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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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
have a right to health, requiring a clean and safe environment. Children have not created the toxic sites, yet those children are exposed to the effects of pollution. Young children have a lower quality of life compared to the affluent. Minorities in particular. The inequitable distribution of the effects of pollution fall inordinately on the poor and groups more than others. Freeman et al. (1973) show that minorities generally are located in environmentally hazardous areas and are exposed to more pollution. Workers employed by polluting industries suffer the harshness and restriction of confinement indoors. Products, those with breathing difficulties suffer the hardest. The polluting company or companies enjoy the benefits of selling their products, those with breathing difficulties suffer the hardship and restriction of confinement indoors.

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 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 Knoeze (1973) argue, the negative effects of pollution fall unevenly on 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 more heavily on 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 this history of pollution, 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 and an item to be overproduced. Also, there would be no incentive to conserve resources 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 accustomed to feeling a compulsion to give every will-to-live the same reverence for life that he gives his own. He experiences the effect as a duty” (Switzerland, 31). 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 the desirable status of a given generation are distributed at a rate sufficient for the welfare of the next generation.

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 animals have moral status 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 varies, the ethical basis is the same. The ethics behind the preservation of non-human animals argue that animals 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. Aesthetics provide a moral requirement for keeping the natural environment. The environmental ethicist argues that a person has a right to enjoy the natural environment. The same intuition behind the ethical rights of the environment provides a basis for public policies like the establishment of national parks. 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 to a national park to pollute may suggest that the park is not a place to be loved and considered sacred, a place where people can experience a 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 Ellouz observed: “all technical progress contains unforeseeable effects” (1962, p. 419). The upshot of Ellouz’s argument is that it is impossible to predict what ever 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. Fleuroux (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 decision-makers 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 system leaves incentives to conserve resources that are essentially free to the polluter. Legal commentators also recognize this problem. Grad (2014) states, “Air and water are regulated as free goods, and thus the cost of pollution is not reflected in what ever price is charged, which in turn meets the cost of pollution. 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.” Other environmental problems are represented by many presidential administrations in the United States appears to be guided by this principle and some others have.

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. However, this form of 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 difficult to attribute to the polluting 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 interrelated (and the ethical values discussed above. The current regulatory framework in place to address environmental problems has its origins in the results of the CERCLA. PRPs are subject to strict liability, and they can be held jointly and severally liable for damages caused by the cleanup costs (Reed, 2013, p. 889). Under CERCLA, 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 formally 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’” (Farber, 2014, p. 97). Specifically, the mechanisms for combating pollution and resource depletion are embedded 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 quality standards for the air and the 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 health threat to the public (Farber, 2014, p. 96). Specifically, 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.

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