

9-1-1998

## The Evolution of Environmental Ethics

Richard N. Morrison

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

---

### Custom Citation

Richard N. Morrison, The Evolution of Environmental Ethics, 2 U. Denv. Water L. Rev. 99 (1998).

This Commentary is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

## COMMENTARY

# THE EVOLUTION OF ENVIRONMENTAL ETHICS

RICHARD N. MORRISON<sup>‡</sup>

### INTRODUCTION

My assumption is that each of us will have the opportunity, in the course of our professional practices, to offer a word of insight to our clients about what they should consider as they make business decisions. The "should" of which I speak is most often derived from our analysis of what the law requires; however, most of us instinctively recognize that our clients' litigation exposure should not be the center of the client's consideration when making a business decision. There is ample room for consideration of that which makes for good business and social ethics. Indeed, one can make the case that good business ethics are every bit as important to business success as is dutiful compliance with statutory law and regulation. Sometimes the opportunity for ethical discussions occurs over a beer at the end of a long day of lobbying Congress. Sometimes it occurs in the office. The point is that we have opportunities to discuss ethics. We need to seize those opportunities.

As legal counselors, there is no doubt that all of us consider ourselves professionals. In the historical sense, a "profession" was a vocation that required some degree of learning or science. The law was

---

<sup>‡</sup>A partner with the Phoenix, Arizona law firm Jennings Strouss & Salmon, P.L.C., Mr. Morrison received his J.D. from the University of Houston, graduating as a member of the Order of the Barons academic honor society. He practices water law on behalf of irrigation districts, and irrigation water delivery districts. He also represents landowners, school districts, dairies, developers, a major university, and other municipal districts. In addition, Mr. Morrison's experience includes transferring water rights and environmental permits, negotiation of Indian water rights settlements, and documentation of water rights for Arizona's general stream adjudication. He teaches agricultural law and water resources management at the Arizona State University School of Agribusiness and Resources Management, and Chairs the Environmental and Natural Resources Department at Jennings Strouss & Salmon.

This commentary is excerpted from a speech Mr. Morrison delivered at a 1998 seminar sponsored by CLE International, Inc., who gave permission for its publication.

\* \* \*

among the learned professions. Today, the word "professional" seems to have lost some of its luster. Dictionaries often define a profession as any vocation or business. We, as attorneys, lament the apparent status slippage of our profession in American culture. In the broadest sense, I suggest that the restoration of the professional image of attorneys is inextricably linked to our sense of ethics. In a narrower sense, a lawyer's ethical considerations are constrained and dictated only by the rules of professional responsibility. However, the broader context requires consideration of the effects of certain actions, both right and wrong, as well as the appropriateness of the motives involved.

The Model Rules of Professional Conduct indicate that lawyers, when counseling clients, should refer not only to the law but also to moral, economic, social, and political factors<sup>1</sup> as well as the wisdom and morality of the client's objectives and the means used to achieve them. In my experience, most seminars on ethics fail to emphasize this rule, but perhaps we will make some progress toward correcting such an oversight.

There are many specific environmental issues with ethical dimensions. For example, in the context of Clean Water Act reauthorization, national consistency in rules and standards is essential. In other words, to what extent do we believe water quality is a site specific issue? Is there an ethical issue if judicial inconsistency promotes forum shopping by users of natural resources? To what extent are we prepared to allocate sufficient resources in order to increase the research and development of scientific information and technologies and to formulate a basis for future environmental programs? Similarly, are we willing to set aside political boundaries in order to figure out how to work together to solve environmental problems? Can the country afford to risk inviting voluntary participation in various environmental incentive programs when farmers and ranchers control one billion acres in the United States? And with the benefit of hindsight, one can certainly wonder how point source regulation and the failure to regulate non-point sources is equitable with respect to the nation's waterways and coastlines.

Part of our challenge is that defining an environmental problem depends upon science. The fact of the matter is that research is typically site specific and, therefore, varies. At the same time, business competitors want equality in the regulatory impact on businesses. In short, I believe that it is certainly becoming harder and not easier to behave ethically in relation to the environment. Much of the reason for this stems from our increased recognition that we lack what we need—more and better science to help us understand the consequences of our actions.

---

1. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983). For those who would like to read more on the subject, the WAKE FOREST LAW REVIEW dedicated its entire Fall 1997 volume to legal professionalism. There are several interesting articles in the review that address a lawyer's moral duty as well as his or her professional duty. See 32 WAKE FOREST L. REV. 613, 613-1044 (1997).

What do I mean when I say we need more and better science? Are we confessing the limitations of our own scientific education? We are reflecting an increased sense of alarm about public health concerns. A good example of this problem is microbial pathogens and other contaminants in drinking water. It is estimated that between seven and thirty million Americans each year develop a gastrointestinal illness, possibly from drinking contaminated water. That is a wide range of figures, but water quality is increasingly a concern, even for people who live in a society that has advanced technology and enlightened public policy. Recent evidence indicates that the effects of microbial contaminants may not be limited to short term gastrointestinal diseases. Water borne contaminants may also be linked to certain long-term chronic conditions, such as diabetes and heart disease. Links with miscarriages are also suspected.

Microbial contaminants present a challenge to water treatment experts. Established disinfection and filtration techniques do not always remove such contaminants from drinking water. The effectiveness of water treatment varies depending upon whether the water borne contaminant is a bacteria, a virus, or a protozoa parasite. This is one issue that confronts us with a reality we do not often consider: we are vitally dependent upon an environment that we cannot see. Microbes are invisible. Threats from unseen dangers convey a sense of drama and make good copy, but they should remind us of a greater reality. We live our lives in the midst of an environmental continuum, one that ranges from the infinitely small to the infinitely large, and also ranges, as far as we can tell, from the infinitely simple to the infinitely complex.

### IS AN ETHICAL PARADIGM SHIFT AT HAND?

Ethics have traditionally dealt with relationships—how we treat others. Social ethics seek a community of shared values wherein conditions exist for what Aristotle called "the good life for man." There are, of course, disagreements over how to define the common good, and lawyers in particular are in a position to influence public discourse on the subject. Aldo Leopold suggested an ethic dealing with human relation to the land, and the animals and plants on it. He proposed that land can no longer be thought of as mere property subject to economic manipulation. He criticized traditional ethics to the extent that they focused on individual human beings as members only of an inter-dependent *human* community. Leopold said we should expand this community to include the land and its soils, water, plants and animals as its integral parts. He argued that land is more than a commodity; it is part of an expanded community. Leopold expressed this notion in his famous and frequently cited land ethic—that a thing is right when it tends to preserve the integrity, stability, and beauty of the

biotic community.<sup>2</sup>

In a 1993 law review article, Professor Eric Freyfogle of the University of Illinois College of Law argued that our current law's basic messages about private property and ownership are misguided. He stated:

The flaws are many, and they emerge more plainly as we learn more about ecology and gain a greater ability to sense how we are damaging the Earth. Our environmental predicament is already grave and it worsens daily. One cause of this predicament—and an important impediment to change—lies in our legal culture, and our inherited sense of land ownership. By all sobering accounts we humans are spoiling and exhausting the land in ways that are unsustainable and, in human time-frames, largely irreversible.<sup>3</sup>

The law sends a message that people are distinct from the land, and that the land is merely an object. Possessing no moral or legal worth, land is a thing that is owned and dominated. Furthermore, land can be divided and subdivided until "nature is no longer a whole: it is a composite of many, differently owned parts. Each portion of the land . . . can be managed with little regard for its connections with the surrounding parts of nature."<sup>4</sup> Professor Freyfogle drew several conclusions from this philosophy of ownership. First, the law deals mostly with the present, thereby discounting the longer time-frame that communities and ecosystems require for health. Second, injury to property is defined by emphasizing harm to the human owners rather than to the land as a productive part of an ecosystem. Third, since market value is the key concept of finding injury, any non-market injury is irrelevant to the legal system, so most plants and animals are valueless in court and hence immaterial. The law's message is that we can rightly ignore them.<sup>5</sup>

Professor Freyfogle discussed the errors that are created by the messages our legal system gives to property owners. For example, private property owners should understand that "[s]tanding timber is not a discrete resource; it is part of a rich forest ecosystem. A prairie wetland is not a mere puddle, awaiting the drainage engineer; it is a vital part in a global network of flood control, water purification, salt protection, and wildlife habitat."<sup>6</sup>

In a legal analysis of environmental ethics, one might wonder why I have not acknowledged the impact of statutes such as the National Park Service Organic Act,<sup>7</sup> the Wilderness Act of 1964,<sup>8</sup> the National

---

2. ALDO LEOPOLD, *A SAND COUNTY ALMANAC* (Oxford University Press, 1966).

3. Eric T. Freyfogle, *Ownership and Ecology*, 43 CASE W. RES. 1269, 1269-70 (1993).

4. *Id.* at 1275.

5. *Id.* at 1276-77.

6. *Id.* at 1279-80.

7. National Park Service Organic Act, 16 U.S.C. §§ 1-4, 22, 43 (1994).

8. Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1994).

Wildlife Refuge System Administration Act,<sup>9</sup> the Multiple-Use Sustained-Yield Act of 1960,<sup>10</sup> the National Forest Management Act,<sup>11</sup> and general statutes such as the Endangered Species Act<sup>12</sup> and the National Environmental Policy Act.<sup>13</sup> Indeed, the impact and potential for ecosystem management by government agencies is the subject of a recent article by Professor Robert B. Keiter of the University of Utah College of Law.<sup>14</sup> Professor Keiter discussed the competing utilitarian and preservation philosophies—utilitarianism calling for the use of natural resources to maximize human benefits and preservationism as evidenced in the current system of national parks and wilderness preserves.<sup>15</sup> He noted, however, that except for the preservationist statutes, most statutes do not create a priority system between the competing interests of ecosystem protection, and the production of minerals, timber, and other commodities.<sup>16</sup>

I do not believe that government regulation alone is sufficient to preserve the ecosystem, and so I return to the question of whether we can identify an environmental ethic which will guide us and our clients through the choices that affect natural resources. If we ask ourselves what it means to act ethically in relation to the use of natural resources, we should ask not only about the impact on the non-human environment, but also about how we deal with each other as professionals and as members of a civilized society in an increasingly technological and sophisticated world.

Another way to state this issue is: how do we feel about nature? Do we respect it for what it is or do we see natural resources merely as assets or inputs to the various activities constituting human enterprise? This is a philosophical question, and it invokes our understanding of where the world is going.

### MOLECULES MAKE LOVE

I am reminded of the writings of Teilhard de Chardin. Teilhard was born in 1881 to a pious, provincial French family. He was a Jesuit who, in the course of his studies, pursued geology and later paleontol-

---

9. National Wildlife Refuge System Administration Act, 16 U.S.C. §§ 668dd, 668ee, 715s (1994), *amended* by Pub. L. No. 105-57, §§ 668dd, 668ee, 111 Stat. 1252 (1997).

10. Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§528-531 (1994).

11. National Forest Management Act, Pub. L. No. 94-588, 90 Stat. 2949; Pub. L. No. 95-233, 92 Stat. 32; Pub. L. No. 100-409, 102 Stat. 1090; Pub. L. No. 101-626, 104 Stat. 4427; Pub. L. No. 103-437, 108 Stat. 4587 (codified as amended in scattered sections of 16 U.S.C.).

12. Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994).

13. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1994).

14. Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293 (1994).

15. *Id.* at 296-98.

16. *See id.* at 304-14.

ogy. He intended to teach and research in these fields. He was well on his way to doing so when he was conscripted for military service during World War I. As a stretcher bearer during the ghastliest battles of that conflict, Teilhard's personal faith was severely challenged. That challenge led him to begin a vision that combined both his religious understanding and his scientific education. His career took a fortuitous turn in 1923 when he was invited to join an expedition in China. In the following 12 years he was part of nine more such exploratory treks.

Teilhard advanced a far-sighted notion of evolution. His thoughts contained amazing insights, notions that remain challenging and impressive even today. Ultimately, the Jesuits banned Teilhard because, among other things, he said that molecules make love. By this he meant to illustrate that at every level, from the simple to the complex, all of life is constantly engaged in a struggle to relate to other life. He wrote, "Man is not the center of the universe as once we thought in our simplicity, but something much more wonderful (the arrow pointing the way to the final unification of the world)."<sup>17</sup> At the same time, he did not see humanity as simply swept along in an evolutionary stream. Rather, he encouraged each of us to see in our own acts the secrets of evolution's proceeding and the responsibility for transmitting its past to its future.<sup>18</sup>

I think Teilhard's views are fully consistent with at least some of the arguments of the ecology movement to the effect that non-human life has value in itself. This value is independent of any instrumental usefulness for limited human purposes. Ethicists have argued this theme. Earnest Partridge wrote: "Nature, evolution and history have not all converged through trackless time, simply to benefit us. For the sake of our good mental and moral health, we need to remind ourselves that we are but a step in the long road behind and beyond us."<sup>19</sup> This perspective embraces the notion that there is a unity between man and nature; humankind is in a position to control nature, but that control must have its limits. Environmental ethical limits are set by the good of the whole of which humankind is but a part.

## CLOSING

Some assume that humanity will always be concerned for its ecosystems because humanity is dependent on them. One commentator recently stated that because England depended upon raw materials from India, it had India's interest necessarily at heart; and because Southern slaveholders depended on their slaves, they had their slaves' interests at heart. Such arguments are not only logically flawed, but are histori-

---

17. PIERRE TEILHARD de CHARDIN, PHENOMENON OF MAN 224 (Bernard Wall trans., Harper & Row rev. English ed. 1965).

18. *Id.* at 226.

20. Earnest Partridge, *Nature Is A Moral Resource*, 6 ENVTL. ETHICS 101, 129 (1984).

cally inaccurate. In my own lifetime, I am reminded of a fairly recent argument made by some of my agricultural friends. They said that farmers are the original environmentalists and have to be: they are dependent upon the natural resources with which they work. The statement has some truth in it, but as much as I love agriculture, it has never seemed to me that agribusiness is especially concerned about the Earth for its own sake.

In your own natural resources practice, do you not have opportunities to talk to clients about their ethical responsibility to the environment? I can think of one client encounter I would have relished. In June of this year, a farmer named Tom Dorr appeared at a national conference to describe the agricultural enterprise he deemed viable for himself and for his area of the country. Tom envisioned farming 225,000 acres under centralized management, with the farm broken up into 8,300 acre blocks. If he pulls it off, he will farm 70% of the land in his county by himself. Although I am not sure, I think that such an approach implies the destruction of small pastures and wooded borders, of open hunting grounds and the security of trees. I am among those who are drawn to such margins. I long for the differences that a fenced row, a stream, or a grove of trees makes on the countryside. I grow increasingly concerned as agribusiness moves in the direction of factory farms. However, agriculture is by no means the only arena for the application of an environmental ethic, and I think each of us would do well to consider the opportunities we have for advancing a system of environmental ethics as we practice law.