
Introduction

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Today seems a good point in time at which to be an environmental law scholar. In fact, it might even be the best. There are more of us than ever. There are more journals and periodicals than any time before in which to publish the fruits of one's labour and most academic publishing houses now dedicate specific catalogue space to environmental law. And environmental law scholars seemingly take advantage of this by publishing more and more work. As a result, there is an abundance of environmental law scholarship out there. With abundance, however, also comes the risk of oversupply. With oversupply comes the risk of spam jurisprudence in which 'there is more, vastly more, of nothing happening',¹ resulting in scholarship being met with, in James Boyd White's words, 'a feeling of guilty dread and with an expectation of frustration'.²

With abundance therefore also comes responsibility. Responsibility to pause and reflect on the joint enterprise that is environmental law scholarship. It is in part in an attempt to dislodge this responsibility that this collection of essays has been brought about. The presence of an obligation to reflect on the practice of the scholarly endeavour might be particularly acute in environmental law scholarship if indeed the discipline is seen as suffering from immaturity as argued by some commentators.³ But there is more to it than a sense of responsibility. For in addition to providing a subset of scholars with an opportunity for

I am grateful for the invaluable support provided by Sarah Mackie in preparing this collection.

¹ Pierre Schlag, 'Spam Jurisprudence, Air Law and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)' (2009) 97 *Geo. L.J.* 803.

² James Boyd White, 'Intellectual Integration' (1988) 82 *Nw. U. L. Rev.* 1, 5.

³ Elizabeth Fisher and others 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 *JEL* 213.

disciplinary introspection and reflection, an additional driver behind the collection is an interest and curiosity about environmental law scholarship and an interest in pondering what it is we do as environmental law scholars.

Lurking in the desire to reflect on the practice of scholarship is of course a series of underlying concerns – perhaps even a disciplinary anxiety. Concerns about what actually constitutes scholarship, considerations about the quality of scholarship as well as considerations about why environmental law scholars do what they do and for what reasons. Initially, the curiosity behind this collection of essays found expression in a series of questions: What is the purpose of environmental law scholarship – what is the point of the enterprise? Why is environmental law scholarship often said to require appreciation of interdisciplinarity? What relationship does environmental law scholarship enjoy with other legal and non-legal disciplines? Does environmental law scholarship require the possession of specific methodological skills? For whom does the environmental law scholar write? Does environmental law scholarship have any impact beyond the academy? And if not, does it really matter? What are the main differences in scholarship between jurisdictions? Is environmental law scholarship necessarily more instrumental than other disciplines (in the sense that environmental law scholars are wedded to particular purposes and outcomes)? Does environmental law scholarship suffer from a lack of rigour?

While some of these points are likely to be perceived as controversial, the premise of the project was always to facilitate an honest self-assessment from within the discipline from some of the discipline's leading contributors. In a sense, an implicit purpose of the project was to engage head-on with any latent scholarly anxieties arising from contemplating the specific concerns just listed. Embracing and engaging any scholarly anxiety would ideally serve the overall good of the discipline of environmental law scholarship insofar as 'a scholarly work's ability to engender [anxiety] should be treated as a mark of excellence.'⁴ With this in mind, the contributors to the collection were invited to offer their personal reflections in response to some of these concerns. The results yielded from this invitation follow in the subsequent pages.

From this emerges a rich and multifaceted picture of environmental law scholarship. One of the more obvious points is of course that

⁴ Edward L. Rubin, 'The Evaluation of Prescriptive Scholarship' (1990) 10 *Tel Aviv U. Stud. L.* 101, 112.

environmental law and environmental law scholarship do not operate in a legal vacuum isolated from external influences be they political, economic, social, scientific or moral considerations. Notwithstanding this, in producing environmental scholarship, environmental law scholars, as highlighted by Aagaard, have a real comparative advantage compared to those who seek to influence the law from the perspective of a policymaker, compared to a non-academic lawyer/legal practitioner and compared to non-legal scholars. Obvious as this may seem, the environmental law scholar's real advantage lays in her ability to understand the subject as a distinctive legal discipline rich in legal 'ambiguities, contingencies, interdependencies [and] implications' that might not be readily apparent to non-legal scholars and commentators.⁵ The ability of the environmental law scholar to challenge what Aagaard sees as methodological and ideological orthodoxies is consequently a skill unique to the legal scholar. This alone ought to dispel disciplinary anxieties.

Like Aagaard, Fisher reminds us that in undertaking environmental law scholarship, the endeavour is, at heart, about expertise. To Fisher, expertise takes the form of a craft which focuses on 'the desire to do a job well for its own sake.'⁶ The commitment to do something for its own sake does not, however, suggest that the craft of scholarship takes place in a void sealed off from external drivers and considerations. On the contrary, Fisher highlights how the practice of crafting environmental law scholarship is an inherently social practice which is shaped by the institutional environment in which it is conducted and moulded by the materials that each scholar engages with (be it international law or specific decisions from a subset of jurisdictions). An important point made by Fisher is, however, that the environmental law scholar ensures that the vigour which the scholar puts into the scholarly endeavour (what Fisher sees as 'obsessive energy') is put to appropriate use to avoid bad scholarship. Bad scholarship is making scholarly arguments not substantiated by the materials being analysed. To Fisher, obsessive energy is thus important but it must be used with caution and in moderation to avoid the scholars channelling themselves into the rabbit warren of their own narrow research agendas isolated from the rest of the scholarly practice.

The importance of scholars keeping an eye on the social practice in which they take part when conducting research is further highlighted by Maldonado who identifies and dissects four main types of scholarship

⁵ Aagaard, Chapter 2, this volume.

⁶ Fisher, Chapter 3, this volume.

prevalent in environmental law. Maldonado thus identifies the paradigmatic models of environmental law scholarship as being the systematisation effort, the reform model, the explanation paradigm and the understanding effort. Each of these models will be familiar to most environmental law scholars and most of us will use each of the models interchangeably. Importantly, however, echoing Fisher's point that no particular approach to scholarship is necessarily superior to another as long as it is done well, Maldonado points out that each model serves a purpose which stands apart from any of the other models but that each of the four models has its own shortcomings and problems. It is the job of the diligent scholar to bear these shortcomings in mind and to be honest and open about them when engaging in scholarship.

Being social and engaging with other scholars does, as we all know, have its own problems and challenges. Some of these challenges are, as Pieraccini drives home, institutional, whereas others are epistemological. Pieraccini thus highlights how institutional pressures have the potential to impede the environmental law scholar (in particular the sociolegal environmental scholar) from producing optimal scholarship which truly engages with interdisciplinary considerations. Though some of the challenges highlighted by Pieraccini – such as audit culture – are more prevalent in certain jurisdictions, some of the drivers behind this culture (that of marketization of higher education) are increasingly found in most countries.⁷ Consequently, Pieraccini's argument serves as a warning call to the architects of higher education policy (wherever they might be) – a warning call which cautions against micromanagement of research agendas and scholarship.⁸

For those brave enough to engage in interdisciplinary research notwithstanding the challenges highlighted by Pieraccini, like Lee, Lock, Natarajan and Rydin, it is evident that interdisciplinary scholarship holds real rewards. Rewards for those involved in the work as well as rewards for those of us who have the pleasure of reading the work. Relaying their experience from taking part in a funded and interdisciplinary research project, examining the decision-making process for so-called nationally significant infrastructure projects, Lee, Lock, Natarajan and Rydin are admirably honest about the challenges and problems faced in undertaking this work. One problem encountered by the

⁷ On this, see Stefan Collini, *Speaking of Universities* (London: Verso, 2017).

⁸ For a fruitful discussion of the values of higher education and academic research, see e.g. Stanley Fish, *Versions of Academic Freedom* (Chicago: University of Chicago Press, 2014).

interdisciplinary team of researchers centres on disciplinary identification. That is, is the project really an environmental law project or is it something else? Another problem relates to the risk of disciplinary misunderstandings and the realisation that methodologies vary significantly from discipline to discipline. In being so forthright and by sharing their story of the challenges they have encountered, Lee, Lock, Natarajan and Rydin demonstrate the ultimate collegial commitment to the practice of environmental law scholarship (and arguably beyond to other disciplines) insofar as their experience serves as an inspiration, albeit a personal one, for other scholars.

In related fashion, and echoing Aagaard's argument about the relevance of legal know-how, Cecot and Livermore draw attention to how environmental law scholars potentially can play an important role in interdisciplinary research by bringing to the fore their specific legal expertise as this relates to familiarity with administrative and legal decision-making processes and institutional contexts. The environmental lawyer, Cecot and Livermore argue, has the potential to act as a facilitator between disparate disciplines. Unfortunately, there remains one area in which environmental law scholars are perhaps lacking behind other legal scholars when it comes to facilitating fruitful exchanges with other disciplines. Cecot and Livermore thus call attention to the relative dearth of engagement with quantitative empirical work by environmental law scholars. Though one gets the impression that the hesitancy in engaging with quantitative work is not as widespread as it once was, Cecot and Livermore point out that the lack of such work is particularly surprising in environmental law scholarship given the wealth of empirical questions ripe for examination (including those pertaining to valuation of costs and benefits, the real-life impacts of policies and the effectiveness and efficacy of environmental policies). One hypothesis potentially explaining the relative lack of engagement with quantitative empirical work, Cecot and Livermore theorise, is that environmental law scholars have traditionally been unsympathetic towards 'economic worldviews', viewing environmental goods and benefits as deontological entities not susceptible to cost-benefit valuation. In pondering the reasons behind the lack of quantitative empirical work, Cecot and Livermore draw attention to the dangers emerging when a scholarly practice is primarily inward looking and isolated. Where this is the case, Cecot and Livermore's analysis convincingly argues that environmental law

scholars are doing a disservice to their discipline and practice, ultimately running the risk of the practice becoming overly arcane.

With environmental law scholarship being shaped by factors ordinarily perceived as being external to the discipline, Stephens, Kotzé and Farber all consider the impacts that emerging paradigms have on environmental law scholarship. In considering the impacts of the emerging concept of the Anthropocene on international environmental law scholarship, Stephens argue that the disruptive nature of this new epoch represents a critical turning point for the study of international environmental law. This argument is in part driven by an assumption that to date, international environmental law has not been entirely effective in halting environmental degradation (though that may well of course be because too much is expected of the discipline) and international environmental law scholars have perhaps been slower in engaging with the emergence of the Anthropocene than domestic environmental law scholars. Stephens cautions against being overly defeatist when responding to the immense challenges associated with the Anthropocene, and his argument for a pragmatic result-orientated reconfiguration of international environmental law and international environmental law scholarship is admirable. Stephens thus argues that one challenge for international environmental law and international environmental law scholarship is to identify the conditions for a legal order which is both equitable and effective. In one sense, the adoption of the Paris Agreement arguably represents a tentative move towards answering Stephens's call. Finally, when it comes to the question of how best to respond to the challenges of the Anthropocene, international environmental law scholars arguably have one advantage over scholars engaging with domestic questions insofar as international law recognises the writings of learned scholars as a subsidiary source of law.⁹ In light of this, there is seemingly plenty of scope for international environmental law scholars to influence debates on the shape and content of international environmental law in the Anthropocene.

Whilst the onset of the Anthropocene poses challenges for international environmental law and international environmental law scholarship, Kotzé drives home the point that the Anthropocene similarly poses methodological challenges for environmental law scholars. On the premise of never wanting to waste a good crisis, Kotzé argues in favour of a more radical reconfiguration of our approaches to environmental law

⁹ E.g. Statute of the ICJ Article 38(1)(d).

scholarship. Though critics might argue that the prefix of ‘critical’ ought to be superfluous insofar as any scholar ought to be ‘critical’ towards the material with which she engages, there is a refreshing radicalness to Kotzé’s thesis. Kotzé thus argues that the present state of environmental law scholarship is insufficiently aligned with ideas of earth system complexities and too accommodating of what he terms ‘neoliberal anthropocentrism’. To Kotzé the Anthropocene offers a unifying background paradigm against which environmental law scholars ought to study the role of law – a new intellectual paradigm for environmental law scholars. However, to fully grasp the opportunity, environmental law scholars will, echoing the argument of Cecot and Livermore, have to get out of their comfort zones and engage with transdisciplinary and transnational agendas (though many environmental law scholars already do so to a great degree).

When it comes to the potential for emerging scholarly paradigms to act as unifying backgrounds for scholarship, Farber argues that the problem of climate change has the potential to provide one such background. In making this argument, Farber highlights how in the absence of such a unifying paradigm, environmental law resembles Easterbrook’s idea of ‘law of the horse’ which suggests that many emerging areas of law (like environmental law) do not make for a coherent body of law but instead are made up of disparate areas of law tangentially relevant to the environment.¹⁰ The argument that environmental law as a body of law is incoherent seems by now to be beyond dispute.¹¹ But Farber’s argument that the law relating to climate change (which to some might in itself represent ‘a law of the horse’) has the potential to unify the discipline of environmental law is all the more relevant when considering, as Farber does, how legal initiatives aiming at dealing with climate change often take the form of transplants which are based on experiences and methods from other jurisdictions. As Farber points out, ‘someone who understands California’s climate change regime would find it easier to understand the EU’s climate change regime.’¹² Implicitly picking up the points made by Stephens and Kotzé, Farber similarly drives home how in the context of climate change law, the international v. domestic dichotomy is breaking down. Necessarily, the scholarly engagement with

¹⁰ Frank H. Easterbrook, ‘Cyberspace and the Law of the Horse’ (1996) *U. Chi. Legal F.* 207.

¹¹ E.g. Todd Aagaard, ‘Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy’ (2010) 95(2) *Cornell Law Review* 221; and Ole W. Pedersen, ‘Modest Pragmatic Lessons for a Diverse and Incoherent Environmental Law’ (2013) 33 *OJLS* 103–131.

¹² Farber, Chapter 10, this volume, 170.

different regimes of climate change law – be it international, domestic or comparatively – ought to bear in mind the differences between legal cultures and jurisdictions which likely reveal finer details and differences between the legal regimes.

Some of these differences as they pertain to environmental law scholarship are brought into perspective by Guneratne when she details the development of environmental law and environmental law scholarship from the perspective of a developing country scholar. Guneratne argues that environmental law scholarship necessarily varies from jurisdiction to jurisdiction, reflecting unique legal cultures and practical circumstances. One such example highlighted by Guneratne is the argument that environmental law scholarship in some developing countries has a stronger element of activism to it than seen in developed countries. In the context of Sri Lanka, Guneratne thus argues that scholarship is necessarily predicated on a foundation of sustainable development and social change. In making this argument, it is evident that the definition of environmental law scholarship developed by Guneratne (and possibly legal scholarship more generally) is anchored in the idea that scholarship has potential to facilitate profound changes in society. The desire to reach out to a wider audience than the immediate community of scholars is not one which is unique to developing countries though it evidently takes on an added urgency in the context of those countries.

Echoing the point made by Guneratne about the necessary contingency of scholarship, Czarnezki and Schindler bring to the fore the potential impacts which the Trump presidency in the USA might have on the practice of environmental law scholarship. Czarnezki and Schindler point out that the boundaries of what constitutes environmental law continue to expand, resulting in a discipline which constantly reinvents itself through the use of alternative methods of regulation. This move away from traditional means of regulation means that environmental law scholars will have to reorientate themselves to ensure that the scholarly practice keeps up with the dynamic understanding and definitions of the law. Against this, the election of President Trump has real potential to impact the nature of environmental regulation and thereby implicitly also the practice of scholarship. One argument put forward by Czarnezki and Schindler is that the Trump administration's willingness to (at least on the rhetorical level) question the role of the administrative state has the potential to shape significantly the form and content of environmental law. One need look no further than to the recent

resignation of the administrator of the USA Environmental Protection Agency (EPA), Scott Pruitt, to appreciate that political cultures have real potential to alter the legal landscape and thereby also the dynamics of scholarship.

Against the politically volatile background of the Trump administration, the chapter by Krämer considers environmental law scholarship in the context of the European Union (EU). Unlike that the present situation in the USA, the EU has gained a reputation as a body polity which is willing to put in place comprehensive systems of environmental regulation. In light of this, Krämer's account of how relatively small a role environmental law scholars have played in shaping this extensive system of law might surprise some. Krämer's argument is of course not that there is no or little EU environmental law scholarship but that those scholars who have dedicated their attention to EU environmental law have often done so from the perspective of their own member states. Though there is evidence to suggest that the tendency for scholars to remain anchored in their own domestic context is waning,¹³ Krämer highlights how it has nevertheless resulted in environmental law scholars yielding little influence over the form and content of EU environmental law. As Krämer argues, that is a shame considering the many environmental challenges facing the EU (notwithstanding its rich environmental law history).

Finally, against these different reflections on environmental law scholarship which, as noted, in a sense reflect the personal, jurisdictional and political circumstances of each scholar, it bears noting that the stock-taking exercise of this volume is not intended as a self-indulgent, self-aggrandising exercise of navel gazing, allowing scholars to reflect on the strength of their own work. Instead, the main purpose of this collection of essays is altogether more modestly to invite environmental law scholars and colleagues to pause and consider the scholarly practice and enterprise of environmental law scholarship. The main point is that such disciplinary self-subversion is 'while often experienced at first as traumatic, [it is also] eventually rewarding and enriching.'¹⁴ With that in mind, it is the hope that this collection will aid such self-subversion.

¹³ Most recently Suzanne Kingston, Veerle Heyvaert and Aleksandra Čavoški, *European Environmental Law* (Cambridge: Cambridge University Press, 2017) and Maria Lee, *EU Environmental Law* (Oxford: Bloomsbury, 2014).

¹⁴ Albert O. Hirschman, *A Propensity to Self-Subversion* (Cambridge, MA: Harvard University Press, 1995) 91.

What Legal Scholarship Can Contribute to Environmental Law

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Debates over environmental law and policy benefit from a variety of participants with differing perspectives. Active contributors to such debates include academics from other fields, government agencies, industry professionals, trade groups, advocacy organizations, and think tanks. Among this crowd, it may not be immediately clear what distinctive contributions legal scholars can make to advance conversations about environmental law. Legal academics generally lack the technical education and training of a scientist, economist, or engineer or the ongoing work experience of a practicing lawyer.

This chapter argues that legal academics have at least three key areas of comparative advantage with respect to environmental policy debates, and that the legal academy should foster scholarship that leverages these advantages. First, legal scholars make law the focal point of their analysis and so bring a more sophisticated understanding of individual laws as they operate in the context of broader legal systems. Second, whereas environmental law practice and policy debates often tend toward siloed analysis of discrete policy problems, environmental law scholarship is more conducive to integrative and crosscutting work. Third, environmental law scholarship is well poised to challenge methodological and ideological orthodoxies that stagnate policy innovation. The best environmental law scholarship exhibits these attributes, and environmental law scholars need to do more in their work to leverage these potential advantages.

I Comparative Advantages of Legal Academics

Scholars produce scholarship because we are driven to think and write – to contemplate the subjects of our research to almost obsessive extents and then to peddle our ruminations in the marketplace of ideas. That