Teaching Environmental Ethics: Moral Considerations and Legislative Action

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ABSTRACT

As one of the first business ethics textbook states, by way of observation, "Custom, convention and the accepted courtesies of a society are not the foundation of ethics even though they provide valuable hints as to what men think...Law enshrines many of the ethical judgments of a society, but it is not coextensive with ethics" (Garrett, 1966, p. 1). Therefore, "changes in the law tend to reflect changes in what a society takes to be right and wrong..." (Shaw, 2008, p. 11).

We think Garrett and Shaw are correct; thus, we work to have our students understand that ethics differs from legal codes but that ethics drives the law. These two points can effectively be shown with regard to environmental ethics. We offer a model that can help students see the relationship between law and ethics. First, we briefly explore the development of environmental ethics and highlight the broader ethical considerations related to the environment. Then, we trace the legal history that followed philosophical analysis.

Introduction

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We think Garrett and Shaw are correct; thus, we work to have our students understand that ethics differs from legal codes but that ethics drives the law. These two points can effectively be shown with regard to environmental ethics. We offer a model that can help students see the relationship between law and ethics. First, we briefly explore the development of environmental ethics and highlight the broader ethical considerations related to the environment. Then, we trace the legal history that followed philosophical analysis.

Environmental Ethics: Rights, Justice, Utility, And Care

Environmental concerns have been with us since the 1960s, originating in large measure from two important publications. When Rachel Carson's Silent Spring appeared in 1962, people were introduced to biological degradation and ecological analysis. As well, the book had emotional impact—who wants to lose bluebirds, a symbol of happiness?

Later in the decade, Garrett Hardin's famous essay, "The Tragedy of the Commons," provided more grist to the ecological mill. His 1968 article, appearing in the widely circulated journal, Science, alerted the world that unless patterns of behavior changed, "Ruin is the destination toward which all men rush" (1244).

Within a short while, ethicists and legislators alike developed responses. Google scholar loosely catalogs 2,730 books and articles between 1900 and 1959 under "books and articles on environmental ethics." Between 1960 and 1969, 2,340 are listed; between 1970 and 1979, 8,280 are

listed, and between 1980 and 1989, that number doubled, with 16,200 items listed. Business ethics textbooks mirrored the interest in environmental ethics. Thomas Garrett's ground-breaking textbook, *Business Ethics* (1966), had no listing in its index for "environmental ethics." On the other hand, Manuel Velasquez's equally groundbreaking, 1982 business ethics textbook, *Business Ethics-Concepts and Cases*, had a whole chapter dedicated to environmental ethics. Legislators were not far behind, as we will see later.

While ethicists are today parsing out finer, narrower problems, the original work by ethicists used basic ethical concepts to establish the backbone of environmental ethics. Textbooks in applied ethics, including business ethics textbooks, such as Shaw's (2008) and Velasquez's (2011), focus on some combination of the ethical considerations of rights, justice, utility, and care, and focus on the two problems Hardin (1968) identified: resource depletion and pollution. Thus, our students learn that environmental ethics is the application of rights, justice, utility, and care to the twin problems of pollution and resource depletion. Hardin (1968) suggested that people act as though resources were unlimited, free goods whose use came without cost. The result is wasteful consumption and environmental degradation. He also observed that people did not and do not take responsibility for the environment because they think that "I am only polluting a little bit when I drive my car. Don't blame me." This form of thought, the relative contribution rationalization (RCR), is meant to remove responsibility from a person to change his or her lifestyle in order to accommodate the natural world.

If a person were to embrace the RCR, what sort of ethical arguments might be offered to justify changing that irresponsible attitude? Or, phrasing the question differently, how can protection of the environment and environmental ethics be justified? The ethical standards of rights, justice, utility, and care serve as the basis for understanding appropriate behavior.

The consideration of environmental rights, articulated by Blackstone (1973), would protect individuals from the injurious effects of pollution and resource depletion. In its simplest form, the argument using negative rights states that pollution violates a person's right to health. Pollution injures people and the right to health protects people from unwarranted and uninvited intrusion.

However, pollution already exists. There are toxic waste sites and Superfund cleanup sites. Damage to the environment has already occurred, with the consequent, probable damage to future inhabitants of the nearby areas. Young children have not created the toxic sites, yet those children have a right to health, requiring a clean and safe environment. Hence, the current, older population must take action to protect the rights of young people. In other words, children are positive right holders and the older population are the duty bearers for removing the harmful toxins.

The argument about positive rights extends itself to considerations of justice. Young children and young adults have not lived long enough to affect the environment negatively. They have not consumed very many resources, nor have they lived long enough to pollute the earth. Nonetheless, the burden of pollution and resource depletion will fall on them, either by way of harming them or by way of assuming the responsibility for restoring the environment. In short, young people have a burden without a benefit, which is a violation of capitalist justice, where benefits are distributed roughly proportionally to the burdens assumed and contributions made to society.

The capitalist notion of justice appears to be violated when the undeserved burdens of environmental degradation are placed on young people. The same notion of justice can be applied to businesses which pollute. If all the costs of production, including environmental costs, are not reflected in the price of some good, then the producer is receiving undeserved benefits while the population at large receives undeserved burdens. For instance, the burden of air pollution could be borne by those who are warned not to leave the house during an ozone alert. While the polluting company or companies enjoy the benefits of selling their products, those with breathing difficulties suffer the hardship and restriction of confinement indoors.

Further, as Freeman, Haveman, and Kneese (1973) argue, the negative effects of pollution fall unevenly in the population. That is, the burden of pollution is felt by certain groups more than others. Freeman et al. (1973) show that the effects of pollution fall inordinately on the poor and minorities in particular. The inequitable distribution of negative environmental consequences is unjust. The poor have a lower quality of life compared to the affluent.

But then, all people have a lower quality of life due to pollution and resource depletion. As such, pollution violates the demands of the utilitarian principle, namely, to maximize desired satisfaction, taking into account all affected parties, all possible policies and actions, and all foreseeable effects. Given the history of production, i.e., that "externalities" have not been adequately taken into account, the utilitarian arguments for free markets and mass production lose force since resources have not been allocated efficiently. Further, if producers do not have to account for externalities, then waste of resources will occur were an item to be overproduced. Also, there would be no incentive to minimize or even reduce pollution during the production process. Were externalities accounted for, producers would likely take action to lower their costs and thus serve environmental ends simultaneously. The greater efficiency is consistent with the utilitarian principle.

Not only would the current generation have some gain, but especially future generations. While it is difficult to argue for the rights of non-existent human beings, as Feinberg (1981) argued, it is easy to argue that future inhabitants of this earth must be considered when environmental policy is drafted or enacted. The roots of this idea can be found in Albert Schweitzer's 1915 grasping of his first principle, reverence for life: "The man who has become a thinking being feels a compulsion to give every will-to-live the same reverence for life that he give his own. He experiences that other life in his own." (Schweitzer, p. 131). For one thing, future generations are vulnerable and dependent upon the generations preceding them. The ethic of care calls for protecting those who are vulnerable and dependent. Another argument for remembering future generations in policy decisions derives from John Rawls (1971). In his famous original position, where people know nothing of their individual identities, people would not know in what generation they are. Rational and self-interested people, coming together to form a society and ignorant of their generational status, "in effect, then, ...must choose a just savings principle that assigns an appropriate rate of accumulation to each level in advance" (Rawls, 1971, p. 287). Participants in the formation of society, not knowing when they might occupy a land, would ensure resources awaiting them.

Other arguments can be drawn from the notion of care, and strong environmentalists have done precisely that. People like Peter Singer (1975) and Tom Reagan (1983) have argued that animals have moral status. Some argue that the moral status of animals is equal to that of human beings – and anyone who disregards that equality is guilty of speciesism (Singer, 1975). Others treat moral status on a sliding scale or a continuum and while ranking animals as less deserving of full moral status, they argue that animals do deserve the respect associated with rights. For instance, while a dog has less moral status than a human being and can expect less respect in terms of rights, a dog ought not be kicked and beaten. Even a moderately favorable position on animal rights is sufficient to generate concern for the environment.

Finally—and despite a lack of literature on the notion—aesthetic rights may exist. A cursory glance at the mission statements of many conservation groups points to that sort of right. Many conservation groups suggest that people have a right to a pretty, i.e., aesthetically pleasing, environment. For example, the Sierra Club wants people to "enjoy the planet." The establishment of national parks by many presidential administrations in the United States appears to be guided by this little grounded and somewhat unexplored right. The spectacular sights of Yellowstone and the Grand Canyon, so this line of thought holds, must be preserved in perpetuity for the enjoyment of future generations, who have a right to see such sights. In addition, allowing visitors inexpensive access to the national parks inspires the populace to better citizenry. Doremus (1999) suggested that the creation of the national park system reflected a national desire to "stimulate healthy contemplation and pure reflection, which in turn would regenerate spirits dulled by the constant labor of the ordinary citizen's life" (p. 441-442).

This last justification for environmental ethics, namely, aesthetic rights, has ethics and law entwined. The law has grown to embrace the environment, but the law itself falls prey to what Jacques Ellul observed: "all technical progress contains unforeseeable effects" (1962, p. 419). The upshot of Ellul's analysis of technical progress is that whatever policy is adopted or item produced, it should solve three problems because it will create two. Such may be the case with legislation regarding the environment. The law, driven by ethics and relying on a conceptual foundation drawn from applied philosophy, has to deal with the real world, such as free market arrangements, and its uncertainties.

An emphasis on ethics clarifies the goals and scope of environmental law and policy. Flournoy (2003) urges a more robust examination of the interplay between environmental ethics and law if we hope to achieve sound environmental policy: "If neither the public nor the decisionmakers articulate the ethical issues involved, we cannot ultimately know whether our laws and policies are consistent with our ethics" (p. 116).

Environmental Ethics and The Law

As Hardin (1968) observed, a reliance on market forces alone is insufficient to combat pollution and depletion of common resources like air and water. The market creates few incentives to conserve resources that are essentially free to the polluter. Legal commentators also recognize this problem. Grad (2014) states, "Air and water are regarded as free goods, and not being paid for, they are used prodigally in industrial production and in the production of power, and they suffer the adverse consequences of pollution and abuse" (p. 1-9). It is unsurprising, then, that regulation has stepped in and attempted to fill this void, representing an application of Hardin's solution to environmental problems: "mutual coercion mutually agreed upon" (Hardin, 1968, p. 1247).

The law's solution to the problem, however, has developed slowly. Federal regulation of pollution is a relatively recent

phenomenon—the Environmental Protection Agency ("EPA") was born in 1970 (Buck, 2006, p. 25). Historically, disputes about pollution were handled through the common law tort of nuisance. If a plaintiff can show that he or she has sustained property damage or personal injury as a result of pollution, the plaintiff can recover compensatory damages or, in some instances, obtain injunctive relief (Grad, 2014, p. 2-37). However, tort law is insufficient to address environmental harms that are diffuse and affect a large number of people—the standing doctrine makes it difficult for private individuals to pursue environmental damages suffered by the community at large. In addition, in the tort context, courts may be reluctant to grant injunctions to stop pollution if it appears that the benefits the polluter provides to the community are greater than the harm borne by the individual. Moreover, nuisance cases can be difficult to prove because the plaintiff has to overcome the hurdle of causation. Harm may be caused by a combination of pollution sources, which makes it difficult to determine which entity should bear financial responsibility for damages (Farber, 2014, p. 99). Perhaps the biggest shortcoming associated with nuisance law is that it is largely reactive—it does not prevent pollution from happening; it simply provides compensation once the damage has been done (Cole & Grossman, 2011, p. 398). The inadequacy of tort law as a mechanism for addressing pollution and resource depletion led to regulation at the Federal level.

The push for environmental regulation in the 1960s and 1970s was largely driven by ethics, and it focused on protecting two interests: public health and the aesthetic value of nature (Grad, 2014, p. 1-5). Commentators have noted that the bulk of the resulting environmental regulation reflects a utilitarian bent, applying cost-benefit analysis to determine how to maximize societal wellbeing through maintaining human health (Purdy, 2003, p. 877-878). Utilitarianism is appealing in the environmental regulatory context because it is largely quantitative: "well-being is rendered into dollar equivalents to produce a single bottom line combining all the beneficial and harmful effects of a decision that is under contemplation" (Purdy, 2003, p. 877). However, environmental laws also reflect a concern for human rights—limiting pollution protects the individual's right to be free from interference with his or her health and property interests (Flournoy, 2003, 85). In addition, laws that seek to place the burden of pollution on the polluter reflect the ethical consideration of distributive justice. Finally, the ethic of care, which focuses on the interconnectedness of humans and nature, appears in laws that preserve habitats and species (Velasquez, 2011).

Generally, the law employs several techniques to serve the ethical values discussed above. The current regulatory framework does not promise to end pollution or resource depletion; rather, it seeks to mitigate their effects by lowering pollution levels to a range that decreases the risk to human health (Grad, 2014, p. 1-9). For example, direct regulation sets forth standards for the amount of pollutants a party may discharge into the air and water. Similarly, many businesses must obtain permits before discharging wastes; thus, states attempt to prevent pollution before it happens (Reed, Pagnattaro, Cahoy, Shed, & Morehead, 2013, p. 619). Failure to comply with these standards can result in civil and criminal penalties. Additionally, regulators can try to influence the behavior of polluters by rewarding industries through tax credits when those industries use pollution control mechanisms, and "punishing" industries through special taxes when those industries create more than their fair share of pollutants (Farber, 2014, p. 96). Finally, regulators can create a market in pollution permits, which allows the state to set pollution standards while businesses are relatively free to allocate those permits according to market forces: "the government can create tradeable permits that firms can sell to each other. By limiting the total number of permits, the government 'caps' emissions, but the distribution of pollution rights between various emitters is left to the market rather than being decided by the government" (Farber, 2014, p. 97).

Specifically, the mechanisms for combating pollution and resource depletion are embodied in several pieces of legislation. Modern environmental regulation began in the 1970s with the enactment of the Clean Air Act and the creation of the EPA (Percival, 1997, p. 164). Under the Clean Air Act, the EPA is responsible for establishing national ambient air quality standards, and individual states are responsible for developing plans to meet those standards. The goal of these standards is to ensure that air quality does not pose a significant threat to public health (Reed et al., 2013, p. 616). Pollution of another significant aspect of the commons—water—is regulated by the Clean Water Act. The Clean Water Act directs the EPA to set industry specific standards for pollutant discharge into water; these standards are known as "effluent guidelines" (Jennings, 2012, p. 363). For point sources (industries that discharge directly into waterways), an EPA permit is required. The permitting process generally requires the discharger to comply with guidelines to pretreat the substance prior to its discharge (EPA, 2010).

Hazardous waste also poses an environmental threat. In 1980, Congress reacted to the Love Canal disaster with the enactment of the Comprehensive Environmental Response Compensation, and Liability Act ("CERCLA"). CERCLA, also known as "Superfund," gives the Federal government authority to clean up sites where leaking or spilled hazardous materials pose a danger to human health (Farber, 2014, p. 223). CERCLA creates a fund to pay for the costs associated with the cleanup. The fund is supported by taxes on polluters and compensation recovered from the entities responsible for the spill. During remediation, the EPA oversees the cleanup and then seeks reimbursement from potentially responsible parties ("PRPs") (Reed et al., 2013, 889). Under CERCLA, PRPs are subject to strict liability, and they can be held jointly and severally liable for the cleanup costs (Percival, 1997, p. 165). PRPs include the current owner or operator of the site—even if that owner was not in possession of the site at the time of the contamination; the owner or operator of the site at the time of the waste disposal; the generator of the waste; and the transporter of the waste (Clarkson, Miller & Cross, 2015, p. 889). Strict liability requires the imposition of liability without regard to the individual fault of the actors. Joint and several liability means that each PRP can be held responsible for the entire harm, and the EPA can choose to collect the entire amount due from any one of the PRPs if the harm "is indivisible or not reasonably capable of apportionment" (Kilbert, 2012). The rationale behind this "polluter pays" model is that it requires the polluter to internalize some of the costs it imposes on the commons: "the landowner is required to internalize formerly externalized costs into her private cost-benefit calculations before engaging in the production of societal 'goods' that carry with them the production of societal 'bads.' In so doing, the polluter theoretically produces an economically efficient level of such 'goods' and 'bads'" (Gergen, 1994, p. 628).

Regulations reflect the law's attempt to impose the basic tenets of rights, justice, utility, and care discussed above. The burdens resulting from pollution and resource depletion have been traditionally diffused among members of the community at large, or borne by later generations who had no role in creating the harm. Laws attempt to shift the burdens to the entity that is in the best position to prevent the harm—industries creating the waste.

While regulation can help mitigate the effects of pollution and resource depletion, it is largely a stopgap measure, and it cannot answer all of our environmental problems. The best solution may lie in Hardin's (1968) suggestion that we should change our behavior by thinking differently about the morality of pollution and resource depletion. Purdy (2003) observes that we have reexamined the moral dimensions of our relationship with the environment in the past, and we should continue to do so because "[c]hanging values lie at the very heart of changes in the environmental-law regime" (p. 885). Freygogle (1994) argues that we must begin to see our relationship with the environment as a moral one, such that we view abuse of the environment as an offense to society rather than a matter of individual economic cost-benefit analysis (p. 842).

Conclusion

Environmental ethics, specifically the considerations of rights, justice, utility, and care, provide the underpinnings for many of our current environmental laws. Through applying these approaches to environmental problems and studying the regulatory framework in place to address them, students see how ethics influences the law. As our relationship with the environment is viewed in moral terms, sound legal policy follows.

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