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Book Reviews

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BOOK REVIEWS

The Environmental Law Reporter in the Classroom

THE ENVIRONMENTAL LAW REPORTER. Washington: ENVIRONMENTAL LAW INSTITUTE 1971. Looseleaf.

The Environmental Law Reporter[1] is a cumulative monthly looseleaf service devoted chiefly to the environmental issues confronting private attorneys, governmental officials, and teachers. During the fall semester of 1971, the *Reporter* was employed as a text for the University of Maryland's basic course in environmental law. This review will attempt to measure its potential as a teaching tool.

The task of evaluating the *Reporter* is complicated because environmental law courses suffer from an identity crisis. Not only are they beset with prototypical birth traumas, but they also are faced with a significant sibling rivalry. For example, at the 1970 meeting of the Association of American Law Schools, a panel of predominantly young and appropriately hirsute participants enthusiastically described the environmental law offerings at various law schools. At the close of the formal presentation, however, a voice from the back of the room disclaimed, "I don't think there is any such thing as environmental law." The speaker was Professor Kenneth Culp Davis, a father figure of administrative law.

Professor Davis's squelch may be embellished. Certainly the preponderance of the so-called environmental cases to date have been efforts to affect administrative decision-making. As such, they deal with the abstract and picturesque litany of administrative law—standing, reviewability, ripeness, sovereign immunity, and exhaustion of remedies. If this were the crux of environmental law, then, in terms of law school curriculum, it is little more than an opportunity to put the piss and vinegar back into administrative law courses by pouring new brine into old bottles.

But there are other problems concerning the quality of the environment that are not within the purview of the traditional courses in administrative law, and that need to be examined in an environmental law course. For example, the extent to which private litigation—suits in nuisance, trespass, and inverse condemnation—and private negotiation can force producers to internalize the full cost of production may be addressed using the study tools of both law and economics. The economist might describe pollution as a product of weakness in property

1. Published by the Environmental Law Institute, 1346 Connecticut Avenue, N.W., Washington, D.C. 20036.

systems. To illustrate, water systems traditionally were treated as commons—free to all for the taking. This view was adequate until the increased load on these systems began to exceed their assimilative capacities. The classic legal response would be to regulate discharges into these systems and thereby to obtain the desired level of environmental quality. Economists, however, suggest that there may be more effective strategies. If producers could be forced to internalize the full social costs occasioned by their discharges through a better property system or through the use of governmentally imposed charges, the same level of environmental quality might be obtained more flexibly and more efficiently.

There are also substantive legal problems that the current rash of environmental cases can be used to emphasize and exemplify. For example, there are the constitutional questions. Despite efforts to define a constitutional right of environmental quality through the concept of a public trust, parochialism and cost allocation continue to exist as roadblocks. There is a natural tendency on the part of governments with geographically circumscribed boundaries to give preferential treatment to their own residents in the utilization of resources. The preferences may take various forms: Maryland excludes nonresidents from its oyster fishery; Delaware excludes new heavy industries from its coastal zone while permitting existing heavy industry to expand; Minnesota attempts to impose radiation emission standards more stringent than national standards to discourage power generating facilities with their attendant environmental side effects from locating in the state. Under constitutional law, such preferences may constitute denials of equal protection, burdens on interstate commerce, or instances of impermissible state activity in areas pre-empted by federal action.

Almost every governmental action designed to enhance or maintain environmental quality has a cost. When government prohibits certain activity this cost initially may be imposed on private parties. For example, when laws preclude construction in wetland areas a cost is imposed on private owners, since the wetlands are reduced in value because of foreclosed developmental opportunities. The constitutional methodology used to determine whether the private owner may force transfer of the cost back to the public sector entails asking whether the governmental action constitutes a "taking" of property in violation of the fourteenth amendment to the United States Constitution. Wetland, water-quality, and mining cases afford a backdrop for analyzing the rather fumbling way in which courts have dealt with this vital question.

A course in environmental law provides a vehicle through which both the legalistic and institutional problems of managing environmen-

tal quality in a federal system can be explored. Increased public attention to environmental problems has placed new stresses on the federal system. In addition to the pervasive problem of determining when Congress has pre-empted an area for exclusively federal action, there are other issues. Pollutants do not respect governmental boundaries; instead they move throughout interstate or international water and air sheds. Accordingly, narrow legal questions arise concerning the jurisdiction of various state and federal courts and the choice of substantive law to be applied. More generally, the first crusade for environmental quality during the 1960's flew the flag of "creative federalism." Federal water and air quality control statutes that were enacted contained elaborate systems for federal and state interaction. The states were designated as primary standard-setters and enforcers, with federal agencies functioning as reviewers, equalizers, and financiers. These elaborate formations are now in disarray and disrepute; gradually, they are being regrouped into new simplified legislative initiatives.

The course that I taught attempted to deal both with the effect of environmental litigation on the administrative process and with the myriad of underlying substantive issues. The suitability of the *Reporter* as a source book varied from context to context.

The *Reporter* was most effective in its treatment of the evolving attitudes toward administrators. This change is perhaps best stated by Judge Bazelon:

> We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. For many years, courts have treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure. On matters of substance, the courts regularly upheld agency action, with a nod in the direction of the "substantial evidence" test, and a bow to the mysteries of administrative expertise. Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the decision, or a crucial factor had not been considered. Gradually, however, that power has come into more frequent use, and with it, the requirement that administrators articulate the factors on which they base their decisions.[2]

The *Reporter* contains the raw material upon which this generalization is based. The *Litigation* section presents the full texts of selected state and federal court opinions; the *Administrative Proceedings* section contains the texts of important administrative determinations; the *Digest Facsimile Service* digests cases soon after they are filed and updates

2. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971) (Secretary of Agriculture must initiate formal proceedings to determine possible cancellation of pesticide registration when a substantial question is found concerning the pesticide's safety).

them monthly. These materials make it possible to expose students to various aspects of interaction between courts and administrators. For example, the ongoing dispute over the registration of DDT under the Federal Insecticide, Fungicide, and Rodenticide Act[3] may be traced sequentially through a series of administrative orders and judicial remands. This permits a view of the administrative process different from that presented by traditional administrative law casebooks. Rather than attempting to exhume principles of general application buried in a static body of Supreme Court cases, many of which are relics of the New Deal, the student sees courts and administrative agencies struggling to make an accommodation in current problem areas. There are, of course, correlative disadvantages. With the emphasis on new developments, there is a dearth of historical perspective. Justice Oliver Wendell Holmes once said, "a page of history is worth a volume of logic."[4] Fortunately, much of the material found in volume one of the *Reporter* at least can pass for logic.

The *Reporter* is much less satisfactory as a source book for considering the relationship of legal concepts and economic analysis. It contains, it is true, useful points of departure. *Bruce v. Director*[5] may be used as a springboard for discussing the "tragedy of the commons." The case involves Maryland's common-property oyster fishery, which has suffered dramatic exploitation. *Boomer v. Atlantic Cement Co.*[6] and other nuisance cases may be employed to consider the efficacy of private litigation as a device for forcing polluters to internalize the full environmental cost of production. Aside from one short note on *Tax Incentives and the Environment* found in the *Summary and Comments* section, however, there are no basic readings in economics. One response might be to assign outside readings in a monograph such as *The Quality of the Environment: An Economic Approach to Some Problems in Using Law, Water and Air.*[7] Even if such readings were assigned, I suspect the students still would not come away from the course with the appreciation of the potential uses and abuses of economic analysis in environmental decision-making that might be obtained from course materials which integrate the two disciplines.[8]

Materials found in the *Reporter* provide an eclectic sampler of

3. 7 U.S.C. §§ 135-135k (1970).
4. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).
5. 261 Md. 585, 276 A.2d 200 (1971).
6. 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).
7. O. HERFINDAHL & A. KNEESE, THE QUALITY OF THE ENVIRONMENT (1965).
8. *See* J. KRIER, ENVIRONMENTAL LAW AND POLICY (1971); C. MEYERS & A. TARLOCK, SELECTED LEGAL AND ECONOMIC ASPECTS OF ENVIRONMENTAL PROTECTION (1971).

substantive environmental law issues that may be employed according to the instructor's predelictions. Cases in the *Litigation* section may be analyzed in the classic law-teaching tradition. Entries in the *Digest Facsimile Service* may be surveyed to illustrate the variety of novel ways in which environmental degradations may be challenged in court. The *Summary and Comments* section provides an analytic commentary on the significance of recent cases and administrative decisions. In addition, the *Reporter* contains the full text of important federal legislation and administrative rulings, as well as a limited selection of equivalent state material.

These constitutents can be blended together to develop a discussion topic. For example, ample materials are available to consider the impact of the National Environmental Policy Act[9] on the administrative process, and its interpretation in the courts; the development of federal water pollution control efforts under the permit program[10] of the Refuse Act of 1899[11] also can be observed. Only in one respect do the materials come up short: since states play a primary role in both the water and air quality efforts, the materials need to be supplemented with more samples of state statutes and quality standards.

The *Reporter* was used in the manner described above during the year of its first volume. Now that the *Reporter* is into its second volume, logistic obstacles are presented to its future use as a course book. The materials are too voluminous and too expensive to justify requiring student acquisition of a complete set; the second volume alone is inadequate because much material contained in the first volume is still topical. There appears to be a solution to the problem, however; a package of case materials could be extracted from back volumes and complemented by the monthly supplements during the semester when the course is in progress. If the details of such a plan can be worked out—and efforts are now underway—the practicability and utility of the *Reporter* as a course book can be maintained and, perhaps, enhanced.

In summary, I feel that the *Reporter* provides an exceptional compendium of materials for use as a source book in a course in environmental law. It has limitations. It is not a predigested pedagogic package and it requires some creative work by the instructor. It does not effectively develop the relationship between legal concepts and economic analysis. It needs to be supplemented with samples of state statutes and

9. 42 U.S.C. §§ 4321, 4331-35, 4341-47 (1970).

10. Exec. Order No. 11,574, 3 C.F.R. § 188 (Supp. 1970).

11. 33 U.S.C. § 407 (1970) (originally enacted as Act of Mar. 3, 1899, ch. 425, § 13, 30 Stat. 1152).

regulations. But the *Reporter* does provide a vehicle for considering the impact of the environmental litigation on the administrative process and for surveying the dynamic problems faced by legal institutions in their efforts to manage the quality of the environment.

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Guidebook for Litigation

THE ENVIRONMENTAL LAW HANDBOOK. By Norman J. Landau & Paul D. Rheingold. New York: Ballantine/Friends of the Earth, 1971. Pp. 496. $1.25 (Paper).

The common law is still the most useful and flexible weapon in the arsenal of those who care enough about the quality of our environment to do something about it. This is the basic premise of the authors of *The Environmental Law Handbook*, both of whom are experienced trial lawyers and are not afraid to try novel methods of coping with problem areas of the law. They contend that even with the current pressure to solve newly recognized environmental problems, we must turn once again to the common law.

In the foreword, Ralph Nader points out the growing awareness of the public to the dangers of pollution, an awareness that has been manifested only during the past five years. The authors, according to Nader, dared to produce a book directed to both lawyers and nonlawyers, which if successful would be a surprising feat in itself. In this writer's opinion, they have achieved a signal success.

The book is unabashedly designed to proliferate the number of lawsuits in the environmental field in an effort to curb the industrial and individual violence to our environment that has gone unchecked in the past, often with an unofficial nod of encouragement from those legal authorities who were supposed to regulate or curb it. The authors endeavor to explain our legal system to nonlawyers in understandable terminology: how is a private lawsuit brought; who can bring a lawsuit; who are the conceivable defendants; what is the opportunity for success; and what are the costs? The analysis of possible defendants, their predictable reaction based on former litigation, and the success potential of suits against them should prove very worthwhile to private citizens, environmental groups, and lawyers alike.

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A general outline of the law relating to pollution and other types of environmental degradation also is included with special emphasis on the litigation already concluded or still underway involving governmental agencies. Although many aspects of the book are designed primarily for nonlawyers, the legal concepts and procedural rituals involved are sufficiently well explained and documented to furnish a more than adequate review for recent law graduates, and a much needed updating for practitioners who have been out of law school for more than five years, during which time much of the environmental law development has taken place.

The authors explain that until very recently the most important legal theory affecting environmental matters was the law of nuisance, a complex body of law that they accurately outline in simplified terms for laymen and in legally meaningful terms for practitioners. They suggest that it is still the primary body of law on which the environmentalist must rely, in spite of such limitations as the requirements of property ownership and damage to the property.

The remainder of the book consists of case citations, extracts from recent opinions, both favorable and unfavorable to the preservation of the environment, and copies of pleadings that have been used successfully in the environmental field. All of these should be of inestimable value and assistance to practitioners who are considering bringing an environmental lawsuit. The bibliography alone could save several days of research.

The authors assign to the legal process the predominant role in the eradication of pollution, apparently feeling that the other methods have failed or are destined to fail. They emphasize that a private lawsuit by a citizen represents one solution to the ecological problems of our nation that is unique, since the courtroom may represent the last arena in which individual citizens can confront mighty government and big business, and prevail.

The bias in favor of litigation of environmental issues evokes the principal criticism of the book—its single-minded emphasis upon the solving of all environmental problems through the courts. Environmental suits often are long and costly, and sometimes are unsuccessful. This is particularly true when the suit is heard by an ill-informed judge, one whose sympathies may lie with the establishment, or one from the old school, with an archaic attitude toward progress, who believes that bigger is always better.

Those of us who already have participated in the efforts to stop pollution through other processes probably can appreciate this attitude better than those who have been led to believe that right naturally

prevails in our legislative halls, city councils, and administrative bodies. We have learned the hard way that these are the very arenas in which the rich, the powerful, the corporations, and the land barons can influence or even control the outcome. We also know that the courts are not the entire answer and that often other remedies, such as direct action, may be more effective and less expensive.

The basic goal of the authors is to place a guide in the layman's hands, enabling him to determine whether he has a cause of action, how he can obtain a lawyer knowledgeable in the field, and how he can communicate his problem to the lawyer even though the latter may not be familiar with the practice of environmental law. The authors briefly introduce the lawyer to the field of environmental law, thus enabling him to conserve countless hours that would otherwise be wasted in familiarizing himself with the basic principles. The book affords lawyers and laymen alike a foundation for understanding environmental matters and facilitates more effective communication.

The authors provide an excellent guidebook, at a bargain price, to one important method for countering ecological destruction—the lawsuit or threat of a lawsuit—and in so doing, have rendered a real service.

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