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978-0-521-36535-2 - The Limits of Law: The Public Regulation of Private Pollution

Peter Cleary Yeager

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## Preface

Commonly, the reasons for undertaking a lengthy social science investigation are as deeply rooted in personal commitments as they are in the problematics of any discipline. This is trivially true, but no more or less admirable, when the commitments are to the problematics themselves, as in basic science research. But the point is especially noteworthy when the commitments underlying the work are to knowledge in the ultimate service of some socially desired end. One's values provide the question and energize the long effort, while the requirements of theory and method quite literally discipline the search for answers. If this book succeeds, my hope is that it is because it contributes in some useful way to the critical quest for environmental protection and social justice while keeping faith with core analytics in social science.

As a college student twenty years ago, I was wholly dispassionate about the cause of environmentalism, even in the face of Earth Day in April 1970, which galvanized and focused the ecological concerns of millions of Americans, particularly the young on campuses across the country. Now, firmly in the grip of midlife, I find my youthful distance from the matter curious and even embarrassing. When I look out on the signs warning of the toxicity of the fish in the pretty Sudbury River near my house, my deepest sense is of injustice, and of loss. Becoming a parent has surely contributed to this sense.

The link between parental concerns and pollution was sharply dramatized to me long before my own son was born, and the episode was the first to impress me at a personal level with the force of the environmental cause. As a newspaper reporter in Minneapolis in 1972, I found myself on a small lawn in a working class neighborhood, talking with a group of residents who were being fumigated in their own homes by potent vapors emanating from the city's sewer system. The fumes were caused by the process waste being dumped into the system by a local manufacturer, and the undeniably wretched odors were wafting about from the storm drains in

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the streets and backing up into houses through the plumbing. This assault, by then ongoing for a year, was driving visitors away, breaking up outdoor activities, and making some residents ill, in the most poignant case sickening at least one pregnant woman to the point of vomiting. During that summer a community group began pressuring both the manufacturer and the city for an end to the hazard, and eventually some timetables for a solution were set. But with the blame being passed back and forth between the city and the company, and with the uncertainties attached to the agreements, there was reason to worry whether just results would soon be achieved. In the meanwhile, there remained the stark image of that sickened woman attempting to gestate new life.

During the same period, a much more prominent environmental drama was being played out in northern Minnesota, one that clearly portrayed the tenacious politics of delay despite substantial risks to human health. In this case, the Reserve Mining Company was dumping over 60,000 tons of mining waste each day into the pristine waters of Lake Superior from its operations in Silver Bay. By the middle of 1973, it had been demonstrated that the company's wastes included asbestos-like fibers that were contaminating the drinking water and the air of Duluth and other cities and towns on the lake. Asbestos fibers were known to be cancer-causing, and the expert inference was drawn that Reserve's wastes created unreasonable risks to the health of people in the region. Nonetheless, and against a persuasive legal case that drew national attention, the discharges continued for another several years. The federal government had initiated its enforcement effort in 1967; the dumping finally ceased in 1980.

I found these cases both intriguing and alarming. In each, it struck me that the law found it inordinately difficult to reach the right result on a timely basis. And on a more profound level, this seemed simply unjust. In sum, the origins of my research comprised equal measures of curiosity – why might law fail to achieve its stated purposes? – and indignation. Together, these motivated me to examine the operations of environmental law, and specifically its efforts to constrain industrial water pollution.

In addition to these personal motivations for the study, I found some compelling analytic reasons for undertaking it. First, my experience in a large-scale study of lawbreaking by major companies had reminded me of both the empirical and theoretical limits of officially generated data on offenses. These data are typically used as



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indicators of the activities of regulated parties of all sorts, from citizens to corporations. But they also register the political and legal processes of state. Therefore, not only is it necessary to understand these processes in order to interpret the data fully, but the effort to do so is rewarded by a richer understanding of the political economic relations linking the state to the society it administers. Herein lie the most fundamental questions of compliance and control, those that seek to know the structural and cultural foundations of a social system. This project is intended to illuminate these matters, if not to provide all of the answers.

Second, it is often tempting to attribute the manifest failures in regulatory law to a conspiracy in which the public interest is sacrificed to the shared, self-serving interests of government and business elites. Such arguments are made with various degrees of sophistication, and too many instances of corruption and conspiracy can be cited as examples. But these explanations miss many of the more fundamental, less visible causes of the *chronic* shortfalls in government regulation of business. The most basic limits to law's effectiveness are institutionalized in the enduring structures of social relations in a political economy, and while these limits are not permanently fixed, they are both more stable and more forceful than the periodic and fitful episodes of the corruption of law. In addition, because of the complex structuring of interests over time, there is rarely any clear identity of interests *within* the elite circles in business or government, to say nothing of *between* them. So while the identification of interests in any arena of public policy is an important starting point in research of this sort, it can never be the sum of it because interests as such are not determinative.

In this book I present an analytic history of the federal government's efforts to regulate industrial water pollution in the United States. These efforts date back one hundred years, but they gained meaningful momentum only with the passage of the Federal Water Pollution Control Act Amendments in 1972. The account focuses on the forces that produced this major piece of legislation, then on the constraints that shaped its implementation, including those that limited the Reagan administration's effort to deregulate environmental pollution in the 1980s. The story examines limits operating at the levels of both near-term instrumental politics, such as those directed at the federal Environmental Protection Agency in the 1980s, and the more enduring institutional structures that undergird American society. In the end the account is principally a structuralist one, sug-

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gesting that instrumental politics most often shapes law only within the constraints set by systemic limits. But this is not to deny the potential efficacy of organized political action in shaping the reach of law and the extent of social change. In the complex dynamics linking law and society, it happens that systemic limits themselves are subject to shifts during key historic junctures, as illustrated in this case study. Not only do social systems and political behavior shape each other, but institutions are at root the product of human action.

This last point seems especially important in the present moment. Despite two decades of significant environmental law, the nation seems to have accomplished little more than an unstable holding action against even more rapid environmental deterioration. In addition to the continuing proliferation of accounts of toxic air and water pollution that contaminates the basic substances of life, there are the newer concerns regarding the depletion of the earth's protective ozone layer and the warming of the earth's climate due to the "greenhouse effect," potentialities that are at least as threatening as the more concrete and immediate evidence of toxic wastes. And of course these serious problems transcend the bounds of national politics, implicating international relations in deeply moral questions regarding environment and economy. With the dramatic decline of communism and the rise of Green parties in politics and "green" products in markets, environmental issues are primed to take center stage in a new era of geopolitical exchange. The forthcoming discussions and debates will have to do with fundamental rights and responsibilities, fairness (as between highly developed and other nations), and ultimately survival.

The second Earth Day, in 1990, marked both the twentieth anniversary of the first one and the critical challenges yet unmet. The environmental dialogue is widening and deepening. There is both risk and opportunity in this, and the world's citizens will have to grapple with central questions of fact and value in determining the fate of the earth. This book is my attempt to chart developments in one chapter of an unfolding story whose conclusion remains much in doubt. If this effort also contributes in some small but positive way to that unfolding, I will not be disappointed.

## Acknowledgments

In a piece of work spanning twelve years, one runs up an almost unconscionable account of professional and personal debts. Not only do public registers of such accounts entirely fail to repay them, but they also carry the risk of the glaring omission (thereby increasing the debt!). Nonetheless, it is important to announce these key contributions, both as a measure of my gratitude and as a reminder of my obligations.

I have enjoyed a variety of institutional supports for this research, supports manifested largely in the kindness and interest of strangers. I am especially indebted to the professionals at the Environmental Protection Agency – the lawyers, engineers, and technicians at both headquarters in Washington and the Region II offices in New York City – who not only permitted but enabled me to do my fieldwork, and even encouraged me in countless ways. Despite my reservations regarding the limits of environmental law, and the evidence of them, I was uniformly impressed by the quality and dedication of these public servants during my stays in their offices. Without their continuing efforts, both the environment and its inhabitants of every species would be all the worse. I would also like to thank officials in the Lands and Natural Resources Division, U.S. Department of Justice, for similarly giving me space and access to key legal materials, as well as the congressional representatives and their staffs who graciously made materials available to me upon request.

I have also benefited significantly from the responses of audiences to a number of manifestations of the arguments at professional conferences over the years, dating back to my first skittish effort in Dallas in 1978. That – again – kind strangers deemed that early report adequate for publishing encouraged an insecure graduate student beyond measure. (I am trusting, of course, that these ultimate results will not bring them any regrets.) In addition, I have enjoyed a number of chances to put some of these ideas and results before

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audiences in professional schools, including the law schools at Harvard and Yale universities and the business schools at Harvard and Boston universities.

I am also grateful for a fellowship year during 1989–90 in Harvard's Program in Ethics and the Professions, which allowed me to consider more deeply the ethical responsibilities of business and permitted me a measure of unfettered time to complete this book. Among a fine group of new colleagues in the program, I especially benefited from the exchange of ideas (and tennis shots) with two fine philosophers, Ken Winston, with whom I share an interest in questions of institutional design toward just outcomes, and Alan Wertheimer, who despite his protestations to the contrary knows plenty about the real world. Finally, I am thankful for the support, patience, and encouragement of my editors at Cambridge University Press, Colin Day, Matt Hendryx, Mary Nevader, and Cynthia Insolio Benn. In many ways, they have conspired to make this a better book. And in particular, Cynthia has worked diligently (but gently) to purge my language of its more self-destructive tendencies, and I have learned much from the almost painless process of working with her.

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justifying the spare material compensations for the work. Susan Eckstein has also been a fine colleague and friend, and pushed me at a propitious moment to reach for more than I believed I could grasp. Finally, Jeff Coulter has been something of a hero for me, a rare blend of keen intelligence, unimpeachable integrity, and principled compassion.

For all of their contributions, I would also like to note that the individuals just named are stout enough, individually (to say nothing of collectively), to bear responsibility for the errors and shortfalls that remain in this book. But there are strict professional norms against saying they do so, and the requirements of truth-telling also happen to forbid it, certainly in this case. So let the responsibility rest where it belongs, here.

And a last word for the deep support of my family. The phrasing “. . . without whose support . . . wouldn't have been completed . . .” by now seems trite, but most every author knows its truth. I am particularly grateful to my parents, Dorothy Cleary Yeager and Ralph Oscar Yeager, Jr., who nurtured the normative foundations that continue to guide my efforts, both personal and professional. My parents-in-law, Eleanore and Harvey Kram, have always been lion-hearted in their support, and have encouraged my work while lightening my load. And finally, my dearest support now comes from my wife and colleague, Kathy Ellen Kram, whose love, intelligence, and good humor have long sustained me in the best and worst of times, and our son, Jason William, to whose future I dedicate this project.

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