

C O M M E N T

Comments on *Our Place in the World: A New Relationship for Environmental Ethics and Law*

by E. Donald Elliott

E. Donald Elliott is a Professor (adjunct) of Law, Yale Law School and Co-Chair, Environmental Practice Group, Covington & Burling LLP, Washington, D.C.

Prof. Jed Purdy makes a valuable contribution by pointing out that environmental law shapes public values, with votes in Congress and decisions by courts merely chapters in a longer story.¹ His is a valid, interesting and important point, although not as original as his subtitle (“*A New Relationship for Environmental Ethics and Law*”) lets on.

I. The Roles of Law in Promoting Changes in Public Values

Historians have often portrayed social movements as using lawsuits to develop public support, with setbacks and wins along the way, but gradually carrying the day by winning over the public mind. This vision that cases and statutes are not the end but one means by which we transform public values is commonplace in accounts of the civil rights movement, for example.² Similarly, the on-going transformation of the law relating to same sex marriage was accomplished not in a moment, but by a gradual process of many legal and social acts that changed public attitudes. Lawyers can be important contributors to this on-going process of social change.

The gradualist school of social movements and legal reform, of which Purdy is a part, sees law and public values as influencing one another, back and forth, in what cultural anthropologists and evolutionary theorists call “co-evolution.”³ While this vision of values shaping law,

but law also shaping social values at the same time, is well understood, even commonplace, for many other legal and social movements, it has been less obvious for environmentalism. Perhaps because the initial legislative victories came so quickly after Earth Day 1970, environmental lawyers and scholars have generally lost sight of the interactive relationship between law and building public support for the environment. This is ironic because one of environmental law’s founding moments, the creation of the Environmental Defense Fund, grew out of a lawsuit against spraying DDT on Long Island.⁴ Nonetheless, the conventional account in environmental law scholarship is typically that public support translates into law and legislation.⁵ Where the public support came from is usually left unexplained.

In contrast, it is conventional wisdom in other areas of law that law shapes public values; a famous example is Justice Brandeis’ dissent in *Olmstead v. United States*, in which he argues that law-breaking by government will breed disrespect and lawlessness.⁶ But until Purdy, how the law shapes public values was rarely discussed in environmental law scholarship. One environmental law scholar did observe in 1994 that “The purpose of law in the activist mode [including environmental law] is to change the norms and behavior of a community or subcommunity.”⁷ The thesis was that one of the goals of environmental law is to transform public values so that people are more supportive of protecting the environment, even when not legally compelled to do so. That has actually occurred to some degree. For example, corporate sustainability efforts have outpaced government regulatory requirements in some areas. Today

Author’s Note: Climate Change is a complex subject, and a comment on someone else’s work is not the place to lay out my views on it. No one should misunderstand my comments as support or opposition for any particular proposal.

1. Jedediah Purdy, *Our Place in the World: A New Relationship for Environmental Ethics and Law*, 62 DUKE L.J. 857 (2013).
2. BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION* (2014). For a good short summary, see <http://www.naacp.org/pages/naacp-legal-history>.
3. WILLIAM H. DURHAM, *COEVOLUTION: GENES, CULTURE AND HUMAN DESTINY* vii (1991) (“I have called the theory ‘coevolution’ . . . to emphasize the

fact that genes and culture are copartners in shaping human diversity”); compare Mark Greenberg, *The Moral Theory Impact of Law*, 123 YALE L.J. 1288 (2014).

4. Environmental Defense Fund, *Our Mission and History*, <http://www.edf.org/about/our-mission-and-history>.
5. See, e.g., RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 43-44 (2004).
6. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
7. E. Donald Elliott, *Environmental TQM: A Pollution Control Program That Works!*, 92 MICH. L. REV. 1840, 1840 (1994).

some large companies such as Wal-Mart, Ford, and IBM put pressure on their supply chains to reduce or eliminate environmentally troublesome substances and to adopt energy efficient practices and Greenhouse Gas reductions that go beyond regulatory compliance.

But living in the wake of the Senate's failure to enact cap-and-trade legislation for carbon during Obama's first term, Professor Purdy's vision in 2013 is not as optimistic about the possibilities for environmental law to lead public values in a positive way as was Professor Elliott in 1993, fresh off the successful enactment of cap-and-trade legislation for sulfur dioxide on bipartisan basis in the first Bush Administration, while he was serving as General Counsel of EPA. Purdy sees law not as leading, as did Brandeis and Elliott, but rather primarily as a negative force "precluding" certain kinds of experiences of nature.⁸ Professor Purdy does not provide many examples of how law "precludes" encounters with nature, but he does discuss at length a modern version of the Jeffersonian ideal of small subsistence farming as supposedly shaping human character in desirable ways.⁹ According to Purdy, "Farming offers its own experiential value",¹⁰ at least if it is done right; he embraces "an integrated agriculture that returns crop and animal waste to the soil to preserve the cycle of fertility" but "lament[s] . . . industrial farming . . ."¹¹

To someone who grew up in a farm state, Indiana, Professor Purdy's encomium to the virtues of "tending land and animals" brings to mind the quip by literary critic William Empson that people who actually live in the country do not write pastoral poetry extolling the virtues of the country life.¹² But as I was chopping wood, adding my compost to the soil to put in my garden and tending to the wants of two cats, it occurred to me that one cannot really deny Purdy's point that the modalities of how we live our daily lives help to shape who we are and what we value. The move that Purdy makes in environmental law is similar to that made by the inventor of the so-called "new history" in the 1920s, James Harvey Robinson. History, since Herodotus, had been defined as the doing of kings and armies, how many they smote and what lands they conquered. Robinson changed the focus to the life experiences of ordinary people and how they lived. So too Purdy, who switches the focus from Congress and EPA to how we live our daily lives.

How the law figures into Purdy's theory is less clear. At one point Purdy seems to imply that agricultural subsidy policy is somehow responsible for the decline of the family farm in America, primarily because most of the farm subsidies today go to agribusiness.¹³ Most of the commentary maintains just the opposite: that the political justification for farm subsidy policies was to try to save the family farm

for political and social reasons after it was no longer able to compete economically with the "factory farm." Agricultural policy seems a better fit to the Hayek-Stigler story of government programs passed in the name of benefitting the little guy being taken over and warped to benefit the politically well-connected and powerful¹⁴ than to Purdy's story of law precluding wholesome, inspiring experiences of nature, but perhaps both are true at once.

Purdy's point may be that the law did not go far enough (in his view) to preclude the techniques that gave factory farms an economic advantage over Purdy's romantic vision of virtuous yeoman farmers "tending land and animals" in bucolic harmony with nature. One wonders, however, where he would draw the line. Are mechanized tractors permissible, or would we respect our bodies and those of animals more if many more of us had to plow the earth for ourselves behind a team of oxen, as the Amish do?

II. Purdy's Methods Are Poetic, Not Empirical

Perhaps the most conspicuous omission from Professor Purdy's 75 page article is his failure to discuss the results of a large scale experiment with the type of public policy that he favors: using law to "nudge"¹⁵ people to have the experiences of nature that we, as a supposedly more enlightened elite, believe will make them better people, namely, wilderness policy. In *Mountains Without Handrails*,¹⁶ the late Joseph Sax, an eminent environmental law scholar whom Purdy regrettably does not cite, mounted an extended argument for the same type of policy that Professor Purdy seems to favor: using law to promote the experience of nature up close and personal in the belief that experiencing nature will make us into better people. Purdy acknowledges that American law has made a major commitment to preserving wilderness, having set aside 107 million acres in perpetuity as statutory wilderness.¹⁷ One might expect Purdy to provide a retrospective empirical assessment of this extensive policy experiment to see whether it actually provided the benefits in improving human nature and public values that are envisioned by Professors Sax and Purdy.¹⁸

But Professor Purdy is not interested in whether past experiments with the types of policies he advocates have actually worked. His methods are not empirical, but rather rhetorical and poetic, even evangelical. He has a wonderful way with words. My personal favorite is that climate change "threatens to become the collective-action prob-

8. *Supra* note 1, at 891.

9. *Supra* note 1, at 902.

10. *Supra* note 1, at 911.

11. *Supra* note 1, at 906.

12. William Empson, *Proletarian Literature in Some Versions of Pastoral* 6 (1938).

13. *Supra* note 1, at 910.

14. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3 (1971).

15. I use this freighted term advisedly. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

16. JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* (1980), *passim* but esp. pp. 47-77 (Chapters 3 and 4).

17. *Supra* note 1, at 890.

18. For an example of the kind of retrospective assessment of public programs against their declared goals that Purdy avoids, see PETER H. SCHUCK, *WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER* (2014).

lem that ate the planet.”¹⁹ His 75 pages are full of turns of phrase that are at once erudite, sophisticated and engaging. It is academic prose at its best (or worst, depending upon one’s taste for the genre).

Purdy discusses three main areas in which he believes that we need an awakening of new environmental ethics: “Food, Agriculture, and the Value of Work,”²⁰ “Animals and the Ethics of Encounters Across Species,”²¹ and “Climate Change, Rationality, and Vision.”²² Most of what he says about the first two is derivative, as he readily acknowledges with frequent citation and sage commentary on the work of his intellectual progenitors such as Thoreau, Aldo Leopold, Michael Pollan, and Peter Singer. Professor Purdy’s most original ideas come with regard to climate change, which he explicitly analogizes to the first two.

III. Climate Change and Legal Change

Professor Purdy’s discussion of climate change is sophisticated and longer than this comment, so I cannot do justice to it, but instead commend it to readers to read for themselves. It culminates in this interesting passage, which is a précis of Professor Purdy’s argument as a whole:

Climate change is not the first problem to present the challenge of palpably expressing elusive, frequently invisible ecological processes. . . .

How might law contribute to this possible cultural development? One modest step is *for scholars to hold themselves open to this thought: reform efforts may make essential cultural contributions even if they seem futile when we ask simply whether they will likely succeed as lawmaking or regulatory strategies*. For instance, municipal efforts to address greenhouse-gas emissions and community-level attempts to define a personal ethics of low-carbon living, although palpably ineffective in one way—they will not directly contribute much to reducing global emissions—may nonetheless turn out to be effective in somewhat the way Sierra Club excursions were: as essays in new ways of experiencing climate change as mattering, and in new shared vocabularies for expressing and elaborating its importance. That is, *we might regard law and lawmaking as forums in which a cultural and imaginative argument proceeds*, an argument that will help to lay the foundation of any legal regime that effectively addresses climate change.²³

As poetry, Purdy’s vision that by living low-carbon lives at the local level we will “help to lay the foundation” for “a legal regime that effectively addresses climate change” is appealing, particularly to people who are concerned about the failure of Washington to address problems about which they care deeply. Purdy’s vision that we can change the world simply by changing our collec-

tive heads is reminiscent of John Lennon’s beautiful, but utopian, lyrics in his 1971 hit single *Imagine*: “you may say I’m a dreamer, but I’m not the only one; I hope some day you’ll join us and the world will be as one.”²⁴ Or the concept, also popular in the 1970s and 1980s, that legislating “nuclear-free zones” in local communities such as Berkeley, California and Takoma Park, Maryland, would somehow lay the foundation for world peace. However appealing the vision may be that our beliefs and experiences can magically change the world, as a serious theory of how effective regimes in environmental law develop, at best Professor Purdy leaves out several important intermediate steps between personal experience of low-carbon lives at the local level and an effective international legal regimes to address climate change.

First, note that Purdy addresses his plea to “hold themselves open to this thought” to his fellow “scholars.” As do most of us who contribute to law reviews, Purdy evidently subscribes to John Maynard Keynes’ dictum/hope that political leaders will eventually be influenced by “some academic scribbler of a few years back.”²⁵ Keynes, however, at least had an explicit two-step theory of how ideas promote legal change; he contended that the idea of academics eventually influence the thoughts and actions of the next generation of political leaders who were our students. Purdy seems to maintain that using law to compel more people to have the experience of low-carbon lives through municipal regulation will in some unspecified way “lay the foundation” for effective international legal regimes to address climate change.

Other scholars addressing the problem of why some societies manage to address environmental problems effectively, but other societies do not, have posited three steps: (1) perception of the problem by “Cassandras” (those who see what others do not), (2) dissemination and acceptance of Cassandra’s vision by the populace and/or governing elites, and (3) putting in place law or other mechanisms of social control (such as religions or morality) that are effective to address the issue.²⁶ These theorists argue that the process of developing regimes to address an environmental problem can go off the rails at any one of the three stages. Purdy focuses on stage two, disseminating ideas (or in his case, “experiences” which he contends shape ideas) to a broader populace. Purdy assumes naïvely that stage three (implementing effective legal regimes) will somehow happen automatically if we only lay the proper foundation by using local law to require people to have experience with low-carbon living. Today some individuals choose to live a low-carbon lifestyle, or to buy carbon offsets to compensate for their sins, even if not compelled by government to do so. But it is not clear that the redemptive quality is

19. *Supra* note 1, at 917.

20. *Supra* note 1, at 905-12.

21. *Supra* note 1, at 912-17.

22. *Supra* note 1, at 917-27.

23. *Supra* note 1, at 925-26 (emphasis supplied).

24. JOHN LENNON, *Imagine*, on *IMAGINE* (Apple Records 1971).

25. JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 383 (1935).

26. E. Donald Elliott, *The Tragi-Comedy of the Commons: Evolutionary Biology, Economics and Environmental Law*, 20 VA. ENVTL. L.J. 17 (2001); see also JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* (2004).

equivalent when people are compelled by municipal law to adopt low-carbon living, as Purdy advocates. The history of blue laws, such as the one passed in Virginia in 1617 requiring church attendance on Sundays, is not encouraging that law can make people more virtuous by compelling them to have allegedly uplifting experiences.²⁷

Purdy's romantic vision that changing mentalities through personal experience will change the world appeals to the narcissism in all of us,²⁸ particularly the young and idealistic and those who feel powerless to affect public policy. As appealing as it may sound, Purdy's theory undervalues the importance of people who care about the environment actually getting involved in political activity and government service and having workable strategies to change laws and regulations for the better.

While Professor Purdy himself characterizes his as an "undeniably thin proposal"²⁹ for combating climate change in the short run, it encapsulates his essential and distinctive vision that "law and lawmaking [are] forums in which a cultural and imaginative argument proceeds."³⁰ Professor Purdy does not even attempt to spell out how experience of "a personal ethics of low-carbon living" at the municipal level will supposedly eventually translate into effective legal measures at the national and international levels. He asserts, however, that effective legal measures on climate are just not possible without a fundamental change in the way that people think and feel about climate change.

Purdy's assertion that bottom-up social change is the only possible route seriously undervalues the contributions of political leadership. For example, although climate change still remains relatively low on the priority list for most Americans,³¹ in 2012, the Obama Administration dramatically increased the CAFE fuel economy standards for automobiles.³² This one act of government policy, which when fully implemented will produce one of the largest reductions in greenhouse gases ever by any country, equivalent to shutting down 194 coal-fired power plants,³³ is not well-explained by Purdy's theory that changing the hearts and minds of the public through personal experience at the municipal level is "essential" and the only viable route to putting in place effective measures to address climate change. Other theories of how environmental laws are passed give greater emphasis to the role of political actors than does Purdy's, and they also emphasize actions that the Executive may take without new legislation or even broad public support.

At the end of the day, Professor Purdy's work is refreshing and innovative. His bottom-up theory of remaking the world through personal experience is not the whole story, perhaps not even the main story, but it captures an important and under-appreciated "view of the cathedral"³⁴ that is missing from conventional accounts of the role of environmental law in shaping our shared public values.

27. David J. Hanson, *Blue Laws*, <http://www2.potsdam.edu/alcohol/Controversies/1095380608.html#.U0mojIDizPs>.

28. Of course the same point is applicable to my perspective. As a Washington lawyer and former government official, as well as a professor, I think that the kinds of things that I do are important. E. Donald Elliott, *Lessons From Implementing the 1990 CAA Amendments*, 40 ELR 10592 (June 2010).

29. *Id.*

30. *Id.*

31. For example, a PEW research poll in January, 2012, ranked climate change as the lowest of 22 national priorities among voters, with only 25% ranking it as a "top priority," a decline of 13% since 2007. Scott Keeter, Director of Survey Research Pew Research Center, Public Attitudes About Energy, Environment and Global Warming, February 22, 2012.

32. Department of Transportation National Highway Traffic Safety Administration, Final Rule, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62624 (Oct. 15, 2012).

33. Larry West, The Obama Administration's CAFE Standards: President Obama's CAFE Standards Require New Cars to Average 35.5 mpg by 2016, <http://environment.about.com/od/environmentallawpolicy/a/obama-sets-new-fuel-efficiency-standards.htm>.

34. *Compare*, for the title, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).