

## Notes for an Environmental Law Course

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## NOTES FOR AN ENVIRONMENTAL LAW COURSE

*Harrison C. Dunning*†

Courses in resources law are well established in many of the nation's law schools. Generally, they are built around the legal problems that occur in the development of particular natural resources. The reason seems obvious: people have been primarily interested in those particular substances found in nature that offer the possibility of immediate economic gain when extracted or otherwise put into production. The law schools have been primarily interested in providing training for those who would represent these developers of economically interesting natural resources. Oil and gas law, hard mineral law, and water law have been important to many law professionals, and the law school natural resources law courses have provided the initial training. By and large, the courses have been technical, fragmented one from another, and highly useful. Until recently, most have been less concerned with public planning than have courses dealing with land as a natural resource.

To some, "environmental law" seems to be another name for "natural resources law," albeit one with considerably more zip and excitement given current political trends. The term is so new that each is entitled to make of it what he wishes, but it can usefully be employed for something quite different from natural resources law or various fragments thereof. "Environment" in past years popularly was used with "heredity" to refer to that which shapes the individual, but today it is often used to refer to the natural life-support systems of the species. If "environment" is taken as what we find about us in nature and what we depend upon for survival, "environmental law" can legitimately be used to refer to the law we employ to govern the interaction between man and his environment. From this perspective, the "environmental lawyer" must ask, what in our law and legal institutions, if anything, prevents the balance from tipping so that life-support systems are no longer able to support the human species?

So defined, the field of environmental law may seem both discouragingly ambitious and impossibly broad. It certainly does not suggest the same set of problems to all lawyers, much less particular

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appellate opinions or a hornbook. What particular questions would a student in a course on environmental law consider? What materials would he use? Most important of all, what unifying principles might give coherence to a course in this subject? Since environmental law, according to the view suggested here, should not be just another name for a general natural resources law course, one would not expect to find simply bits and pieces from already developed fields—water law, mining law, land use planning law, public domain law, and so forth. Nor would one be very happy to find in the course only a series of problems regarding litigation and the legal process as they affect protection of some part of the environment—standing, class actions, burden of proof, remedies, etc. Such courses could be very useful and would draw on materials now included in the standard law school curriculum. But they do not go to the heart of the matter.

Two subjects seem particularly appropriate for the concern and attention of the student in a course in environmental law. One is population, the other waste. The staggering increases in human populations, past and projected, and the uneven distribution of humans and human activities over the globe have put and will continue to put enormous pressures on our natural life-support systems. These pressures are exacerbated when we develop advanced agricultural and industrial systems that require the disposal of large quantities of novel forms of waste. If the notion of interdependency between man and his environment is to be central to a course in environmental law, then problems of the control of both population growth and population distribution seem a logical place to begin. Nor does it seem inappropriate for law students to examine in detail what law and our legal institutions have to do with population. If survival of the species is in fact threatened, it would be astounding if we offered law students no opportunity systematically to study our situation. In some respects, the lesson with regard to population control may be that what law and legal institutions can contribute is limited—that it is far less than many laymen expect. In others, the study will necessarily be programmatic: although one can point to relatively few present efforts to reduce the number of wanted births, much may be gained simply from the consideration by law students of future approaches to controlling the numbers and distribution of humans. Neither of these considerations should be cause for apology or for foregoing an attempt to develop principles that can give coherence and meaning to the problems of law and population.

The other subject especially appropriate for emphasis under the heading of environmental law is waste. From a resource-oriented view,

waste is simply a pollutant, to be reduced or eliminated in the interest of maintaining the resource in a more natural state. Our pollution control laws often seem designed by authors who have this view. The view is fragmentary, so much so that measures to control pollution of one resource sometimes directly bring about increased pollution of another resource. If our orientation is man in nature and the balance between the two, the problem becomes one of how to reduce the quantity and harmful quality of the waste we have and how to dispose of the remainder. A student would examine the impact of particular wastes on various interrelated parts of the environment rather than the impact of various pollutants on a particular natural resource.

One merit of the environmental law perspective suggested here may be to illuminate the virtual lack of protection our society affords man's natural life-supporting systems. Where interference with the environment brings direct, short-run harm to humans, even if non-economic in nature, our traditional approaches may prove reasonably satisfactory to allocate the responsibility for past damage and to prevent future damage. It is where the threat is indirect and long-term, but where we face changes in nature that ultimately may doom the species, that our past approaches seem entirely inadequate. But if the law of torts and the public regulatory agencies, which themselves sponsor the developmental activity that must be controlled, provide no solutions, what will? What new legal forms could evolve?<sup>1</sup> These are the key questions for the student of this new field.

In sum, environmental law can be thought of as something quite different from natural resources law. The central problem in developing this area of legal study is coherence. Emphasis on the interdependence of man and his natural life-support systems and on what this means for law and legal institutions may be one path to coherence. Others may be an emphasis on the central role of planning in development, or the conservation values that are protected or not protected by our present legal systems. In any event, the biological and physical facts, the voices of many law students, and the mood of the times suggest that our law schools must do more than simply offer study of the law governing the economic exploitation of particular natural resources. Congressman John Saylor recently commented of environmental law

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<sup>1</sup> From the civilizational standpoint, the expansion of the law of torts was a magnificent advance over the blood-feud, the code duello, and the retaliatory horsewhip. But out of respect for this achievement of our ancestors we are not required to go on multiplying damage suits ad infinitum, while ignoring the need for new legal forms more relevant to the problems of our own time.

Ways, *How to Think about the Environment*, FORTUNE, Feb. 1970, at 98, 165.

that “[p]erhaps this is the first time in legal history where the opportunity to develop a new law specialty was known prior to the time of the full development of what can be called the body of law in the subject.”<sup>2</sup> This opportunity presents a major challenge to legal education in the 1970’s.

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<sup>2</sup> 115 CONG. REC. H 9825 (daily ed. Oct. 21, 1969).