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Looking Beyond Environmental Law's Mid-life Crisis

LINDA A. MALONE*

In the late 1970s, as a young lawyer just out of law school, I had the privilege of working with Fred Bosselman and David Callies at the law firm Ross & Hardies in Chicago. Bosselman and Callies, along with John Banta, had just a few years earlier published the landmark book in environmental regulation of land use, *The Taking Issue*,¹ which, among other legal innovations, suggested that a temporary regulatory taking of private property might require compensation.² I knew that I wanted to practice environmental law, although the environmental course offerings at Duke Law School (like most law schools at the time) had been limited to the basic survey course taught from materials the visiting professor had assembled. I knew nothing about land use, an area that my property teacher (like many law professors at the time) refused to consider or teach as any aspect of property law. My other area of interest was public international law, an area I didn't even expect to encounter in private law firm practice. I settled instead for an assignment to the small but growing group of attorneys who represented foreign corporations with subsidiaries in the United States. International environmental law was not even recognized as an area of legal expertise, by practitioners or by academics.

It has been a long, strange journey for those of us who have traveled along the path of environmental regulation of land use—from the explosion of naively optimistic federal legislation in the 1970s, to the dawning awareness of the environment's complexities in the early 1980s, to the startling recognition of global interconnectedness in the late 1980s and early 1990s, to the economic

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1. FRED BOSSELMAN, DAVID CALLIES & JOHN BANTA, *THE TAKING ISSUE: A STUDY ON THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS* (1973).

2. FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971).

critiques of command and control regulation in the mid 1990s, to the current controversies over “junk science” and debate over whether the environmental apocalypse has already begun. The fashionableness of environmental law has seen accompanying change with rises and falls in law school student enrollment from the environmental heydays of the 1980s to the cynicism of the 1990s. Now environmental law is just one of many established specialty areas and land use has become a bread and butter course for diversified general private practice. The cocktail party “chit chat” no lawyer can avoid is less likely to invoke the response “what a fascinating area” than used to be the case, and more likely to lead to a disgruntled recollection of property regulated excessively or unfairly (inevitably from the landowner’s viewpoint). Environmental law generally, and environmental regulation of land use specifically, seem to be in the throes of a mid-life crisis.

As Mark Twain would say, however, reports of the death of environmentalism have been exaggerated. A mid-life environmental crisis may be generated by feelings of failure, unachieved goals, and impending catastrophe, but that does not necessarily mean that the possibilities for achievement are over. Thoughtful evaluation of values and directions in the environmental movement may just as well be seen as a sign of renewal, growth, and enduring commitment.

In this case one common solution to a mid-life crisis—a new, gas guzzling sports car—is part of the problem, not the solution. Aspirations for environmental improvement have run into the stumbling block for all aspirations of human nature. The “haves” and “have-nots” all want more. More means more production, which means more environmental degradation quantitatively unless more is done to minimize the post-production degradation qualitatively. We appease our collective conscience with the hope that science is always on the verge of a quick fix for whatever the environmental problem might be. Our petulant demands for satiety and comfort and environmental improvement have placed us on a moving walkway, walking backwards. It is not that difficult to figure out why we are not getting where we need to go.

The temptation to consume our resources cannot be overestimated. As environmentalists or citizens we continue to focus on the symptoms and not the cure for what ails us. There are some in this world who deserve more, just to have the minimum humane requirements for living. They are not the problem, except to the extent that we have ignored their basic needs. The problem is

that nothing is ever enough for the spoiled masses of the developed world. The same self-centered destructiveness that drives many mid-life crises is driving an environmental crisis.

Is there any reason to hope that fifty years into the environmental revolution any of these seemingly intractable attitudes will change? There is. Environmentalism, however one chooses to define that term, will be pulled through this mid-life crisis, probably kicking and screaming all the way, by the unavoidable demands of its global family. Even if the developed countries can afford in the short-term to continue their selfish and self-centered ways, the developing world cannot afford to tolerate them and the developing world's needs cannot be ignored. Whether examined in the context of economic globalization or human rights, what goes around the world comes around, quite literally. A few examples suffice. Pollution, "natural" disasters, and disease do not recognize national boundaries. A quality of life that does not include a basically safe, healthy environment breeds illness, resentment, migration, poverty, and violence. National security cannot exist without environmental security and assurance of basic, inalienable human rights in all civil societies. As the devastation after Hurricane Katrina has proven, environmental threats and disasters cannot be characterized as internal or external, natural or manmade, environmental or economic. Those are distinctions without a difference.

Another form of environmental myopia is the still minimal recognition of the role of women in environmental preservation. Feminist literature, whether based in law and feminism or advocacy of an expanded role for women in environmental preservation, has received relatively little acknowledgment compared, for example, to its recognition in criminal, constitutional, or international law. Eco-feminism³ has been limited to relatively few articles of mostly academic impact. When Wangari Maathai received the Nobel Peace Prize in 2004, public attention was focused on her status as an environmentalist receiving the Peace Prize and secondly on her being the first African to receive the award, and only incidentally on her being a woman environmentalist. Although in

3. See generally MARY MELLOR, *FEMINISM & ECOLOGY* (1997). Eco-feminism, a social movement that emerged in the 1970s, views the degradation of the natural world and the oppression of women as interconnected. *Id.* at 1. While the movement shares with environmentalists a concern about ecological damage caused by contemporary socio-economic systems, it asserts that women disproportionately bear the consequences of environmental impacts and it challenges the failure of the ecological movement to adequately address women's subordination. *Id.* at 2.

some sense the non-recognition of her gender might be seen as a sign of progress, the stature of women in environmental law has not reached the point that such an extraordinary accomplishment by a woman should be gender-neutralized. What cognizance there has been of the pivotal role women might play in environmental advocacy and preservation, particularly at the grassroots level, has progressed more aggressively in the human rights arena than in more conventional environmental arenas.

John Nolon and I shared in the excitement when Maathai received the award at a conference that marked the beginning of my friendship and admiration for him. We were attending the second annual colloquium of the Environmental Law Commission of the International Union for the Conservation of Nature and Natural Resources ("IUCN") in Nairobi, Kenya, and Maathai had been the opening speaker at the conference. We spoke of what an extraordinary woman she was and how little general understanding there was in our privileged country of how environmental advocates like Maathai endured torture, imprisonment, and the threat (too often realized) of death for their advocacy of environmental preservation as a human right. Two days later she received notice that she had been awarded the Nobel Peace Prize, quite appropriately while she was planting trees on Mount Kenya.

The birth of environmentalism is often traced to a woman, Rachel Carson, for demonstrating environmental interconnections, and a man, Aldo Leopold, for formulating an environmental ethic. Aside from this pairing demonstrating the theories of Carol Gilligan's *In a Different Voice*⁴ (and perhaps *Men Are From Mars, Women Are From Venus*),⁵ the divergent paths of these two icons are overdue for merger. Carson's environmental interconnectedness must be broadened to recognize the interconnectedness of social, economic, political, and environmental progress; Leopold's environmental ethic must be expanded to a human rights ethic; and both must be interrelated to recognize that there is no technological solution or ethical solution in isolation from the other. Tentative steps toward a holistic environmentalism have already been taken. Recognition that water pollution may come from the air, that hazardous waste cleanup may require financial incen-

4. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

5. JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS: A PRACTICAL GUIDE FOR IMPROVING COMMUNICATION AND GETTING WHAT YOU WANT IN YOUR RELATIONSHIPS* (1992).

tives for brownfields redevelopment, and that environmental improvement may require land use regulation implicitly acknowledges that categorization of environmental issues is counterproductive and shortsighted. The heated debate over command-and-control regulation versus economic incentives was full of sound and fury but ultimately signified nothing. There are no "either-or" resolutions. The remedies for environmental problems must be as varied and open-ended as the problems they address.

Academic literature has if anything impeded a more holistic, open-minded approach to the environment. Much of the scholarship is specialized to the point of practical obscurity, or is advocacy of a specific scholarly agenda that refuses to cede any recognition to competing theories. Extremism, conservative or liberal, is disproportionately recognized in this marketplace of ideas. Thoughtful scholarship that is receptive to multiple theories and options is too easily dismissed as descriptive or lacking in innovation. The "real world" impact of scholarship is not only undervalued in academia; it is rarely even assessed. Add to this dilemma the immediacy of environmental problems and the not uncommon, two-year gap between the creation of an article and its publication, and the result is an expanding "disconnect" between the academic literature and the most pressing environmental crises.

This issue's recognition of Professor Nolon's scholarship is a welcome exception to the dire assessment above. Professor Nolon has brought his considerable experience and expertise, in both the academic and "real world" spheres, to the forefront of environmental regulation of land use. Almost single-handedly, he has resurrected the importance of local government to the resolution of environmental issues, and yet he has maintained a broader perspective on the important role of local government in all localities globally. His scholarship defies easy categorization because it transcends categorization. For those of us fortunate enough to know him personally, his open-mindedness and essential humanity are reflected in his scholarship. As a result, his articles have contributed to both the academic literature and the practical implementation of the environmental solutions he proposes.

When I first became familiar with Professor Nolon's scholarship, I felt that my environmental education had come full circle. The young associate working with Fred Bosselman and David Callies had been inspired by their book on the pivotal and under-appreciated role of the federal government in land use, *The Quiet*

Revolution in Land Use Control,⁶ to write her own book on environmental regulation of land use entitled, *Environmental Regulation of Land Use*.⁷ Despite this unimaginative title, publishers found the topic quite imaginative—questioning what could possibly be in such a title and whether there was any market for such a “narrow” (read as “non-existent”) subject matter. The book is now in its sixteenth year of publication, and its initially unusual focus on federal regulation of environmental land use is now quite commonplace. Professor Nolon’s scholarship was a necessary reminder for many of us that local governments remain the bedrock level of environmental regulation of land use. The next frontier to which he has directed us is to explore the variety of ways in which local governments globally have led the way in innovative environmental advocacy and preservation. I look forward with great interest to the publication of this collection of Professor Nolon’s work, which exemplifies how we need to think globally and act locally and look beyond the mid-life crisis of environmentalism in the United States.

6. BOSSELMAN & CALLIES, *supra* note 2.

7. LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE (2005).