

Environmental Harms and Capitalist Regulation

Andrew M. Wender, J.D., Ph.D.

Richard J. Lazarus, *The Making of Environmental Law*, University of Chicago Press, 2004.

The benefit that a reader is likely to derive from Richard Lazarus's 2004 book, *The Making of Environmental Law*, hinges on what he or she is seeking from the text. If one is in search of an engaging, detailed, chronological account of the historical development of federal environmental laws and policies in the United States since the 1969-70 advent of modern environmental law, the book has much to offer. Lazarus writes as a manifestly proud alumnus of the U.S. government's environmental protection establishment during the 1980s, when he served in the midst of "[e]nvironmental law's surprising persistence" [p. 116] against the deregulatory pressures of the Reagan administration. He demonstrates an intimate conversancy with the executive- and legislative-level political machinations involved in environmental law's initial decades of growth, dissecting such material as Richard Nixon's cynical, backroom declarations about those "environmentalists...who wanted the citizens of the United States to 'go back and live like a bunch of damned animals'" [p. 77]. (Lazarus's treatment of the judiciary's role in the unfolding of U.S. environmental jurisprudence is solid, but less exhaustive).

However, there are crucial consequences to Lazarus's sympathetic—indeed, nostalgic, with such chapter headings as "The Graying of the Green" [pp. 251-54]—historical analysis of environmental law. Chief among them is that the book is of more limited value to readers wishing for a theoretically rich, self-reflective critique of an environmental protection regime approaching its fortieth year of life. In this respect, *The Making of Environmental Law* lacks some virtues of an important volume that it cites, Richard N.L. Andrews' *Managing the Environment, Managing Ourselves: A History of American Environmental Policy* (necessarily, Lazarus cites the 1999 edition of Andrews' text, which now is available in a valuable 2006 edition). The culminating point at which one fully realizes the theoretical blind spots inherent in Lazarus's inquiry arrives where he assesses the need for "[r]eforming [e]nvironmental [l]aw":

Environmental law's future effectiveness will...turn on its ability to adapt to...developing ecological threats, evolving societal attitudes, and changing world circumstances. No wholly revolutionary reworking of the existing framework of environmental law should be required—the basic architecture can remain the same, but the precise focus and general mix of laws and lawmaking institutions involved must be reformed in order to achieve the necessary changes in industry and individual behavior [p. 225].

If systemic ecological degradation is today continuing apace, as Lazarus allows by citing Andrews among others, does it not stand to reason that some radical revision of our conceptions and institutional modes of environmental regulation may, in fact, be urgent? Lazarus misses the opportunity to observe that, well-intentioned as it may be, much modern environmental law and policy, particularly within the U.S., remains at its root paradoxically intertwined with a liberal capitalist ideology whose economist vision of existence helps to further the earth's destruction. In one of the relatively few junctures at which he reaches

back to the “natural resources law” and common law principles such as nuisance that pre-exist modern environmental jurisprudence, Lazarus notes that property doctrine underlay those regulatory mechanisms. He then moves to contrast this with “[p]ollution control law,” whose base lies “in *tort law*—the law of civil liability governing intentional and accidental injuries—rather than in property law” [pp. 178-79]. This is valid, so far as it goes. Yet, the seeming contrast elides the more foundational phenomenon that the command and control method of environmental regulation, which is in a sense the chief protagonist of Lazarus’s narrative, is predicated on a notion of economic efficiency not far removed from the idea that private property rights comprise the touchstone of legal and political life.

Some of the theoretical gaps in *The Making of Environmental Law* may initially trace to the problematic, early dichotomy that is drawn between areas of law like civil procedure or evidence that deal with “conduct or activity...largely internal to the legal system,” and “other areas of law,” such as environmental law, which “falls largely into the...external...category” [p. 1]. On Lazarus’s understanding, this means that environmental law “must be primarily responsive to fixed factors, wholly external to the law itself, that determine the character of the problem and associated human activity that the law seeks to govern” [p. 1]. As is exemplified by such areas of research as the study of law and society, and contemporary legal theory more generally, it is difficult to imagine social conduct regulated by the law that does not somehow overlap with the ideas and actions embodied in the law. For one, there is the above-indicated, shared ethos between the law’s presuppositions about the virtues of economic efficiency and the industrial and consumer behavior contributing to ecological decay.

The book is stronger in its theoretical consideration of “scientific uncertainty,” which is, as Lazarus valuably notes, an “inevitable feature of any system of laws for environmental protection” [p. 19]. Here too, though, one wonders whether Lazarus may be somewhat too sanguine. He claims that “environmental protection law” has as “its primary focus...the prevention, rather than redress, of environmental harms” [p. 23] despite the fact that U.S. environmental jurisprudence eschews European environmental regimes’ appreciation of the precautionary principle as a vital counterweight to the elusiveness of manageable risks. The curious treatment of such theoretical issues continues with his waiting until the book’s final six lines to mention how “the world’s religions are beginning to develop a distinct spiritual environmentalist voice,” a statement that does not fully capture how the examination of religion and ecology has factored into environmentalist and environmental policy discourse, within the U.S. and internationally, for the better part of two or three decades.

The Making of Environmental Law is a worthwhile text for examining the legal and political factors and events entailed by the development of U.S. environmental law between the rise of major environmental legislation and the initial years of the George W. Bush administration. Other sources are necessary, though, if one is concerned with the unspoken premises of environmental law and how knowledge of these premises can help point to even more fruitful means of ameliorating environmental harm.