. The lay person reading this book or a similar work, however, may not realize that the various proponents of different intellectual theories are simultaneously likely to be emotionally engaged in seeking judicial recognition for them. Thus, what seems obvious to those of us in the fraternity may come as a bit of a surprise to the general reader, even though many of the contributors make a point of indicating their involvement. Roberts is the most candid in this regard:

I also suspect that this kind of conference may be a law generating device by which we throw out a citation and hope that some day some judge finally cites the damn thing for his emotional conclusion because, trained like a lawyer, he has to cite something that says it's authority.27

And yet, this "self-serving aspect" of the book represents, in my mind, one of its valuable aspects. The conference participants are involved with the highest and best use of legal thinking, its creative function. Since so many areas of public decision-making display a paucity of imagination (if not a total inability) for creating and evaluating decision-alternatives, Law and the Environment serves as an excellent record of how a group of committed persons can work at overcoming this obstacle. If our society is ever going to be able to deal with the complex problems it has allowed to arise, it will be precisely through such a utilization of talents.

In this regard, the process of developing an environmental law

27 P. 249.
can serve as a model for possible action in other apparently intractable areas. The attempt to propound a constitutional right to a healthy and decent environment, and to make such a notion intellectually respectable, is one prime example of this process. Others are the need to deal with the factor of irreversibility in certain public decisions and the need to challenge irresponsible and irresponsible bureaucracies. Law can be an integrating and unifying mechanism, intimately tied to both man's most profound normative questions as well as his most grubby daily activities. And the adversarial mode by which it operates is seen to have real value as a means of resisting the efforts to eliminate—through consensus operations—deeply felt value differences and widespread citizen participation in public affairs.

CONCLUSION

Many of the preceding comments and observations are based on the experience of using this book as a part of a course on the legal system and environmental control, designed primarily for non-law students in a variety of academic and professional disciplines. General student reaction to it ranged from "current and cogent" to "spotty quality—some readings better than others." However, there was a fairly clear agreement that the book fails to stand on its own and takes too much for granted on the part of the reader; it is useful as supplementary material to be read in conjunction with numerous other articles and monographs. Its incompleteness is particularly annoying in view of its high price.

In sum, those of us interested in environmental law will continue to appreciate the seminal importance of the 1969 conference, and will continue to respect its participants as our teachers and trailblazers. But the book, with its sloppy editing and typesetting, (the Index, for example, is incorrect in apparently all page references)\(^2\) will elicit only mixed satisfactions.

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\(^2\) Having had the privilege of examining the galleys, I suspect that the citations were to that pagination. I suggest that readers may wish to utilize my crude method of error correction which is to "add 4" to all references as a first approximation.