Draft of September 28, 2005

Ends and Means in Environmental Law, or The Unlikely Marriage of Law and Letters

Eric T. Freyfogle

To sponsor a conference on environmental law and letters is to raise the possibility that two quite different scholarly perspectives on nature and culture might have more reason to talk with one another than they presume. Can environmental lawyers and legal scholars learn from the humanities? Do humanistic scholars, particularly those who dwell on people and land, have significant things to learn from the law? The communications here could well be two-way. But the more pressing issue, perhaps, has to do with the influence of humanities on law, and through lawyers and legal scholars on institutional frameworks of environmental policy. Would our environmental laws and policies improve if the people making them took account of humanistic insights?

My answer, in brief, is this: Humanistic perspectives could aid the law, but it's unlikely at present that they will do so, and influence won't occur, not significantly, unless humanists put their observations in more useable form. That means, mostly, directing their comments to the environmental movement as a whole, and only through that movement to the legal community itself.

"The law is a jealous mistress," so said Justice Story in 1821 in an unsuccessful attempt to keep bar admission standards from sinking down. More pertinent is to observe that lawyers *qua* lawyers are decidedly polygamous by disposition in their willingness to take up with diverse

intellectual partners. Lawyers certainly, and legal scholars largely, are not looking to marry. They look for business associates, intellectual colleagues who can help them at their work. To understand this professional trait in its various manifestations is to see why humanistic approaches now hold little appeal.

*   *   *   *   *

The place to begin is with the practice of law, American style, and with the skills and mental frames that lawyers begin learning in law school. Practicing lawyers make money off clients, who come for help with problems. A client usually has a goal and the lawyer helps achieve that goal, with little or no modification. Often the lawyer's work requires advocacy on the client's behalf, in courtrooms, negotiations or other legal settings. Advocacy is an art, the first rule of which is to know your judge or jury. Arguments are addressed to particular people and are designed to persuade those people. Arguments are good when they succeed in that task. For lawyers there's no need to await the verdict of history or the slow-developing critiques of book reviewers or colleagues. Win or lose, the feedback on work product is immediate. Truth in any abstract sense is relevant only insofar as truth has a greater power to persuade. Working lawyers and, to a lesser but distinct degree, legal scholars tend to see the world in terms of problems that need solving. Problems typically are discrete, and are best approached one by one.

As for the law itself, it is understood typically as a collection of tools, each intended to address a problem or to help people accomplish particular tasks. Laws are designed to achieve results, and are judged by their results. To the extent law approaches larger goals, change typically unfolds incrementally, step by legal step. Lawyers rarely consider the ways problems

are interlinked so as to make it necessary when solving one problem also to solve others; to use Wes Jackson's apt phrase, they don't attempt to solve for pattern. Even in the case of discrete problems, the law's tendency is to look for shallow roots. The law's guiding precept is proximate cause, which is to say that lawyers begin with a clear harm and then work up the chain of causation only to find the nearest person or big event that played a causal role. They don't keep working their way, link by causal link, to find ever-earlier causes. Thus, for lawyers water pollution is a distinct problem, not a symptom of some underlying economic or cultural malaise, and the party emitting the pollution is solely responsible for it. Lawyer look for someone to blame, and are disinclined to trace problems to economic or political systems, much less to cultural values and presumptions. Individual defendants can have deep pockets and serve time in prison; cultural values do not and cannot.

To put the point more simply, lawyers work within the system as they find it, pressing a bit here and there but rarely talking about fundamental change. The values and assumptions of the surrounding culture are the ones they employ. Thus, American lawyers place a high price on individual liberty, because society does. The typical lawyer respects the free market, honors private property, and promotes the efficient allocation of natural resources. Landscapes where lawyers live and work are divided into political jurisdictions and property boundaries, which is to say they are fragmented and subject to competing, conflicting managerial regimes. Nature's many parts are chiefly valued in the market. In the unusual case of claims of *nonmarket* value, the existence of such value is a factual claim demanding proof, just like other factual claims; what lawyers want to know is not whether nonmarket value *really* exists or whether reasonable people *should* recognize it, but merely whether a particular litigant in a case does or does not embrace

the value.

*   *   *   *   *

To get at the humanistic perspective on people and nature, we can begin where so many others have begun, with Nathaniel Hawthorne at Sleepy Hollow, famously gazing over the peaceful valley that is disrupted by a noisy railroad. Hawthorne was a humanist and was absorbed by the rural vista largely because it proved so suggestive. He was inclined merely and importantly to stand back from the scene and take it in as a whole, in all its contradictions and ambiguities. For Hawthorne as for humanists since, the scene was part of an unfolding narrative, stretching backward and forward in time and including the seen and the unseen. Hawthorne was observer as well as participant, both in the particular scene and in the larger contexts for which the scene stood as symbol or metaphor. Nature and culture were mixed, each influencing the other in an on-going dialectic. For Hawthorne, Sleepy Hollow was not a problem to be solved: it was a situation to be understood.

The gap here between the legal and humanistic perspectives can be wide indeed. The typical lawyer looking at Sleepy Hollow would not consider the railroad as cultural symbol or as metaphor of contradiction. If she feared that steam-engine technology could rise too high, demoting humans from masters into servant, her fear would be fleeting. Lawyers are accustomed to power and human dominance; their perspective is rarely long. Working within the Enlightenment tradition, lawyers embrace rational discourse and are comfortable with knowledge drawn empirically. They work with facts as given. When facts are in dispute or incomplete—as they nearly always are—the remedy is simple: present the evidence to a fact finder,

assign the burden of proof, and obtain the resolution. "Findings of fact" are thereafter accepted as true, with a confidence that could make a devoted scientist blush. Nature is a tangible object, existing in space and time and apart from humans. Value is assigned by people, individually or collectively, and human verdicts are final. Like scientists, lawyers ignore the intangible. Like philosophers, they are prone to use both utilitarian and rights-based moral reasoning while discounting other approaches. They are suspicious or disdainful of moral frameworks based on sentiment, on ideals of virtue, and on religious sensibilities, which are deemed too mushy and resistant to logical argument. Adding to the lawyer's confidence in evaluating scenes is the conceit that law is a science—the fabulous idea that legal conclusions from case to case grow logically and coherently from within the law's dark recesses. It's an ill-supported myth, not something to withstand an argumentative wind, yet it blossoms and draws praise all the less, adding to the lawyer's belief that his home turf is the most secure and sensible of intellectual grounds.

Far distant from this legal stance—farther, really, than is commonly understood—is the humanistic view of the landscape—of the machine in the garden; of humans at work manipulating nature as they see fit. If we can judge from much writing on nature and culture, humanists are far less committed to the tenets of the Enlightenment. For the humanist, the landscape appears in all its organic wholeness, not as a collection of resources and jurisdictional pieces. It is approached and understood by ways of knowing that reach beyond the empirical. It is valued by moral means that supplement or even displace the logical. The humanist likely has little faith in progress, and indeed may possess only a faint idea about what qualifies as progress. Unguided by evidentiary rules or burdens of proof, the humanists sees humans embedded in the landscape, complexly

woven in webs of interdependence. Truth is illusive and judgments are necessarily tentative. The story has no beginning and no end.

Taken seriously, much humanistic writing calls into question the course of Western culture. It proposes that we rethink our ways of knowing, that we question or discard our many dualities, and that we start afresh in imagining the ways we might live. They are heady lessons, but can the lawyer or legal scholar make use of them?

* * * * *

We can approach our subject from another angle.

Among the dominant developments in Western history over the past few centuries have been the coming of industrialization, market capitalism, and economic liberalism. How and why these tandem forces gained such strength is unclear, as are the complex ways that the forces intertwined. Parts of the story, though, are known, as they relate to nature and human uses of it.

In the feudal world at its height, land formed the base of society in pretty much all its aspects, political, social, economic, and even religious. Human activities of all types were complexly related to land. The ownership and use of land was extensively dictated by custom and law. Land was a source of economic income, to be sure, but even more it was a source of social, political, and military power. It was the instrument used to control people, binding them to one another and to a given place in a largely hierarchical arrangement. Within this arrangement power relations flowed in multiple directions. Thus, claims to land were typically multiple, as were the interests that land served. In his prominent study of a half century ago, Karl Polanyi summarized the situation as follows:

> Land, the pivotal element in the feudal order, was the basis of the military, judicial, administrative, and political system; its status and function were determined by legal and customary rules. Whether its possession was transferable or not, and if so, to whom, and under what restrictions; what the rights of property entailed; to what uses some types of land might be put—all these questions were removed from the organization of buying and selling, and subjected to an entirely different set of institutional regulations.

From this hierarchical, organic, interdependent world Western society moved step by unsteady step toward the present. We can measure those steps in many ways, but perhaps none is more revealing than to identify how the ties between people and land were gradually reduced in number. On the human side, people were gradually pulled away from land. From placed beings, embedded in a known social and economic world, they became largely rootless entities, chiefly valued for their labor and talked about increasingly as market commodities. In the feudal world peasants formed aggregates; in the coming world of market capitalism they were valued one by one. This process of commodifying labor was a long one, and it met strong resistance. Yet prevail it largely did (slavery aside), until the advent in the twentieth century of labor standards, worker protections, and minimum wage laws.

Matching this commodification of labor was the gradual commodification of nature. For that to come about, ownership rights needed radical simplification and the managerial powers of the remaining, individual owners needed widening. This commodification process began quite early, when feudal lords pressed against kings to gain greater powers to dispose of lands as they saw fit, while living and upon death. The biggest hurdles came when lords set out to strip their lands of the many customary rights and tenancies that peasants and commoners had in them.

That process would take centuries. In England, the waves of enclosure during the Tudor and Early Stuart eras continued apace, despite royal resistance. Landowners shed their tenants, combined their land holdings, and brought on the sheep. Then and for centuries thereafter, aided in the eighteenth and nineteenth centuries by Parliamentary Acts, common lands were also turned into private holdings, with customary users either cast aside penniless or bought off with overvalued allotments. If the details were many the outcome was nonetheless simple. Lands increasingly had one owner for each, and that owner had growing powers to use or transfer the land as she saw fit. Land use had become a business; land values were largely market-based.

With this commodification of land came a suite of new ideas about it and about the ways humans related to it. The ways that people actually used particular lands often declined in number and type, as modes of foraging and subsistence living gave way to the single-minded production of staple commodities for the market. Land boundaries became more definite and clearly marked, often with high shrubs and fences. Well into the nineteenth century, rural dwellers in America asserted the right to graze livestock on unenclosed rural lands, regardless of ownership; as many courts explained, the forest was a commons. But the tide, plainly, was turning. New ideas of ownership expanded a landowner's right to exclude outsiders, regardless of labor theories of natural rights that cast doubt on the ownership of unenclosed land. Foraging practices declined while roads were laid out and travelers expected to keep to them. Most surprising of all, the United States gradually embraced a land-use rule that it had once ridiculed England for upholding—the idea that a landowner could exclude local people from hunting on his lands. In America as in England, a person now had to own land in order to hunt.

So deeply embedded today is the idea of land-as-commodity that most Americans can

hardly conceive of a sensible alternative. Landscapes come divided into pieces, with a distinct owner for each. Particular natural “resources” are broken off for separate ownership—water flows, mines, grazing rights, and the like. In all cases, it’s the market that sets the value. Americans argue ceaselessly about the proper *intensity* of landowner use-rights; they argue, that is, about whether intensive development will be allowed in a given place, or whether the law instead should protect more sensitive land users who are disrupted by their noisy industrial neighbors. But this argument over intensity leaves unchallenged the basic achievement of the centuries: nature is a collection of commodities; landscapes are fragmented; and the market largely dictates what gets done.

This tale of commodification gives us a second place where we might stand, to consider the wide gap between legal and humanistic perspectives. Lawyers and legal scholars have been at the forefront of the moves toward commodification. They largely accept it without question. They might chafe at some implications but rarely dream of alternatives. For many humanists, things could hardly be more different, though the pull of private ownership in personal life is not absent. The humanist writer on nature and culture is disinclined to worry about human-drawn lines on the map; about the legal allocation of rights to use nature. Lawyers, to be sure, are not entirely blind to problems that cross land boundaries—pollution, for instance. Indeed, to a large extent legally recognized harms arise only when there is a crossing of commodity boundary lines. For the humanist, though, the lines simply don’t exist. Nature is an integrated whole and people are part of it. If the ownership of a land parcel gives a person a special attachment to it—as surely it does, and in good ways—the emotional attachment to place is still between the owner and the land, not between the owner and private property as an abstract bundle of legal rights. A

William Blackstone, steeped in the law, might wax poetically about his private property as that "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe," but no humanist would think about land in any such terms. Land is a real place, with particular soils and trees and wildlife, not an intangible legal construct.

In their instinctive acceptance of the commodification of nature, lawyers largely stand side by side with the average American, save for rural dwellers who live close to the land. It’s the humanist who stands apart, who sees the land as an organic whole, who sees it stripped of the invisible, human-drawn boundaries that have such great effects when it comes to making sensible, collective decisions about how we ought to live.

*   *   *   *   *

Americans so readily accept the commodification of nature in part because the idea fits so sensibly within our nation’s liberal culture. The dominance of liberalism—defined in its classic sense that exalted individual initiative—was articulated as an historical interpretation by historians in the 1950s, the so-called consensus school led by Louis Hartz and Richard Hofstadter. Although America’s liberal culture has always had dissenters and it has permeated public life more than private realms, the dominance of liberalism nonetheless can hardly be denied. Indeed, political developments since the Reagan years have provided widespread evidence of America’s deeply rooted liberal orientation. Debates take place, but the spectrum of competing views typically ranges from welfare liberalism on the political left to economic liberalism on the right. Only on the political fringe do we find proponents of distinctly non-liberal views, including

organic social visions that unite people into integrated wholes and promote the interests of the whole over the desires of individual human parts. In America, people count as individuals. We favor equality of opportunity among individuals; we promote the full democratic participation of all adult citizens. In the nineteenth century, courts would sometimes talk about the "rights of communities," which counterbalanced the rights held by individuals. Today, we can hardly conceive that a community as such might have rights.

As it exalts the individual human, liberalism necessarily detaches that human from all that surrounds her, not just other people but nature. Nature is the object; the human is the morally worthy subject; and moral worth attaches to the human as an isolated being, not as a part of something larger. Philosophers can wonder whether nature itself might have intrinsic value on its own, or whether some human might be needed to recognize or even create that value. For liberal Americans, lawyers included, this question seems frivolous. By liberal definition moral value attaches only to people, and thus nature can gain value only secondarily, through the forceful will of some human. Like economists, lawyers see value in nature only to extent that humans have given rise to that value. The issue for economists is whether humans are willing to spend money on nature; that is, whether a part of nature is a commodity that fetches money in the mart. Lawyers are a bit more catholic in recognizing value: a person can value something even outside the market. Still, value is human created, and exists only so long as some individual human recognizes it. Legal scholars might ponder whether trees have legal standing, but the underlying idea has no place to enter the law and has not done so. Value is a human construct, subject to ceaseless re-evaluation.

America's liberalism constrains legal discourse in another critical way. Since individual

humans are the sole moral actors in the universe, overall goals and ideas of right and wrong can only arise in one way: people establish them. Good land use is decided by people; the moral rightness of interactions with nature are judged by people. In the legal mind, this foundational reality is easily pieced together with liberal culture and with the fragmented, commodified landscape. To divide nature into parts—whether private property or political jurisdictions—is to specify more clearly *which* people get to make the decisions about good land use and about the moral rightness of human-nature interactions. Lawyers are highly attuned to this issue: *who* decides a question is often critical to the ultimate decision. In a liberal world filled with rights-bearing individuals, the individual is given as much freedom to decide as possible. When landscapes are fragmented, it's the owner of the fragmented piece, or the political jurisdiction with its legally distinct boundaries, that holds the power to act. It is thus up to the various decision-makers to decide for themselves how they'll define good land use and what moral value, if any, they'll recognize. Moral value is thus not merely a human creation: it's the result of countless decisions made by a countless number of human decision-makers, using whatever evaluation standards they deem appropriate.

When lawyers get involved in issues relating to nature, they do so in this context. It is the human decision-maker who gives rise to value, which is to say a human decision-maker who sets the goal. Trained in the use of law as a tool, lawyers are prone to pay attention to the *means,* rather to the *ends.* Indeed, to the extent lawyers have a speciality, it lies in their creative, flexible use of law as a set of tools. As specialists in the means, they pay less attention to the aims or ends, since that's not their job or their expertise. Nor do they, as noted, trace problems back to their underlying causes in American culture—to our ways of seeing nature, valuing it,

understanding our links to it, and so on. Legal scholars are more prone than practitioners to give critical thought to the ends, but only modestly so. Legal literature on environmental subjects is dominated by discussions about various legal tools and the relative merits of each. Should we use market-based methods or stick to command and control? Should we rely on public disclosure requirements or insist on a "hard-look" rule (such as the requirement to prepare environmental impact statements) that pushes decision-makers to study environmental effects and to explore alternatives? What level of government in our federal system should have the power to address which environmental problems? What powers should citizens have to challenge government action, and what deference are governments owed? What types of evidence should be put on the public record, and when should the factual record be closed? These and countless similar issues draw the attention of legal scholars, day in and day out. And they all, conspicuously, relate to allocations of power, methods of decisionmaking, and choices of legal tools, which is to say they all relate to the means. Rarely do legal scholars pause to consider normatively the kinds of goals that we ought to be pursuing. Are we as a species living well within the natural order? Are we using nature in ways that adequately respect the interests of future generations? Are we engaging in good land use? These and similar questions, relating to the ends of environmental law and policy, are simply not talked about very often. And when they are talked about, the level of discussion, sadly, is not very high. Legal scholars make little use of serious writing on the overall aims of environmental policy, just as they pay little attention to serious conservation writings challenging fundamental elements of American culture. They are embedded in current structures of power and work within those structures.

It is for these reasons that legal scholars, like economists, are prone to grab on to

simplistic ideas about the proper thrust of environmental policy. One popular proposal is that we should divide even more of nature into fragmented pieces, and assign a private owner to each piece. The idea here is that private owners largely take care of what they own. But do they? The question doesn't get discussed much, nor is the factual record really explored. Before even getting to the evidence, though, we can answer this question only if we first talk about what it means to take care of land. What standard or measure should we use in judging whether land is being well tended? Lawyers ignore the question—it's not their job, or not within their area of expertise. Having skipped the question they have no clear idea of the answer. Lacking an answer, they have no way to measure whether landowners really do take care of what they own. And not knowing then whether landowners do take care, it thus is easier for liberty-loving scholars to assert loudly that privatization is the cure-all for environmental ills. Who's to say otherwise? The same line of analysis can be applied to questions about allocating power within the federal system. Can states do an adequate job of environmental protection? It's hard to know, when we have no way to judge the outcome of their work. Even when a statute seems to establish a rather clear environmental goal—protecting endangered species, for instance—the clarity of the goal is often superficial, and we can't really evaluate competing tools effectively unless we dig beneath the surface to get a clearer sense of what we're trying to accomplish and why. Is the protection of endangered species part of some larger suite of environmental goals, and if so what are they? Even if protection is a free-standing goal, why have we set it, and what might our rationales tell us about how we define a "species" and how we decide whether "conservation" has taken place?

The failure of legal scholars to consider ends more clearly pushes them, not just to focus

their attention on the means, but to latch on to fundamental first principles or moral axioms that enable them to construct arguments deductively. Influenced by the vast literature on civil rights, lawyers have long been comfortable starting with premises about individual freedom and moral worth, and proceeding deductively to legal and policy conclusions. The tendency to reason this way received major pushes from the American Revolution and Jacksonian democracy. It got a further push—in ways that helped set America apart from other Western nations—with the Civil War, and the emphasis the war gave to individual liberty, negatively defined, as our highest cultural value. That notion of liberty, of course, was quickly picked up by defenders of free enterprise and used for the next half century as a potent rhetorical tool to ward off legislative attempts to contain industrial capitalism. Rights-based reasoning received another forceful push in the years before and during World War II, when the specter of Hitler's Germany encouraged the United States to define itself as everything that Nazism was not.

This tendency to reason from first principles, with the conclusion obtained at the final step, through rational processes, has had growing effects in legal scholarship. In the environmental arena, many environmental scholars exalt the primacy of private property, even though private property is quite a different type of individual right. Others exalt the liberty of economic enterprises. The more attention that such arguments draw, the less attention there is to devote to what ought to be our fundamental questions: how should we live on land, and what aspects of our social and cultural orders keep us from doing better at the task?

* * * * *

The commodification of labor and land that took place over a number of centuries

reached its peak in England around the middle of the nineteenth century. So extensive were the ill effects that commodification brought on--in terms of poverty, unemployment, urban ugliness, degraded families, disappearing towns, and the like--that counter-reactions were inevitable. In countless settings citizens rose up to place limits on the ways that market forces could treat people and land. Liberals of the day, defending the self-regulating market and free enterprise, claimed that misguided conspiracies were afoot to "collectivize" society. But the reality, it seems, was far different. The push to promote the free market was built upon a well-considered, well-articulated set of ideas. It was built upon liberal political thought, mixed with key precepts of classical economics. The reaction to market capitalism, in contrast, arose more haphazardly, and without real intellectual coherence. Its grounding was chiefly emotional, in the outrage engendered by the ever-present signs of beggars in the streets, children in factories, and landscapes scarred by noise and soot. Reformers pushed to contain the market, but they focused attention on the specific visible ills, rarely bothering to formulate a coherent critique of liberal and economic principles. The ills spoke for themselves and the aim of reform was to mitigate them, not to remedy systemic flaws.

The reaction to industrial capitalism began in the United States about the same time—earlier in connection with certain social ills, largely later with respect to land-use degradation. But the story in America was largely the same, in that reform efforts were often disjointed, sometimes worked at cross purposes, and were only loosely shaped by a coherent critique of the new age of enterprise. Looking back to the Progressive Era, it is common to discern two distinct strands to the conservation efforts—the utilitarian, sustained-yield work of Gifford Pinchot and the preservation efforts of John Muir. But though Pinchot and Muir did clash, the many reactions to

industrial capitalism did not at all break neatly into two categories. The reformers were many, and they divided up, not based on philosophy, but on the specific ills that aroused their ire. Reformers were driven by causes, mostly defensive in that they sought to protect or clean up places that the reformers held dear. Philosophy was secondary. As in England, the ills spoke for themselves.

We need to recall this history because it helps explain one of the chief traits, and perhaps severest deficiency, of the environmental movement today. “Archdruid” David Brower, arousing the Sierra Club troops in the 1950s, famously denied any need to develop a coherent philosophy. What environmentalists needed was a clear cause, he asserted—some obvious harm to challenge, or some natural area to protect. Brower’s sentiment would largely govern the environmental movement then on the verge of rapid growth. It would be an activist cause, aimed at halting specific harms and protecting valued places, not chiefly at reshaping society based on new cultural values. Environmental groups proliferated in number, each playing a niche role. Groups largely worked in isolation, competing with one another for dollars and members. Little thought was given to how the activist pieces might fit together. The environmental movement, that is, was not a multi-group effort to achieve a single goal; it was a disjointed effort to achieve a wide variety of goals, nearly all defined narrowly. The specific aims by and large were to change the ways that people (businesses, mostly) interacted with nature. Groups sought to alter the ways people *behaved*, not the ways they *thought*. Cultural reform was secondary.

The environmental movement today continues to display these characteristics: groups are action oriented, they rarely work together, and they have no particular message or vision to offer the American people. As a whole, the movement has no goal, no visible public figures, and no

effective ways to counter the cultural criticisms leveled against it. Not surprisingly, it has become rather easy prey for opponents out to discredit it. The criticisms by now are familiar: environmentalists care only about nature, not about people; they favor owls over jobs; they're elitist and anti-democratic; they favor restrictions on liberty and undercut private property; they push measures that severely undercut the American economy. These and similar criticisms are wide of the mark, by and large, and could easily be countered. But they are not, because the movement as a whole has no institutional way to counter them. What are environmentalists out to accomplish overall? The question receives no answer, and few if any groups seem even to ask the question of themselves. Academics in some disciplines give the matter thought; some write about sustainability and sustainable development, others about ecological integrity and ecosystem health, still others about ecosystem services. Environmental law scholars, though, are rarely among them, not in any serious way. As lawyers they're prone to give little thought to overall ends. And as environmentalists—many of them, though hardly all—they're prone to attack the obvious ills close at hand, without standing back to critique American culture or to imagine far different ways of inhabiting the land. It should not surprise us, then, that the literature of environmental law pays little attention to larger questions about ends, just as it pays little attention to the deep-rooted cultural origins of environmental problems. Lawyers and activists alike work within the system, developing tactics to win small victories. In the flurry of work, few take time to survey the larger scenes.

*   *   *   *   *

These observations return us to the point of beginning, and to questions about the

likelihood that lawyers and legal scholars might find value in the humanities–in the work of literary writers about people and place, or the work of humanities scholars who comment critically upon and augment that primary literature.

The basic problem is this. Lawyers and legal scholars are looking for help in doing their specific work, day to day. The problems are obvious, the resistance is strong, and more powerful tools are needed to get the jobs done. Literary writers, though, aren't in the business of crafting tools or helping at specific tasks. Humanities scholars aren't inclined to dwell upon matters of implementation; of how we might reorient American culture to instill greater humility in our interactions with land.

We might sum up the situation by turning to the work of Mark Twain. Imagine one of his riverboat captains, attentively watching the river and trying to steer his boat clear of the countless snags. Lawyers and legal scholars aren't usually riverboat captains themselves. They're advisors, standing beside the captain, giving advice on how best to avoid dangers and get to the captain's desired end. The question at hand: if our riverboat crew also included a poet, what help might the poet provide? What could the poet say to the lawyer, to help the lawyer in his advisory work?

The answer, alas, is: probably not much. The interests and observations of the poet are simply too detached from the needs of the captain and thus of the captain's advisor. It's not only that the poet will want to talk about the river's beauty or the music it pours forth. It is that the poet's observations might well question why the crew is on a riverboat to begin with, why it is operating under steam power, and why it is heading to one place rather than another. These are big questions, too big.

The comments of literary writers and humanities scholars, taken seriously (as they should

be taken seriously), simply pose too much of a challenge to American culture. And the challenges they pose come all at once, as a whole. They raise questions about our over-reliance on reason and our tendency to stick to empiricism as the only way of knowing. They challenge the fragmentation of nature and the assignment of value to it based solely on the satisfaction of human needs. As they survey the scene, they do not distinguish clearly between human life and other life forms, as our dominant culture does. To the typical humanist, landscapes are filled with mystery and intangible components. Linking the many parts are not just ecological processes but narratives lines, open rather than fixed, dependent upon contingencies and morally complex in their unfolding. Resolutions are not in sight, at least not enduring ones. Stories never end, nor does the telling of them.

To the extent the field of environmental letters has something to say to legal scholars and lawyers, it might be this: stand back from what you're doing and take in the whole of things, even as you pay greater attention to the lesser, easily overlooked parts. Observe the many ways that nature and culture are interwoven, and how humans are integrated into landscapes. Imagine new forms of mindfulness, new ways of knowing, new scales of value, new ways of relating to one another and to other life forms.

Good advice, all of it, to be sure. But this is just now what lawyers or even legal scholars want to hear. And they don't want to hear it because it simply isn't useful to them. It doesn't fit into the cultural world in which they live and work. The humanities collectively invite us to imagine an entirely new world, but that's not the business that lawyers and legal scholars are in. If our leading environmental writers are right, true conservation cannot take place without fundamental changes in American culture. Lawyers, though, are problem solvers, first and foremost. Larger

questions, about ultimate aims and underlying causes, they leave to others. And thus they pay little attention to the poets. The humanist agenda is simply too vast to put to use. It doesn't start from where we are today and identify the next few steps. It imagines new places where we might go, while paying little attention to how we might get there.

If the humanities writers want to contribute effectively to the environmental effort, broadly defined, they'll need to make their work more relevant. The place to do that, perhaps, is by speaking, not to legal scholars and lawyers directly, but instead to the environmental movement as a social cause.

Much of what humanists want to talk about bears on the question of overall goals: what should the environmental movement be seeking to accomplish, in terms of our ways of living in nature and the various cultural ways that we see nature and value it. In the shaping of environmental goals and in the crafting of an overall environmental critique of modern culture humanists can play significant roles. But their attempts to have influence are much weakened by the liberal, fragmented characteristics of the environmental movement itself. Environmental activists show no more interest in humanistic writings than do legal scholars. Individual environmentalists have posed sharp challenges to American culture and offered refined ideas about how we might inhabit the land. But the movement as a whole hardly pays attention. Its cultural criticism is weak. Its visions of a better way are dim. And the prospects of changing the movement are not great, given the competition among groups and their abiding concern for institutional stability.

Still, if change seems remote, the possibility of it does exist. If lawyers and legal scholars attend mostly to tools, they are at least accustomed to being told what goals to promote, whether

by clients, by Congress, or by the courts. The law itself can also change significantly, as it has over time. The liberal culture of today, so respectful of the autonomous individual human, so disdainful of nature and of organic wholes, could evolve over time to something much different, and the law could evolve along with it.

For a glimpse of such change, we can end with a few lines from a contemporary writer on nature and culture who has given a good deal of thought to law and legal culture—Wendell Berry of Kentucky. Berry's father was a lawyer, as is his brother and a nephew. Lawyers appear regularly in his fiction. One of Berry's explorations of law and law practice appears in his extended story, "Fidelity," which recounts the final illness of Burley Coulter, one of Berry's most beloved, eccentric fictional characters. Burley is taken to a hospital and stuck with tubes, yet his prognosis is bleak. His son and others want Burley to die at home, where he was born and lived, so they kidnap him in the middle of the night. A police detective is soon on their trail, trying to find the kidnapper and bring him to justice. Standing in the way, though, is elderly lawyer Wheeler Catlett, loosely modeled after Berry's own father and one of the keepers of the agrarian flame. Wheeler challenges the police detective, in the detective's claim that it is wrong to remove a patient from a hospital without the hospital's permission. How can that be, Wheeler asks? If a patient needs permission to get out of the hospital, then he's effectively in jail.

From here, the scene comes to its climax, offering a glimpse of a different moral order that law and lawyers might promote, the kind of organic, place-based moral order that Wendell Berry has proclaimed in his writing for decades.

> "Well, anyway," Detective Bode said, "all I know is that the law has been broken, and I am here to serve the law.
>
> "But, my dear boy, you don't eat or drink the law, or sit in the shade of it or warm yourself by it, or wear it, or have your being in it. The law exists only to serve."

“Serve what?”

“Why, all the many things that are above it. Love.”

Draft of September 28, 2005

Ends and Means in Environmental Law, or The Unlikely Marriage of Law and Letters

Eric T. Freyfogle

To sponsor a conference on environmental law and letters is to raise the possibility that two quite different scholarly perspectives on nature and culture might have more reason to talk with one another than they presume. Can environmental lawyers and legal scholars learn from the humanities? Do humanistic scholars, particularly those who dwell on people and land, have significant things to learn from the law? The communications here could well be two-way. But the more pressing issue, perhaps, has to do with the influence of humanities on law, and through lawyers and legal scholars on institutional frameworks of environmental policy. Would our environmental laws and policies improve if the people making them took account of humanistic insights?

My answer, in brief, is this: Humanistic perspectives could aid the law, but it's unlikely at present that they will do so, and influence won't occur, not significantly, unless humanists put their observations in more useable form. That means, mostly, directing their comments to the environmental movement as a whole, and only through that movement to the legal community itself.

"The law is a jealous mistress," so said Justice Story in 1821 in an unsuccessful attempt to keep bar admission standards from sinking down. More pertinent is to observe that lawyers *qua* lawyers are decidedly polygamous by disposition in their willingness to take up with diverse

intellectual partners. Lawyers certainly, and legal scholars largely, are not looking to marry. They look for business associates, intellectual colleagues who can help them at their work. To understand this professional trait in its various manifestations is to see why humanistic approaches now hold little appeal.

* * * * *

The place to begin is with the practice of law, American style, and with the skills and mental frames that lawyers begin learning in law school. Practicing lawyers make money off clients, who come for help with problems. A client usually has a goal and the lawyer helps achieve that goal, with little or no modification. Often the lawyer's work requires advocacy on the client's behalf, in courtrooms, negotiations or other legal settings. Advocacy is an art, the first rule of which is to know your judge or jury. Arguments are addressed to particular people and are designed to persuade those people. Arguments are good when they succeed in that task. For lawyers there's no need to await the verdict of history or the slow-developing critiques of book reviewers or colleagues. Win or lose, the feedback on work product is immediate. Truth in any abstract sense is relevant only insofar as truth has a greater power to persuade. Working lawyers and, to a lesser but distinct degree, legal scholars tend to see the world in terms of problems that need solving. Problems typically are discrete, and are best approached one by one.

As for the law itself, it is understood typically as a collection of tools, each intended to address a problem or to help people accomplish particular tasks. Laws are designed to achieve results, and are judged by their results. To the extent law approaches larger goals, change typically unfolds incrementally, step by legal step. Lawyers rarely consider the ways problems

are interlinked so as to make it necessary when solving one problem also to solve others; to use Wes Jackson's apt phrase, they don't attempt to solve for pattern. Even in the case of discrete problems, the law's tendency is to look for shallow roots. The law's guiding precept is proximate cause, which is to say that lawyers begin with a clear harm and then work up the chain of causation only to find the nearest person or big event that played a causal role. They don't keep working their way, link by causal link, to find ever-earlier causes. Thus, for lawyers water pollution is a distinct problem, not a symptom of some underlying economic or cultural malaise, and the party emitting the pollution is solely responsible for it. Lawyer look for someone to blame, and are disinclined to trace problems to economic or political systems, much less to cultural values and presumptions. Individual defendants can have deep pockets and serve time in prison; cultural values do not and cannot.

To put the point more simply, lawyers work within the system as they find it, pressing a bit here and there but rarely talking about fundamental change. The values and assumptions of the surrounding culture are the ones they employ. Thus, American lawyers place a high price on individual liberty, because society does. The typical lawyer respects the free market, honors private property, and promotes the efficient allocation of natural resources. Landscapes where lawyers live and work are divided into political jurisdictions and property boundaries, which is to say they are fragmented and subject to competing, conflicting managerial regimes. Nature's many parts are chiefly valued in the market. In the unusual case of claims of *nonmarket* value, the existence of such value is a factual claim demanding proof, just like other factual claims; what lawyers want to know is not whether nonmarket value *really* exists or whether reasonable people *should* recognize it, but merely whether a particular litigant in a case does or does not embrace

the value.

* * * * *

To get at the humanistic perspective on people and nature, we can begin where so many others have begun, with Nathaniel Hawthorne at Sleepy Hollow, famously gazing over the peaceful valley that is disrupted by a noisy railroad. Hawthorne was a humanist and was absorbed by the rural vista largely because it proved so suggestive. He was inclined merely and importantly to stand back from the scene and take it in as a whole, in all its contradictions and ambiguities. For Hawthorne as for humanists since, the scene was part of an unfolding narrative, stretching backward and forward in time and including the seen and the unseen. Hawthorne was observer as well as participant, both in the particular scene and in the larger contexts for which the scene stood as symbol or metaphor. Nature and culture were mixed, each influencing the other in an on-going dialectic. For Hawthorne, Sleepy Hollow was not a problem to be solved: it was a situation to be understood.

The gap here between the legal and humanistic perspectives can be wide indeed. The typical lawyer looking at Sleepy Hollow would not consider the railroad as cultural symbol or as metaphor of contradiction. If she feared that steam-engine technology could rise too high, demoting humans from masters into servant, her fear would be fleeting. Lawyers are accustomed to power and human dominance; their perspective is rarely long. Working within the Enlightenment tradition, lawyers embrace rational discourse and are comfortable with knowledge drawn empirically. They work with facts as given. When facts are in dispute or incomplete—as they nearly always are—the remedy is simple: present the evidence to a fact finder,

assign the burden of proof, and obtain the resolution. “Findings of fact” are thereafter accepted as true, with a confidence that could make a devoted scientist blush. Nature is a tangible object, existing in space and time and apart from humans. Value is assigned by people, individually or collectively, and human verdicts are final. Like scientists, lawyers ignore the intangible. Like philosophers, they are prone to use both utilitarian and rights-based moral reasoning while discounting other approaches. They are suspicious or disdainful of moral frameworks based on sentiment, on ideals of virtue, and on religious sensibilities, which are deemed too mushy and resistant to logical argument. Adding to the lawyer’s confidence in evaluating scenes is the conceit that law is a science—the fabulous idea that legal conclusions from case to case grow logically and coherently from within the law’s dark recesses. It’s an ill-supported myth, not something to withstand an argumentative wind, yet it blossoms and draws praise all the less, adding to the lawyer’s belief that his home turf is the most secure and sensible of intellectual grounds.

Far distant from this legal stance—farther, really, than is commonly understood—is the humanistic view of the landscape—of the machine in the garden; of humans at work manipulating nature as they see fit. If we can judge from much writing on nature and culture, humanists are far less committed to the tenets of the Enlightenment. For the humanist, the landscape appears in all its organic wholeness, not as a collection of resources and jurisdictional pieces. It is approached and understood by ways of knowing that reach beyond the empirical. It is valued by moral means that supplement or even displace the logical. The humanist likely has little faith in progress, and indeed may possess only a faint idea about what qualifies as progress. Unguided by evidentiary rules or burdens of proof, the humanists sees humans embedded in the landscape, complexly

woven in webs of interdependence. Truth is illusive and judgments are necessarily tentative. The story has no beginning and no end.

Taken seriously, much humanistic writing calls into question the course of Western culture. It proposes that we rethink our ways of knowing, that we question or discard our many dualities, and that we start afresh in imagining the ways we might live. They are heady lessons, but can the lawyer or legal scholar make use of them?

* * * * *

We can approach our subject from another angle.

Among the dominant developments in Western history over the past few centuries have been the coming of industrialization, market capitalism, and economic liberalism. How and why these tandem forces gained such strength is unclear, as are the complex ways that the forces intertwined. Parts of the story, though, are known, as they relate to nature and human uses of it.

In the feudal world at its height, land formed the base of society in pretty much all its aspects, political, social, economic, and even religious. Human activities of all types were complexly related to land. The ownership and use of land was extensively dictated by custom and law. Land was a source of economic income, to be sure, but even more it was a source of social, political, and military power. It was the instrument used to control people, binding them to one another and to a given place in a largely hierarchical arrangement. Within this arrangement power relations flowed in multiple directions. Thus, claims to land were typically multiple, as were the interests that land served. In his prominent study of a half century ago, Karl Polanyi summarized the situation as follows:

> Land, the pivotal element in the feudal order, was the basis of the military, judicial, administrative, and political system; its status and function were determined by legal and customary rules. Whether its possession was transferable or not, and if so, to whom, and under what restrictions; what the rights of property entailed; to what uses some types of land might be put—all these questions were removed from the organization of buying and selling, and subjected to an entirely different set of institutional regulations.

From this hierarchical, organic, interdependent world Western society moved step by unsteady step toward the present. We can measure those steps in many ways, but perhaps none is more revealing than to identify how the ties between people and land were gradually reduced in number. On the human side, people were gradually pulled away from land. From placed beings, embedded in a known social and economic world, they became largely rootless entities, chiefly valued for their labor and talked about increasingly as market commodities. In the feudal world peasants formed aggregates; in the coming world of market capitalism they were valued one by one. This process of commodifying labor was a long one, and it met strong resistance. Yet prevail it largely did (slavery aside), until the advent in the twentieth century of labor standards, worker protections, and minimum wage laws.

Matching this commodification of labor was the gradual commodification of nature. For that to come about, ownership rights needed radical simplification and the managerial powers of the remaining, individual owners needed widening. This commodification process began quite early, when feudal lords pressed against kings to gain greater powers to dispose of lands as they saw fit, while living and upon death. The biggest hurdles came when lords set out to strip their lands of the many customary rights and tenancies that peasants and commoners had in them.

That process would take centuries. In England, the waves of enclosure during the Tudor and Early Stuart eras continued apace, despite royal resistance. Landowners shed their tenants, combined their land holdings, and brought on the sheep. Then and for centuries thereafter, aided in the eighteenth and nineteenth centuries by Parliamentary Acts, common lands were also turned into private holdings, with customary users either cast aside penniless or bought off with overvalued allotments. If the details were many the outcome was nonetheless simple. Lands increasingly had one owner for each, and that owner had growing powers to use or transfer the land as she saw fit. Land use had become a business; land values were largely market-based.

With this commodification of land came a suite of new ideas about it and about the ways humans related to it. The ways that people actually used particular lands often declined in number and type, as modes of foraging and subsistence living gave way to the single-minded production of staple commodities for the market. Land boundaries became more definite and clearly marked, often with high shrubs and fences. Well into the nineteenth century, rural dwellers in America asserted the right to graze livestock on unenclosed rural lands, regardless of ownership; as many courts explained, the forest was a commons. But the tide, plainly, was turning. New ideas of ownership expanded a landowner's right to exclude outsiders, regardless of labor theories of natural rights that cast doubt on the ownership of unenclosed land. Foraging practices declined while roads were laid out and travelers expected to keep to them. Most surprising of all, the United States gradually embraced a land-use rule that it had once ridiculed England for upholding—the idea that a landowner could exclude local people from hunting on his lands. In America as in England, a person now had to own land in order to hunt.

So deeply embedded today is the idea of land-as-commodity that most Americans can

hardly conceive of a sensible alternative. Landscapes come divided into pieces, with a distinct owner for each. Particular natural "resources" are broken off for separate ownership—water flows, mines, grazing rights, and the like. In all cases, it's the market that sets the value. Americans argue ceaselessly about the proper *intensity* of landowner use-rights; they argue, that is, about whether intensive development will be allowed in a given place, or whether the law instead should protect more sensitive land users who are disrupted by their noisy industrial neighbors. But this argument over intensity leaves unchallenged the basic achievement of the centuries: nature is a collection of commodities; landscapes are fragmented; and the market largely dictates what gets done.

This tale of commodification gives us a second place where we might stand, to consider the wide gap between legal and humanistic perspectives. Lawyers and legal scholars have been at the forefront of the moves toward commodification. They largely accept it without question. They might chafe at some implications but rarely dream of alternatives. For many humanists, things could hardly be more different, though the pull of private ownership in personal life is not absent. The humanist writer on nature and culture is disinclined to worry about human-drawn lines on the map; about the legal allocation of rights to use nature. Lawyers, to be sure, are not entirely blind to problems that cross land boundaries—pollution, for instance. Indeed, to a large extent legally recognized harms arise only when there is a crossing of commodity boundary lines. For the humanist, though, the lines simply don't exist. Nature is an integrated whole and people are part of it. If the ownership of a land parcel gives a person a special attachment to it—as surely it does, and in good ways—the emotional attachment to place is still between the owner and the land, not between the owner and private property as an abstract bundle of legal rights. A

William Blackstone, steeped in the law, might wax poetically about his private property as that "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe," but no humanist would think about land in any such terms. Land is a real place, with particular soils and trees and wildlife, not an intangible legal construct.

In their instinctive acceptance of the commodification of nature, lawyers largely stand side by side with the average American, save for rural dwellers who live close to the land. It's the humanist who stands apart, who sees the land as an organic whole, who sees it stripped of the invisible, human-drawn boundaries that have such great effects when it comes to making sensible, collective decisions about how we ought to live.

* * * * *

Americans so readily accept the commodification of nature in part because the idea fits so sensibly within our nation's liberal culture. The dominance of liberalism—defined in its classic sense that exalted individual initiative—was articulated as an historical interpretation by historians in the 1950s, the so-called consensus school led by Louis Hartz and Richard Hofstadter. Although America's liberal culture has always had dissenters and it has permeated public life more than private realms, the dominance of liberalism nonetheless can hardly be denied. Indeed, political developments since the Reagan years have provided widespread evidence of America's deeply rooted liberal orientation. Debates take place, but the spectrum of competing views typically ranges from welfare liberalism on the political left to economic liberalism on the right. Only on the political fringe do we find proponents of distinctly non-liberal views, including

organic social visions that unite people into integrated wholes and promote the interests of the whole over the desires of individual human parts. In America, people count as individuals. We favor equality of opportunity among individuals; we promote the full democratic participation of all adult citizens. In the nineteenth century, courts would sometimes talk about the "rights of communities," which counterbalanced the rights held by individuals. Today, we can hardly conceive that a community as such might have rights.

As it exalts the individual human, liberalism necessarily detaches that human from all that surrounds her, not just other people but nature. Nature is the object; the human is the morally worthy subject; and moral worth attaches to the human as an isolated being, not as a part of something larger. Philosophers can wonder whether nature itself might have intrinsic value on its own, or whether some human might be needed to recognize or even create that value. For liberal Americans, lawyers included, this question seems frivolous. By liberal definition moral value attaches only to people, and thus nature can gain value only secondarily, through the forceful will of some human. Like economists, lawyers see value in nature only to extent that humans have given rise to that value. The issue for economists is whether humans are willing to spend money on nature; that is, whether a part of nature is a commodity that fetches money in the mart. Lawyers are a bit more catholic in recognizing value: a person can value something even outside the market. Still, value is human created, and exists only so long as some individual human recognizes it. Legal scholars might ponder whether trees have legal standing, but the underlying idea has no place to enter the law and has not done so. Value is a human construct, subject to ceaseless re-evaluation.

America's liberalism constrains legal discourse in another critical way. Since individual

humans are the sole moral actors in the universe, overall goals and ideas of right and wrong can only arise in one way: people establish them. Good land use is decided by people; the moral rightness of interactions with nature are judged by people. In the legal mind, this foundational reality is easily pieced together with liberal culture and with the fragmented, commodified landscape. To divide nature into parts—whether private property or political jurisdictions—is to specify more clearly *which* people get to make the decisions about good land use and about the moral rightness of human-nature interactions. Lawyers are highly attuned to this issue: *who* decides a question is often critical to the ultimate decision. In a liberal world filled with rights-bearing individuals, the individual is given as much freedom to decide as possible. When landscapes are fragmented, it's the owner of the fragmented piece, or the political jurisdiction with its legally distinct boundaries, that holds the power to act. It is thus up to the various decision-makers to decide for themselves how they'll define good land use and what moral value, if any, they'll recognize. Moral value is thus not merely a human creation: it's the result of countless decisions made by a countless number of human decision-makers, using whatever evaluation standards they deem appropriate.

When lawyers get involved in issues relating to nature, they do so in this context. It is the human decision-maker who gives rise to value, which is to say a human decision-maker who sets the goal. Trained in the use of law as a tool, lawyers are prone to pay attention to the *means,* rather to the *ends.* Indeed, to the extent lawyers have a speciality, it lies in their creative, flexible use of law as a set of tools. As specialists in the means, they pay less attention to the aims or ends, since that's not their job or their expertise. Nor do they, as noted, trace problems back to their underlying causes in American culture—to our ways of seeing nature, valuing it,

understanding our links to it, and so on. Legal scholars are more prone than practitioners to give critical thought to the ends, but only modestly so. Legal literature on environmental subjects is dominated by discussions about various legal tools and the relative merits of each. Should we use market-based methods or stick to command and control? Should we rely on public disclosure requirements or insist on a “hard-look” rule (such as the requirement to prepare environmental impact statements) that pushes decision-makers to study environmental effects and to explore alternatives? What level of government in our federal system should have the power to address which environmental problems? What powers should citizens have to challenge government action, and what deference are governments owed? What types of evidence should be put on the public record, and when should the factual record be closed? These and countless similar issues draw the attention of legal scholars, day in and day out. And they all, conspicuously, relate to allocations of power, methods of decisionmaking, and choices of legal tools, which is to say they all relate to the means. Rarely do legal scholars pause to consider normatively the kinds of goals that we ought to be pursuing. Are we as a species living well within the natural order? Are we using nature in ways that adequately respect the interests of future generations? Are we engaging in good land use? These and similar questions, relating to the ends of environmental law and policy, are simply not talked about very often. And when they are talked about, the level of discussion, sadly, is not very high. Legal scholars make little use of serious writing on the overall aims of environmental policy, just as they pay little attention to serious conservation writings challenging fundamental elements of American culture. They are embedded in current structures of power and work within those structures.

It is for these reasons that legal scholars, like economists, are prone to grab on to

simplistic ideas about the proper thrust of environmental policy. One popular proposal is that we should divide even more of nature into fragmented pieces, and assign a private owner to each piece. The idea here is that private owners largely take care of what they own. But do they? The question doesn't get discussed much, nor is the factual record really explored. Before even getting to the evidence, though, we can answer this question only if we first talk about what it means to take care of land. What standard or measure should we use in judging whether land is being well tended? Lawyers ignore the question—it's not their job, or not within their area of expertise. Having skipped the question they have no clear idea of the answer. Lacking an answer, they have no way to measure whether landowners really do take care of what they own. And not knowing then whether landowners do take care, it thus is easier for liberty-loving scholars to assert loudly that privatization is the cure-all for environmental ills. Who's to say otherwise? The same line of analysis can be applied to questions about allocating power within the federal system. Can states do an adequate job of environmental protection? It's hard to know, when we have no way to judge the outcome of their work. Even when a statute seems to establish a rather clear environmental goal—protecting endangered species, for instance—the clarity of the goal is often superficial, and we can't really evaluate competing tools effectively unless we dig beneath the surface to get a clearer sense of what we're trying to accomplish and why. Is the protection of endangered species part of some larger suite of environmental goals, and if so what are they? Even if protection is a free-standing goal, why have we set it, and what might our rationales tell us about how we define a "species" and how we decide whether "conservation" has taken place?

The failure of legal scholars to consider ends more clearly pushes them, not just to focus

their attention on the means, but to latch on to fundamental first principles or moral axioms that enable them to construct arguments deductively. Influenced by the vast literature on civil rights, lawyers have long been comfortable starting with premises about individual freedom and moral worth, and proceeding deductively to legal and policy conclusions. The tendency to reason this way received major pushes from the American Revolution and Jacksonian democracy. It got a further push—in ways that helped set America apart from other Western nations—with the Civil War, and the emphasis the war gave to individual liberty, negatively defined, as our highest cultural value. That notion of liberty, of course, was quickly picked up by defenders of free enterprise and used for the next half century as a potent rhetorical tool to ward off legislative attempts to contain industrial capitalism. Rights-based reasoning received another forceful push in the years before and during World War II, when the specter of Hitler's Germany encouraged the United States to define itself as everything that Nazism was not.

This tendency to reason from first principles, with the conclusion obtained at the final step, through rational processes, has had growing effects in legal scholarship. In the environmental arena, many environmental scholars exalt the primacy of private property, even though private property is quite a different type of individual right. Others exalt the liberty of economic enterprises. The more attention that such arguments draw, the less attention there is to devote to what ought to be our fundamental questions: how should we live on land, and what aspects of our social and cultural orders keep us from doing better at the task?

* * * * *

The commodification of labor and land that took place over a number of centuries

reached its peak in England around the middle of the nineteenth century. So extensive were the ill effects that commodification brought on--in terms of poverty, unemployment, urban ugliness, degraded families, disappearing towns, and the like--that counter-reactions were inevitable. In countless settings citizens rose up to place limits on the ways that market forces could treat people and land. Liberals of the day, defending the self-regulating market and free enterprise, claimed that misguided conspiracies were afoot to "collectivize" society. But the reality, it seems, was far different. The push to promote the free market was built upon a well-considered, well-articulated set of ideas. It was built upon liberal political thought, mixed with key precepts of classical economics. The reaction to market capitalism, in contrast, arose more haphazardly, and without real intellectual coherence. Its grounding was chiefly emotional, in the outrage engendered by the ever-present signs of beggars in the streets, children in factories, and landscapes scarred by noise and soot. Reformers pushed to contain the market, but they focused attention on the specific visible ills, rarely bothering to formulate a coherent critique of liberal and economic principles. The ills spoke for themselves and the aim of reform was to mitigate them, not to remedy systemic flaws.

The reaction to industrial capitalism began in the United States about the same time--earlier in connection with certain social ills, largely later with respect to land-use degradation. But the story in America was largely the same, in that reform efforts were often disjointed, sometimes worked at cross purposes, and were only loosely shaped by a coherent critique of the new age of enterprise. Looking back to the Progressive Era, it is common to discern two distinct strands to the conservation efforts--the utilitarian, sustained-yield work of Gifford Pinchot and the preservation efforts of John Muir. But though Pinchot and Muir did clash, the many reactions to

industrial capitalism did not at all break neatly into two categories. The reformers were many, and they divided up, not based on philosophy, but on the specific ills that aroused their ire. Reformers were driven by causes, mostly defensive in that they sought to protect or clean up places that the reformers held dear. Philosophy was secondary. As in England, the ills spoke for themselves.

We need to recall this history because it helps explain one of the chief traits, and perhaps severest deficiency, of the environmental movement today. "Archdruid" David Brower, arousing the Sierra Club troops in the 1950s, famously denied any need to develop a coherent philosophy. What environmentalists needed was a clear cause, he asserted—some obvious harm to challenge, or some natural area to protect. Brower's sentiment would largely govern the environmental movement then on the verge of rapid growth. It would be an activist cause, aimed at halting specific harms and protecting valued places, not chiefly at reshaping society based on new cultural values. Environmental groups proliferated in number, each playing a niche role. Groups largely worked in isolation, competing with one another for dollars and members. Little thought was given to how the activist pieces might fit together. The environmental movement, that is, was not a multi-group effort to achieve a single goal; it was a disjointed effort to achieve a wide variety of goals, nearly all defined narrowly. The specific aims by and large were to change the ways that people (businesses, mostly) interacted with nature. Groups sought to alter the ways people *behaved*, not the ways they *thought*. Cultural reform was secondary.

The environmental movement today continues to display these characteristics: groups are action oriented, they rarely work together, and they have no particular message or vision to offer the American people. As a whole, the movement has no goal, no visible public figures, and no

effective ways to counter the cultural criticisms leveled against it. Not surprisingly, it has become rather easy prey for opponents out to discredit it. The criticisms by now are familiar: environmentalists care only about nature, not about people; they favor owls over jobs; they're elitist and anti-democratic; they favor restrictions on liberty and undercut private property; they push measures that severely undercut the American economy. These and similar criticisms are wide of the mark, by and large, and could easily be countered. But they are not, because the movement as a whole has no institutional way to counter them. What are environmentalists out to accomplish overall? The question receives no answer, and few if any groups seem even to ask the question of themselves. Academics in some disciplines give the matter thought; some write about sustainability and sustainable development, others about ecological integrity and ecosystem health, still others about ecosystem services. Environmental law scholars, though, are rarely among them, not in any serious way. As lawyers they're prone to give little thought to overall ends. And as environmentalists—many of them, though hardly all—they're prone to attack the obvious ills close at hand, without standing back to critique American culture or to imagine far different ways of inhabiting the land. It should not surprise us, then, that the literature of environmental law pays little attention to larger questions about ends, just as it pays little attention to the deep-rooted cultural origins of environmental problems. Lawyers and activists alike work within the system, developing tactics to win small victories. In the flurry of work, few take time to survey the larger scenes.

* * * * *

These observations return us to the point of beginning, and to questions about the

likelihood that lawyers and legal scholars might find value in the humanities–in the work of literary writers about people and place, or the work of humanities scholars who comment critically upon and augment that primary literature.

The basic problem is this. Lawyers and legal scholars are looking for help in doing their specific work, day to day. The problems are obvious, the resistance is strong, and more powerful tools are needed to get the jobs done. Literary writers, though, aren't in the business of crafting tools or helping at specific tasks. Humanities scholars aren't inclined to dwell upon matters of implementation; of how we might reorient American culture to instill greater humility in our interactions with land.

We might sum up the situation by turning to the work of Mark Twain. Imagine one of his riverboat captains, attentively watching the river and trying to steer his boat clear of the countless snags. Lawyers and legal scholars aren't usually riverboat captains themselves. They're advisors, standing beside the captain, giving advice on how best to avoid dangers and get to the captain's desired end. The question at hand: if our riverboat crew also included a poet, what help might the poet provide? What could the poet say to the lawyer, to help the lawyer in his advisory work?

The answer, alas, is: probably not much. The interests and observations of the poet are simply too detached from the needs of the captain and thus of the captain's advisor. It's not only that the poet will want to talk about the river's beauty or the music it pours forth. It is that the poet's observations might well question why the crew is on a riverboat to begin with, why it is operating under steam power, and why it is heading to one place rather than another. These are big questions, too big.

The comments of literary writers and humanities scholars, taken seriously (as they should

be taken seriously), simply pose too much of a challenge to American culture. And the challenges they pose come all at once, as a whole. They raise questions about our over-reliance on reason and our tendency to stick to empiricism as the only way of knowing. They challenge the fragmentation of nature and the assignment of value to it based solely on the satisfaction of human needs. As they survey the scene, they do not distinguish clearly between human life and other life forms, as our dominant culture does. To the typical humanist, landscapes are filled with mystery and intangible components. Linking the many parts are not just ecological processes but narratives lines, open rather than fixed, dependent upon contingencies and morally complex in their unfolding. Resolutions are not in sight, at least not enduring ones. Stories never end, nor does the telling of them.

To the extent the field of environmental letters has something to say to legal scholars and lawyers, it might be this: stand back from what you're doing and take in the whole of things, even as you pay greater attention to the lesser, easily overlooked parts. Observe the many ways that nature and culture are interwoven, and how humans are integrated into landscapes. Imagine new forms of mindfulness, new ways of knowing, new scales of value, new ways of relating to one another and to other life forms.

Good advice, all of it, to be sure. But this is just now what lawyers or even legal scholars want to hear. And they don't want to hear it because it simply isn't useful to them. It doesn't fit into the cultural world in which they live and work. The humanities collectively invite us to imagine an entirely new world, but that's not the business that lawyers and legal scholars are in. If our leading environmental writers are right, true conservation cannot take place without fundamental changes in American culture. Lawyers, though, are problem solvers, first and foremost. Larger

questions, about ultimate aims and underlying causes, they leave to others. And thus they pay little attention to the poets. The humanist agenda is simply too vast to put to use. It doesn't start from where we are today and identify the next few steps. It imagines new places where we might go, while paying little attention to how we might get there.

If the humanities writers want to contribute effectively to the environmental effort, broadly defined, they'll need to make their work more relevant. The place to do that, perhaps, is by speaking, not to legal scholars and lawyers directly, but instead to the environmental movement as a social cause.

Much of what humanists want to talk about bears on the question of overall goals: what should the environmental movement be seeking to accomplish, in terms of our ways of living in nature and the various cultural ways that we see nature and value it. In the shaping of environmental goals and in the crafting of an overall environmental critique of modern culture humanists can play significant roles. But their attempts to have influence are much weakened by the liberal, fragmented characteristics of the environmental movement itself. Environmental activists show no more interest in humanistic writings than do legal scholars. Individual environmentalists have posed sharp challenges to American culture and offered refined ideas about how we might inhabit the land. But the movement as a whole hardly pays attention. Its cultural criticism is weak. Its visions of a better way are dim. And the prospects of changing the movement are not great, given the competition among groups and their abiding concern for institutional stability.

Still, if change seems remote, the possibility of it does exist. If lawyers and legal scholars attend mostly to tools, they are at least accustomed to being told what goals to promote, whether

by clients, by Congress, or by the courts. The law itself can also change significantly, as it has over time. The liberal culture of today, so respectful of the autonomous individual human, so disdainful of nature and of organic wholes, could evolve over time to something much different, and the law could evolve along with it.

For a glimpse of such change, we can end with a few lines from a contemporary writer on nature and culture who has given a good deal of thought to law and legal culture—Wendell Berry of Kentucky. Berry's father was a lawyer, as is his brother and a nephew. Lawyers appear regularly in his fiction. One of Berry's explorations of law and law practice appears in his extended story, "Fidelity," which recounts the final illness of Burley Coulter, one of Berry's most beloved, eccentric fictional characters. Burley is taken to a hospital and stuck with tubes, yet his prognosis is bleak. His son and others want Burley to die at home, where he was born and lived, so they kidnap him in the middle of the night. A police detective is soon on their trail, trying to find the kidnapper and bring him to justice. Standing in the way, though, is elderly lawyer Wheeler Catlett, loosely modeled after Berry's own father and one of the keepers of the agrarian flame. Wheeler challenges the police detective, in the detective's claim that it is wrong to remove a patient from a hospital without the hospital's permission. How can that be, Wheeler asks? If a patient needs permission to get out of the hospital, then he's effectively in jail.

From here, the scene comes to its climax, offering a glimpse of a different moral order that law and lawyers might promote, the kind of organic, place-based moral order that Wendell Berry has proclaimed in his writing for decades.

> "Well, anyway," Detective Bode said, "all I know is that the law has been broken, and I am here to serve the law.
>
> "But, my dear boy, you don't eat or drink the law, or sit in the shade of it or warm yourself by it, or wear it, or have your being in it. The law exists only to serve."

“Serve what?”
“Why, all the many things that are above it. Love.”

Draft of September 28, 2005

Ends and Means in Environmental Law, or The Unlikely Marriage of Law and Letters

Eric T. Freyfogle

To sponsor a conference on environmental law and letters is to raise the possibility that two quite different scholarly perspectives on nature and culture might have more reason to talk with one another than they presume. Can environmental lawyers and legal scholars learn from the humanities? Do humanistic scholars, particularly those who dwell on people and land, have significant things to learn from the law? The communications here could well be two-way. But the more pressing issue, perhaps, has to do with the influence of humanities on law, and through lawyers and legal scholars on institutional frameworks of environmental policy. Would our environmental laws and policies improve if the people making them took account of humanistic insights?

My answer, in brief, is this: Humanistic perspectives could aid the law, but it's unlikely at present that they will do so, and influence won't occur, not significantly, unless humanists put their observations in more useable form. That means, mostly, directing their comments to the environmental movement as a whole, and only through that movement to the legal community itself.

"The law is a jealous mistress," so said Justice Story in 1821 in an unsuccessful attempt to keep bar admission standards from sinking down. More pertinent is to observe that lawyers *qua* lawyers are decidedly polygamous by disposition in their willingness to take up with diverse

intellectual partners. Lawyers certainly, and legal scholars largely, are not looking to marry. They look for business associates, intellectual colleagues who can help them at their work. To understand this professional trait in its various manifestations is to see why humanistic approaches now hold little appeal.

* * * * *

The place to begin is with the practice of law, American style, and with the skills and mental frames that lawyers begin learning in law school. Practicing lawyers make money off clients, who come for help with problems. A client usually has a goal and the lawyer helps achieve that goal, with little or no modification. Often the lawyer's work requires advocacy on the client's behalf, in courtrooms, negotiations or other legal settings. Advocacy is an art, the first rule of which is to know your judge or jury. Arguments are addressed to particular people and are designed to persuade those people. Arguments are good when they succeed in that task. For lawyers there's no need to await the verdict of history or the slow-developing critiques of book reviewers or colleagues. Win or lose, the feedback on work product is immediate. Truth in any abstract sense is relevant only insofar as truth has a greater power to persuade. Working lawyers and, to a lesser but distinct degree, legal scholars tend to see the world in terms of problems that need solving. Problems typically are discrete, and are best approached one by one.

As for the law itself, it is understood typically as a collection of tools, each intended to address a problem or to help people accomplish particular tasks. Laws are designed to achieve results, and are judged by their results. To the extent law approaches larger goals, change typically unfolds incrementally, step by legal step. Lawyers rarely consider the ways problems

are interlinked so as to make it necessary when solving one problem also to solve others; to use Wes Jackson's apt phrase, they don't attempt to solve for pattern. Even in the case of discrete problems, the law's tendency is to look for shallow roots. The law's guiding precept is proximate cause, which is to say that lawyers begin with a clear harm and then work up the chain of causation only to find the nearest person or big event that played a causal role. They don't keep working their way, link by causal link, to find ever-earlier causes. Thus, for lawyers water pollution is a distinct problem, not a symptom of some underlying economic or cultural malaise, and the party emitting the pollution is solely responsible for it. Lawyer look for someone to blame, and are disinclined to trace problems to economic or political systems, much less to cultural values and presumptions. Individual defendants can have deep pockets and serve time in prison; cultural values do not and cannot.

To put the point more simply, lawyers work within the system as they find it, pressing a bit here and there but rarely talking about fundamental change. The values and assumptions of the surrounding culture are the ones they employ. Thus, American lawyers place a high price on individual liberty, because society does. The typical lawyer respects the free market, honors private property, and promotes the efficient allocation of natural resources. Landscapes where lawyers live and work are divided into political jurisdictions and property boundaries, which is to say they are fragmented and subject to competing, conflicting managerial regimes. Nature's many parts are chiefly valued in the market. In the unusual case of claims of *nonmarket* value, the existence of such value is a factual claim demanding proof, just like other factual claims; what lawyers want to know is not whether nonmarket value *really* exists or whether reasonable people *should* recognize it, but merely whether a particular litigant in a case does or does not embrace

the value.

*   *   *   *   *

To get at the humanistic perspective on people and nature, we can begin where so many others have begun, with Nathaniel Hawthorne at Sleepy Hollow, famously gazing over the peaceful valley that is disrupted by a noisy railroad. Hawthorne was a humanist and was absorbed by the rural vista largely because it proved so suggestive. He was inclined merely and importantly to stand back from the scene and take it in as a whole, in all its contradictions and ambiguities. For Hawthorne as for humanists since, the scene was part of an unfolding narrative, stretching backward and forward in time and including the seen and the unseen. Hawthorne was observer as well as participant, both in the particular scene and in the larger contexts for which the scene stood as symbol or metaphor. Nature and culture were mixed, each influencing the other in an on-going dialectic. For Hawthorne, Sleepy Hollow was not a problem to be solved: it was a situation to be understood.

The gap here between the legal and humanistic perspectives can be wide indeed. The typical lawyer looking at Sleepy Hollow would not consider the railroad as cultural symbol or as metaphor of contradiction. If she feared that steam-engine technology could rise too high, demoting humans from masters into servant, her fear would be fleeting. Lawyers are accustomed to power and human dominance; their perspective is rarely long. Working within the Enlightenment tradition, lawyers embrace rational discourse and are comfortable with knowledge drawn empirically. They work with facts as given. When facts are in dispute or incomplete—as they nearly always are—the remedy is simple: present the evidence to a fact finder,

assign the burden of proof, and obtain the resolution. “Findings of fact” are thereafter accepted as true, with a confidence that could make a devoted scientist blush. Nature is a tangible object, existing in space and time and apart from humans. Value is assigned by people, individually or collectively, and human verdicts are final. Like scientists, lawyers ignore the intangible. Like philosophers, they are prone to use both utilitarian and rights-based moral reasoning while discounting other approaches. They are suspicious or disdainful of moral frameworks based on sentiment, on ideals of virtue, and on religious sensibilities, which are deemed too mushy and resistant to logical argument. Adding to the lawyer’s confidence in evaluating scenes is the conceit that law is a science—the fabulous idea that legal conclusions from case to case grow logically and coherently from within the law’s dark recesses. It’s an ill-supported myth, not something to withstand an argumentative wind, yet it blossoms and draws praise all the less, adding to the lawyer’s belief that his home turf is the most secure and sensible of intellectual grounds.

Far distant from this legal stance—farther, really, than is commonly understood—is the humanistic view of the landscape—of the machine in the garden; of humans at work manipulating nature as they see fit. If we can judge from much writing on nature and culture, humanists are far less committed to the tenets of the Enlightenment. For the humanist, the landscape appears in all its organic wholeness, not as a collection of resources and jurisdictional pieces. It is approached and understood by ways of knowing that reach beyond the empirical. It is valued by moral means that supplement or even displace the logical. The humanist likely has little faith in progress, and indeed may possess only a faint idea about what qualifies as progress. Unguided by evidentiary rules or burdens of proof, the humanists sees humans embedded in the landscape, complexly

woven in webs of interdependence. Truth is illusive and judgments are necessarily tentative. The story has no beginning and no end.

Taken seriously, much humanistic writing calls into question the course of Western culture. It proposes that we rethink our ways of knowing, that we question or discard our many dualities, and that we start afresh in imagining the ways we might live. They are heady lessons, but can the lawyer or legal scholar make use of them?

* * * * *

We can approach our subject from another angle.

Among the dominant developments in Western history over the past few centuries have been the coming of industrialization, market capitalism, and economic liberalism. How and why these tandem forces gained such strength is unclear, as are the complex ways that the forces intertwined. Parts of the story, though, are known, as they relate to nature and human uses of it.

In the feudal world at its height, land formed the base of society in pretty much all its aspects, political, social, economic, and even religious. Human activities of all types were complexly related to land. The ownership and use of land was extensively dictated by custom and law. Land was a source of economic income, to be sure, but even more it was a source of social, political, and military power. It was the instrument used to control people, binding them to one another and to a given place in a largely hierarchical arrangement. Within this arrangement power relations flowed in multiple directions. Thus, claims to land were typically multiple, as were the interests that land served. In his prominent study of a half century ago, Karl Polanyi summarized the situation as follows:

> Land, the pivotal element in the feudal order, was the basis of the military, judicial, administrative, and political system; its status and function were determined by legal and customary rules. Whether its possession was transferable or not, and if so, to whom, and under what restrictions; what the rights of property entailed; to what uses some types of land might be put—all these questions were removed from the organization of buying and selling, and subjected to an entirely different set of institutional regulations.

From this hierarchical, organic, interdependent world Western society moved step by unsteady step toward the present. We can measure those steps in many ways, but perhaps none is more revealing than to identify how the ties between people and land were gradually reduced in number. On the human side, people were gradually pulled away from land. From placed beings, embedded in a known social and economic world, they became largely rootless entities, chiefly valued for their labor and talked about increasingly as market commodities. In the feudal world peasants formed aggregates; in the coming world of market capitalism they were valued one by one. This process of commodifying labor was a long one, and it met strong resistance. Yet prevail it largely did (slavery aside), until the advent in the twentieth century of labor standards, worker protections, and minimum wage laws.

Matching this commodification of labor was the gradual commodification of nature. For that to come about, ownership rights needed radical simplification and the managerial powers of the remaining, individual owners needed widening. This commodification process began quite early, when feudal lords pressed against kings to gain greater powers to dispose of lands as they saw fit, while living and upon death. The biggest hurdles came when lords set out to strip their lands of the many customary rights and tenancies that peasants and commoners had in them.

That process would take centuries. In England, the waves of enclosure during the Tudor and Early Stuart eras continued apace, despite royal resistance. Landowners shed their tenants, combined their land holdings, and brought on the sheep. Then and for centuries thereafter, aided in the eighteenth and nineteenth centuries by Parliamentary Acts, common lands were also turned into private holdings, with customary users either cast aside penniless or bought off with overvalued allotments. If the details were many the outcome was nonetheless simple. Lands increasingly had one owner for each, and that owner had growing powers to use or transfer the land as she saw fit. Land use had become a business; land values were largely market-based.

With this commodification of land came a suite of new ideas about it and about the ways humans related to it. The ways that people actually used particular lands often declined in number and type, as modes of foraging and subsistence living gave way to the single-minded production of staple commodities for the market. Land boundaries became more definite and clearly marked, often with high shrubs and fences. Well into the nineteenth century, rural dwellers in America asserted the right to graze livestock on unenclosed rural lands, regardless of ownership; as many courts explained, the forest was a commons. But the tide, plainly, was turning. New ideas of ownership expanded a landowner's right to exclude outsiders, regardless of labor theories of natural rights that cast doubt on the ownership of unenclosed land. Foraging practices declined while roads were laid out and travelers expected to keep to them. Most surprising of all, the United States gradually embraced a land-use rule that it had once ridiculed England for upholding—the idea that a landowner could exclude local people from hunting on his lands. In America as in England, a person now had to own land in order to hunt.

So deeply embedded today is the idea of land-as-commodity that most Americans can

hardly conceive of a sensible alternative. Landscapes come divided into pieces, with a distinct owner for each. Particular natural “resources” are broken off for separate ownership—water flows, mines, grazing rights, and the like. In all cases, it’s the market that sets the value. Americans argue ceaselessly about the proper *intensity* of landowner use-rights; they argue, that is, about whether intensive development will be allowed in a given place, or whether the law instead should protect more sensitive land users who are disrupted by their noisy industrial neighbors. But this argument over intensity leaves unchallenged the basic achievement of the centuries: nature is a collection of commodities; landscapes are fragmented; and the market largely dictates what gets done.

This tale of commodification gives us a second place where we might stand, to consider the wide gap between legal and humanistic perspectives. Lawyers and legal scholars have been at the forefront of the moves toward commodification. They largely accept it without question. They might chafe at some implications but rarely dream of alternatives. For many humanists, things could hardly be more different, though the pull of private ownership in personal life is not absent. The humanist writer on nature and culture is disinclined to worry about human-drawn lines on the map; about the legal allocation of rights to use nature. Lawyers, to be sure, are not entirely blind to problems that cross land boundaries—pollution, for instance. Indeed, to a large extent legally recognized harms arise only when there is a crossing of commodity boundary lines. For the humanist, though, the lines simply don’t exist. Nature is an integrated whole and people are part of it. If the ownership of a land parcel gives a person a special attachment to it—as surely it does, and in good ways—the emotional attachment to place is still between the owner and the land, not between the owner and private property as an abstract bundle of legal rights. A

William Blackstone, steeped in the law, might wax poetically about his private property as that "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe," but no humanist would think about land in any such terms. Land is a real place, with particular soils and trees and wildlife, not an intangible legal construct.

In their instinctive acceptance of the commodification of nature, lawyers largely stand side by side with the average American, save for rural dwellers who live close to the land. It's the humanist who stands apart, who sees the land as an organic whole, who sees it stripped of the invisible, human-drawn boundaries that have such great effects when it comes to making sensible, collective decisions about how we ought to live.

*   *   *   *   *

Americans so readily accept the commodification of nature in part because the idea fits so sensibly within our nation's liberal culture. The dominance of liberalism—defined in its classic sense that exalted individual initiative—was articulated as an historical interpretation by historians in the 1950s, the so-called consensus school led by Louis Hartz and Richard Hofstadter. Although America's liberal culture has always had dissenters and it has permeated public life more than private realms, the dominance of liberalism nonetheless can hardly be denied. Indeed, political developments since the Reagan years have provided widespread evidence of America's deeply rooted liberal orientation. Debates take place, but the spectrum of competing views typically ranges from welfare liberalism on the political left to economic liberalism on the right. Only on the political fringe do we find proponents of distinctly non-liberal views, including

organic social visions that unite people into integrated wholes and promote the interests of the whole over the desires of individual human parts. In America, people count as individuals. We favor equality of opportunity among individuals; we promote the full democratic participation of all adult citizens. In the nineteenth century, courts would sometimes talk about the "rights of communities," which counterbalanced the rights held by individuals. Today, we can hardly conceive that a community as such might have rights.

As it exalts the individual human, liberalism necessarily detaches that human from all that surrounds her, not just other people but nature. Nature is the object; the human is the morally worthy subject; and moral worth attaches to the human as an isolated being, not as a part of something larger. Philosophers can wonder whether nature itself might have intrinsic value on its own, or whether some human might be needed to recognize or even create that value. For liberal Americans, lawyers included, this question seems frivolous. By liberal definition moral value attaches only to people, and thus nature can gain value only secondarily, through the forceful will of some human. Like economists, lawyers see value in nature only to extent that humans have given rise to that value. The issue for economists is whether humans are willing to spend money on nature; that is, whether a part of nature is a commodity that fetches money in the mart. Lawyers are a bit more catholic in recognizing value: a person can value something even outside the market. Still, value is human created, and exists only so long as some individual human recognizes it. Legal scholars might ponder whether trees have legal standing, but the underlying idea has no place to enter the law and has not done so. Value is a human construct, subject to ceaseless re-evaluation.

America's liberalism constrains legal discourse in another critical way. Since individual

humans are the sole moral actors in the universe, overall goals and ideas of right and wrong can only arise in one way: people establish them. Good land use is decided by people; the moral rightness of interactions with nature are judged by people. In the legal mind, this foundational reality is easily pieced together with liberal culture and with the fragmented, commodified landscape. To divide nature into parts—whether private property or political jurisdictions—is to specify more clearly *which* people get to make the decisions about good land use and about the moral rightness of human-nature interactions. Lawyers are highly attuned to this issue: *who* decides a question is often critical to the ultimate decision. In a liberal world filled with rights-bearing individuals, the individual is given as much freedom to decide as possible. When landscapes are fragmented, it's the owner of the fragmented piece, or the political jurisdiction with its legally distinct boundaries, that holds the power to act. It is thus up to the various decision-makers to decide for themselves how they'll define good land use and what moral value, if any, they'll recognize. Moral value is thus not merely a human creation: it's the result of countless decisions made by a countless number of human decision-makers, using whatever evaluation standards they deem appropriate.

When lawyers get involved in issues relating to nature, they do so in this context. It is the human decision-maker who gives rise to value, which is to say a human decision-maker who sets the goal. Trained in the use of law as a tool, lawyers are prone to pay attention to the *means,* rather to the *ends.* Indeed, to the extent lawyers have a speciality, it lies in their creative, flexible use of law as a set of tools. As specialists in the means, they pay less attention to the aims or ends, since that's not their job or their expertise. Nor do they, as noted, trace problems back to their underlying causes in American culture—to our ways of seeing nature, valuing it,

understanding our links to it, and so on. Legal scholars are more prone than practitioners to give critical thought to the ends, but only modestly so. Legal literature on environmental subjects is dominated by discussions about various legal tools and the relative merits of each. Should we use market-based methods or stick to command and control? Should we rely on public disclosure requirements or insist on a "hard-look" rule (such as the requirement to prepare environmental impact statements) that pushes decision-makers to study environmental effects and to explore alternatives? What level of government in our federal system should have the power to address which environmental problems? What powers should citizens have to challenge government action, and what deference are governments owed? What types of evidence should be put on the public record, and when should the factual record be closed? These and countless similar issues draw the attention of legal scholars, day in and day out. And they all, conspicuously, relate to allocations of power, methods of decisionmaking, and choices of legal tools, which is to say they all relate to the means. Rarely do legal scholars pause to consider normatively the kinds of goals that we ought to be pursuing. Are we as a species living well within the natural order? Are we using nature in ways that adequately respect the interests of future generations? Are we engaging in good land use? These and similar questions, relating to the ends of environmental law and policy, are simply not talked about very often. And when they are talked about, the level of discussion, sadly, is not very high. Legal scholars make little use of serious writing on the overall aims of environmental policy, just as they pay little attention to serious conservation writings challenging fundamental elements of American culture. They are embedded in current structures of power and work within those structures.

It is for these reasons that legal scholars, like economists, are prone to grab on to

simplistic ideas about the proper thrust of environmental policy. One popular proposal is that we should divide even more of nature into fragmented pieces, and assign a private owner to each piece. The idea here is that private owners largely take care of what they own. But do they? The question doesn't get discussed much, nor is the factual record really explored. Before even getting to the evidence, though, we can answer this question only if we first talk about what it means to take care of land. What standard or measure should we use in judging whether land is being well tended? Lawyers ignore the question—it's not their job, or not within their area of expertise. Having skipped the question they have no clear idea of the answer. Lacking an answer, they have no way to measure whether landowners really do take care of what they own. And not knowing then whether landowners do take care, it thus is easier for liberty-loving scholars to assert loudly that privatization is the cure-all for environmental ills. Who's to say otherwise? The same line of analysis can be applied to questions about allocating power within the federal system. Can states do an adequate job of environmental protection? It's hard to know, when we have no way to judge the outcome of their work. Even when a statute seems to establish a rather clear environmental goal—protecting endangered species, for instance—the clarity of the goal is often superficial, and we can't really evaluate competing tools effectively unless we dig beneath the surface to get a clearer sense of what we're trying to accomplish and why. Is the protection of endangered species part of some larger suite of environmental goals, and if so what are they? Even if protection is a free-standing goal, why have we set it, and what might our rationales tell us about how we define a "species" and how we decide whether "conservation" has taken place?

The failure of legal scholars to consider ends more clearly pushes them, not just to focus

their attention on the means, but to latch on to fundamental first principles or moral axioms that enable them to construct arguments deductively. Influenced by the vast literature on civil rights, lawyers have long been comfortable starting with premises about individual freedom and moral worth, and proceeding deductively to legal and policy conclusions. The tendency to reason this way received major pushes from the American Revolution and Jacksonian democracy. It got a further push—in ways that helped set America apart from other Western nations—with the Civil War, and the emphasis the war gave to individual liberty, negatively defined, as our highest cultural value. That notion of liberty, of course, was quickly picked up by defenders of free enterprise and used for the next half century as a potent rhetorical tool to ward off legislative attempts to contain industrial capitalism. Rights-based reasoning received another forceful push in the years before and during World War II, when the specter of Hitler's Germany encouraged the United States to define itself as everything that Nazism was not.

This tendency to reason from first principles, with the conclusion obtained at the final step, through rational processes, has had growing effects in legal scholarship. In the environmental arena, many environmental scholars exalt the primacy of private property, even though private property is quite a different type of individual right. Others exalt the liberty of economic enterprises. The more attention that such arguments draw, the less attention there is to devote to what ought to be our fundamental questions: how should we live on land, and what aspects of our social and cultural orders keep us from doing better at the task?

* * * * *

The commodification of labor and land that took place over a number of centuries

reached its peak in England around the middle of the nineteenth century. So extensive were the ill effects that commodification brought on--in terms of poverty, unemployment, urban ugliness, degraded families, disappearing towns, and the like--that counter-reactions were inevitable. In countless settings citizens rose up to place limits on the ways that market forces could treat people and land. Liberals of the day, defending the self-regulating market and free enterprise, claimed that misguided conspiracies were afoot to "collectivize" society. But the reality, it seems, was far different. The push to promote the free market was built upon a well-considered, well-articulated set of ideas. It was built upon liberal political thought, mixed with key precepts of classical economics. The reaction to market capitalism, in contrast, arose more haphazardly, and without real intellectual coherence. Its grounding was chiefly emotional, in the outrage engendered by the ever-present signs of beggars in the streets, children in factories, and landscapes scarred by noise and soot. Reformers pushed to contain the market, but they focused attention on the specific visible ills, rarely bothering to formulate a coherent critique of liberal and economic principles. The ills spoke for themselves and the aim of reform was to mitigate them, not to remedy systemic flaws.

The reaction to industrial capitalism began in the United States about the same time--earlier in connection with certain social ills, largely later with respect to land-use degradation. But the story in America was largely the same, in that reform efforts were often disjointed, sometimes worked at cross purposes, and were only loosely shaped by a coherent critique of the new age of enterprise. Looking back to the Progressive Era, it is common to discern two distinct strands to the conservation efforts--the utilitarian, sustained-yield work of Gifford Pinchot and the preservation efforts of John Muir. But though Pinchot and Muir did clash, the many reactions to

industrial capitalism did not at all break neatly into two categories. The reformers were many, and they divided up, not based on philosophy, but on the specific ills that aroused their ire. Reformers were driven by causes, mostly defensive in that they sought to protect or clean up places that the reformers held dear. Philosophy was secondary. As in England, the ills spoke for themselves.

We need to recall this history because it helps explain one of the chief traits, and perhaps severest deficiency, of the environmental movement today. “Archdruid” David Brower, arousing the Sierra Club troops in the 1950s, famously denied any need to develop a coherent philosophy. What environmentalists needed was a clear cause, he asserted—some obvious harm to challenge, or some natural area to protect. Brower’s sentiment would largely govern the environmental movement then on the verge of rapid growth. It would be an activist cause, aimed at halting specific harms and protecting valued places, not chiefly at reshaping society based on new cultural values. Environmental groups proliferated in number, each playing a niche role. Groups largely worked in isolation, competing with one another for dollars and members. Little thought was given to how the activist pieces might fit together. The environmental movement, that is, was not a multi-group effort to achieve a single goal; it was a disjointed effort to achieve a wide variety of goals, nearly all defined narrowly. The specific aims by and large were to change the ways that people (businesses, mostly) interacted with nature. Groups sought to alter the ways people *behaved*, not the ways they *thought*. Cultural reform was secondary.

The environmental movement today continues to display these characteristics: groups are action oriented, they rarely work together, and they have no particular message or vision to offer the American people. As a whole, the movement has no goal, no visible public figures, and no

effective ways to counter the cultural criticisms leveled against it. Not surprisingly, it has become rather easy prey for opponents out to discredit it. The criticisms by now are familiar: environmentalists care only about nature, not about people; they favor owls over jobs; they're elitist and anti-democratic; they favor restrictions on liberty and undercut private property; they push measures that severely undercut the American economy. These and similar criticisms are wide of the mark, by and large, and could easily be countered. But they are not, because the movement as a whole has no institutional way to counter them. What are environmentalists out to accomplish overall? The question receives no answer, and few if any groups seem even to ask the question of themselves. Academics in some disciplines give the matter thought; some write about sustainability and sustainable development, others about ecological integrity and ecosystem health, still others about ecosystem services. Environmental law scholars, though, are rarely among them, not in any serious way. As lawyers they're prone to give little thought to overall ends. And as environmentalists—many of them, though hardly all—they're prone to attack the obvious ills close at hand, without standing back to critique American culture or to imagine far different ways of inhabiting the land. It should not surprise us, then, that the literature of environmental law pays little attention to larger questions about ends, just as it pays little attention to the deep-rooted cultural origins of environmental problems. Lawyers and activists alike work within the system, developing tactics to win small victories. In the flurry of work, few take time to survey the larger scenes.

* * * * *

These observations return us to the point of beginning, and to questions about the

likelihood that lawyers and legal scholars might find value in the humanities—in the work of literary writers about people and place, or the work of humanities scholars who comment critically upon and augment that primary literature.

The basic problem is this. Lawyers and legal scholars are looking for help in doing their specific work, day to day. The problems are obvious, the resistance is strong, and more powerful tools are needed to get the jobs done. Literary writers, though, aren't in the business of crafting tools or helping at specific tasks. Humanities scholars aren't inclined to dwell upon matters of implementation; of how we might reorient American culture to instill greater humility in our interactions with land.

We might sum up the situation by turning to the work of Mark Twain. Imagine one of his riverboat captains, attentively watching the river and trying to steer his boat clear of the countless snags. Lawyers and legal scholars aren't usually riverboat captains themselves. They're advisors, standing beside the captain, giving advice on how best to avoid dangers and get to the captain's desired end. The question at hand: if our riverboat crew also included a poet, what help might the poet provide? What could the poet say to the lawyer, to help the lawyer in his advisory work?

The answer, alas, is: probably not much. The interests and observations of the poet are simply too detached from the needs of the captain and thus of the captain's advisor. It's not only that the poet will want to talk about the river's beauty or the music it pours forth. It is that the poet's observations might well question why the crew is on a riverboat to begin with, why it is operating under steam power, and why it is heading to one place rather than another. These are big questions, too big.

The comments of literary writers and humanities scholars, taken seriously (as they should

be taken seriously), simply pose too much of a challenge to American culture. And the challenges they pose come all at once, as a whole. They raise questions about our over-reliance on reason and our tendency to stick to empiricism as the only way of knowing. They challenge the fragmentation of nature and the assignment of value to it based solely on the satisfaction of human needs. As they survey the scene, they do not distinguish clearly between human life and other life forms, as our dominant culture does. To the typical humanist, landscapes are filled with mystery and intangible components. Linking the many parts are not just ecological processes but narratives lines, open rather than fixed, dependent upon contingencies and morally complex in their unfolding. Resolutions are not in sight, at least not enduring ones. Stories never end, nor does the telling of them.

To the extent the field of environmental letters has something to say to legal scholars and lawyers, it might be this: stand back from what you're doing and take in the whole of things, even as you pay greater attention to the lesser, easily overlooked parts. Observe the many ways that nature and culture are interwoven, and how humans are integrated into landscapes. Imagine new forms of mindfulness, new ways of knowing, new scales of value, new ways of relating to one another and to other life forms.

Good advice, all of it, to be sure. But this is just now what lawyers or even legal scholars want to hear. And they don't want to hear it because it simply isn't useful to them. It doesn't fit into the cultural world in which they live and work. The humanities collectively invite us to imagine an entirely new world, but that's not the business that lawyers and legal scholars are in. If our leading environmental writers are right, true conservation cannot take place without fundamental changes in American culture. Lawyers, though, are problem solvers, first and foremost. Larger

questions, about ultimate aims and underlying causes, they leave to others. And thus they pay little attention to the poets. The humanist agenda is simply too vast to put to use. It doesn't start from where we are today and identify the next few steps. It imagines new places where we might go, while paying little attention to how we might get there.

If the humanities writers want to contribute effectively to the environmental effort, broadly defined, they'll need to make their work more relevant. The place to do that, perhaps, is by speaking, not to legal scholars and lawyers directly, but instead to the environmental movement as a social cause.

Much of what humanists want to talk about bears on the question of overall goals: what should the environmental movement be seeking to accomplish, in terms of our ways of living in nature and the various cultural ways that we see nature and value it. In the shaping of environmental goals and in the crafting of an overall environmental critique of modern culture humanists can play significant roles. But their attempts to have influence are much weakened by the liberal, fragmented characteristics of the environmental movement itself. Environmental activists show no more interest in humanistic writings than do legal scholars. Individual environmentalists have posed sharp challenges to American culture and offered refined ideas about how we might inhabit the land. But the movement as a whole hardly pays attention. Its cultural criticism is weak. Its visions of a better way are dim. And the prospects of changing the movement are not great, given the competition among groups and their abiding concern for institutional stability.

Still, if change seems remote, the possibility of it does exist. If lawyers and legal scholars attend mostly to tools, they are at least accustomed to being told what goals to promote, whether

by clients, by Congress, or by the courts. The law itself can also change significantly, as it has over time. The liberal culture of today, so respectful of the autonomous individual human, so disdainful of nature and of organic wholes, could evolve over time to something much different, and the law could evolve along with it.

For a glimpse of such change, we can end with a few lines from a contemporary writer on nature and culture who has given a good deal of thought to law and legal culture—Wendell Berry of Kentucky. Berry's father was a lawyer, as is his brother and a nephew. Lawyers appear regularly in his fiction. One of Berry's explorations of law and law practice appears in his extended story, "Fidelity," which recounts the final illness of Burley Coulter, one of Berry's most beloved, eccentric fictional characters. Burley is taken to a hospital and stuck with tubes, yet his prognosis is bleak. His son and others want Burley to die at home, where he was born and lived, so they kidnap him in the middle of the night. A police detective is soon on their trail, trying to find the kidnapper and bring him to justice. Standing in the way, though, is elderly lawyer Wheeler Catlett, loosely modeled after Berry's own father and one of the keepers of the agrarian flame. Wheeler challenges the police detective, in the detective's claim that it is wrong to remove a patient from a hospital without the hospital's permission. How can that be, Wheeler asks? If a patient needs permission to get out of the hospital, then he's effectively in jail.

From here, the scene comes to its climax, offering a glimpse of a different moral order that law and lawyers might promote, the kind of organic, place-based moral order that Wendell Berry has proclaimed in his writing for decades.

> "Well, anyway," Detective Bode said, "all I know is that the law has been broken, and I am here to serve the law.
>
> "But, my dear boy, you don't eat or drink the law, or sit in the shade of it or warm yourself by it, or wear it, or have your being in it. The law exists only to serve."

“Serve what?”
“Why, all the many things that are above it. Love.”

Draft of September 28, 2005

Ends and Means in Environmental Law, or The Unlikely Marriage of Law and Letters

Eric T. Freyfogle

To sponsor a conference on environmental law and letters is to raise the possibility that two quite different scholarly perspectives on nature and culture might have more reason to talk with one another than they presume. Can environmental lawyers and legal scholars learn from the humanities? Do humanistic scholars, particularly those who dwell on people and land, have significant things to learn from the law? The communications here could well be two-way. But the more pressing issue, perhaps, has to do with the influence of humanities on law, and through lawyers and legal scholars on institutional frameworks of environmental policy. Would our environmental laws and policies improve if the people making them took account of humanistic insights?

My answer, in brief, is this: Humanistic perspectives could aid the law, but it's unlikely at present that they will do so, and influence won't occur, not significantly, unless humanists put their observations in more useable form. That means, mostly, directing their comments to the environmental movement as a whole, and only through that movement to the legal community itself.

"The law is a jealous mistress," so said Justice Story in 1821 in an unsuccessful attempt to keep bar admission standards from sinking down. More pertinent is to observe that lawyers *qua* lawyers are decidedly polygamous by disposition in their willingness to take up with diverse

intellectual partners. Lawyers certainly, and legal scholars largely, are not looking to marry. They look for business associates, intellectual colleagues who can help them at their work. To understand this professional trait in its various manifestations is to see why humanistic approaches now hold little appeal.

* * * * *

The place to begin is with the practice of law, American style, and with the skills and mental frames that lawyers begin learning in law school. Practicing lawyers make money off clients, who come for help with problems. A client usually has a goal and the lawyer helps achieve that goal, with little or no modification. Often the lawyer's work requires advocacy on the client's behalf, in courtrooms, negotiations or other legal settings. Advocacy is an art, the first rule of which is to know your judge or jury. Arguments are addressed to particular people and are designed to persuade those people. Arguments are good when they succeed in that task. For lawyers there's no need to await the verdict of history or the slow-developing critiques of book reviewers or colleagues. Win or lose, the feedback on work product is immediate. Truth in any abstract sense is relevant only insofar as truth has a greater power to persuade. Working lawyers and, to a lesser but distinct degree, legal scholars tend to see the world in terms of problems that need solving. Problems typically are discrete, and are best approached one by one.

As for the law itself, it is understood typically as a collection of tools, each intended to address a problem or to help people accomplish particular tasks. Laws are designed to achieve results, and are judged by their results. To the extent law approaches larger goals, change typically unfolds incrementally, step by legal step. Lawyers rarely consider the ways problems

are interlinked so as to make it necessary when solving one problem also to solve others; to use Wes Jackson's apt phrase, they don't attempt to solve for pattern. Even in the case of discrete problems, the law's tendency is to look for shallow roots. The law's guiding precept is proximate cause, which is to say that lawyers begin with a clear harm and then work up the chain of causation only to find the nearest person or big event that played a causal role. They don't keep working their way, link by causal link, to find ever-earlier causes. Thus, for lawyers water pollution is a distinct problem, not a symptom of some underlying economic or cultural malaise, and the party emitting the pollution is solely responsible for it. Lawyer look for someone to blame, and are disinclined to trace problems to economic or political systems, much less to cultural values and presumptions. Individual defendants can have deep pockets and serve time in prison; cultural values do not and cannot.

To put the point more simply, lawyers work within the system as they find it, pressing a bit here and there but rarely talking about fundamental change. The values and assumptions of the surrounding culture are the ones they employ. Thus, American lawyers place a high price on individual liberty, because society does. The typical lawyer respects the free market, honors private property, and promotes the efficient allocation of natural resources. Landscapes where lawyers live and work are divided into political jurisdictions and property boundaries, which is to say they are fragmented and subject to competing, conflicting managerial regimes. Nature's many parts are chiefly valued in the market. In the unusual case of claims of *nonmarket* value, the existence of such value is a factual claim demanding proof, just like other factual claims; what lawyers want to know is not whether nonmarket value *really* exists or whether reasonable people *should* recognize it, but merely whether a particular litigant in a case does or does not embrace

the value.

* * * * *

To get at the humanistic perspective on people and nature, we can begin where so many others have begun, with Nathaniel Hawthorne at Sleepy Hollow, famously gazing over the peaceful valley that is disrupted by a noisy railroad. Hawthorne was a humanist and was absorbed by the rural vista largely because it proved so suggestive. He was inclined merely and importantly to stand back from the scene and take it in as a whole, in all its contradictions and ambiguities. For Hawthorne as for humanists since, the scene was part of an unfolding narrative, stretching backward and forward in time and including the seen and the unseen. Hawthorne was observer as well as participant, both in the particular scene and in the larger contexts for which the scene stood as symbol or metaphor. Nature and culture were mixed, each influencing the other in an on-going dialectic. For Hawthorne, Sleepy Hollow was not a problem to be solved: it was a situation to be understood.

The gap here between the legal and humanistic perspectives can be wide indeed. The typical lawyer looking at Sleepy Hollow would not consider the railroad as cultural symbol or as metaphor of contradiction. If she feared that steam-engine technology could rise too high, demoting humans from masters into servant, her fear would be fleeting. Lawyers are accustomed to power and human dominance; their perspective is rarely long. Working within the Enlightenment tradition, lawyers embrace rational discourse and are comfortable with knowledge drawn empirically. They work with facts as given. When facts are in dispute or incomplete—as they nearly always are—the remedy is simple: present the evidence to a fact finder,

assign the burden of proof, and obtain the resolution. “Findings of fact” are thereafter accepted as true, with a confidence that could make a devoted scientist blush. Nature is a tangible object, existing in space and time and apart from humans. Value is assigned by people, individually or collectively, and human verdicts are final. Like scientists, lawyers ignore the intangible. Like philosophers, they are prone to use both utilitarian and rights-based moral reasoning while discounting other approaches. They are suspicious or disdainful of moral frameworks based on sentiment, on ideals of virtue, and on religious sensibilities, which are deemed too mushy and resistant to logical argument. Adding to the lawyer’s confidence in evaluating scenes is the conceit that law is a science—the fabulous idea that legal conclusions from case to case grow logically and coherently from within the law’s dark recesses. It’s an ill-supported myth, not something to withstand an argumentative wind, yet it blossoms and draws praise all the less, adding to the lawyer’s belief that his home turf is the most secure and sensible of intellectual grounds.

Far distant from this legal stance—farther, really, than is commonly understood—is the humanistic view of the landscape—of the machine in the garden; of humans at work manipulating nature as they see fit. If we can judge from much writing on nature and culture, humanists are far less committed to the tenets of the Enlightenment. For the humanist, the landscape appears in all its organic wholeness, not as a collection of resources and jurisdictional pieces. It is approached and understood by ways of knowing that reach beyond the empirical. It is valued by moral means that supplement or even displace the logical. The humanist likely has little faith in progress, and indeed may possess only a faint idea about what qualifies as progress. Unguided by evidentiary rules or burdens of proof, the humanists sees humans embedded in the landscape, complexly

woven in webs of interdependence. Truth is illusive and judgments are necessarily tentative. The story has no beginning and no end.

Taken seriously, much humanistic writing calls into question the course of Western culture. It proposes that we rethink our ways of knowing, that we question or discard our many dualities, and that we start afresh in imagining the ways we might live. They are heady lessons, but can the lawyer or legal scholar make use of them?

*   *   *   *   *

We can approach our subject from another angle.

Among the dominant developments in Western history over the past few centuries have been the coming of industrialization, market capitalism, and economic liberalism. How and why these tandem forces gained such strength is unclear, as are the complex ways that the forces intertwined. Parts of the story, though, are known, as they relate to nature and human uses of it.

In the feudal world at its height, land formed the base of society in pretty much all its aspects, political, social, economic, and even religious. Human activities of all types were complexly related to land. The ownership and use of land was extensively dictated by custom and law. Land was a source of economic income, to be sure, but even more it was a source of social, political, and military power. It was the instrument used to control people, binding them to one another and to a given place in a largely hierarchical arrangement. Within this arrangement power relations flowed in multiple directions. Thus, claims to land were typically multiple, as were the interests that land served. In his prominent study of a half century ago, Karl Polanyi summarized the situation as follows:

> Land, the pivotal element in the feudal order, was the basis of the military, judicial, administrative, and political system; its status and function were determined by legal and customary rules. Whether its possession was transferable or not, and if so, to whom, and under what restrictions; what the rights of property entailed; to what uses some types of land might be put—all these questions were removed from the organization of buying and selling, and subjected to an entirely different set of institutional regulations.

From this hierarchical, organic, interdependent world Western society moved step by unsteady step toward the present. We can measure those steps in many ways, but perhaps none is more revealing than to identify how the ties between people and land were gradually reduced in number. On the human side, people were gradually pulled away from land. From placed beings, embedded in a known social and economic world, they became largely rootless entities, chiefly valued for their labor and talked about increasingly as market commodities. In the feudal world peasants formed aggregates; in the coming world of market capitalism they were valued one by one. This process of commodifying labor was a long one, and it met strong resistance. Yet prevail it largely did (slavery aside), until the advent in the twentieth century of labor standards, worker protections, and minimum wage laws.

Matching this commodification of labor was the gradual commodification of nature. For that to come about, ownership rights needed radical simplification and the managerial powers of the remaining, individual owners needed widening. This commodification process began quite early, when feudal lords pressed against kings to gain greater powers to dispose of lands as they saw fit, while living and upon death. The biggest hurdles came when lords set out to strip their lands of the many customary rights and tenancies that peasants and commoners had in them.

That process would take centuries. In England, the waves of enclosure during the Tudor and Early Stuart eras continued apace, despite royal resistance. Landowners shed their tenants, combined their land holdings, and brought on the sheep. Then and for centuries thereafter, aided in the eighteenth and nineteenth centuries by Parliamentary Acts, common lands were also turned into private holdings, with customary users either cast aside penniless or bought off with overvalued allotments. If the details were many the outcome was nonetheless simple. Lands increasingly had one owner for each, and that owner had growing powers to use or transfer the land as she saw fit. Land use had become a business; land values were largely market-based.

With this commodification of land came a suite of new ideas about it and about the ways humans related to it. The ways that people actually used particular lands often declined in number and type, as modes of foraging and subsistence living gave way to the single-minded production of staple commodities for the market. Land boundaries became more definite and clearly marked, often with high shrubs and fences. Well into the nineteenth century, rural dwellers in America asserted the right to graze livestock on unenclosed rural lands, regardless of ownership; as many courts explained, the forest was a commons. But the tide, plainly, was turning. New ideas of ownership expanded a landowner's right to exclude outsiders, regardless of labor theories of natural rights that cast doubt on the ownership of unenclosed land. Foraging practices declined while roads were laid out and travelers expected to keep to them. Most surprising of all, the United States gradually embraced a land-use rule that it had once ridiculed England for upholding—the idea that a landowner could exclude local people from hunting on his lands. In America as in England, a person now had to own land in order to hunt.

So deeply embedded today is the idea of land-as-commodity that most Americans can

hardly conceive of a sensible alternative. Landscapes come divided into pieces, with a distinct owner for each. Particular natural “resources” are broken off for separate ownership—water flows, mines, grazing rights, and the like. In all cases, it’s the market that sets the value. Americans argue ceaselessly about the proper *intensity* of landowner use-rights; they argue, that is, about whether intensive development will be allowed in a given place, or whether the law instead should protect more sensitive land users who are disrupted by their noisy industrial neighbors. But this argument over intensity leaves unchallenged the basic achievement of the centuries: nature is a collection of commodities; landscapes are fragmented; and the market largely dictates what gets done.

This tale of commodification gives us a second place where we might stand, to consider the wide gap between legal and humanistic perspectives. Lawyers and legal scholars have been at the forefront of the moves toward commodification. They largely accept it without question. They might chafe at some implications but rarely dream of alternatives. For many humanists, things could hardly be more different, though the pull of private ownership in personal life is not absent. The humanist writer on nature and culture is disinclined to worry about human-drawn lines on the map; about the legal allocation of rights to use nature. Lawyers, to be sure, are not entirely blind to problems that cross land boundaries—pollution, for instance. Indeed, to a large extent legally recognized harms arise only when there is a crossing of commodity boundary lines. For the humanist, though, the lines simply don’t exist. Nature is an integrated whole and people are part of it. If the ownership of a land parcel gives a person a special attachment to it—as surely it does, and in good ways—the emotional attachment to place is still between the owner and the land, not between the owner and private property as an abstract bundle of legal rights. A

William Blackstone, steeped in the law, might wax poetically about his private property as that "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe," but no humanist would think about land in any such terms. Land is a real place, with particular soils and trees and wildlife, not an intangible legal construct.

In their instinctive acceptance of the commodification of nature, lawyers largely stand side by side with the average American, save for rural dwellers who live close to the land. It's the humanist who stands apart, who sees the land as an organic whole, who sees it stripped of the invisible, human-drawn boundaries that have such great effects when it comes to making sensible, collective decisions about how we ought to live.

*   *   *   *   *

Americans so readily accept the commodification of nature in part because the idea fits so sensibly within our nation's liberal culture. The dominance of liberalism—defined in its classic sense that exalted individual initiative—was articulated as an historical interpretation by historians in the 1950s, the so-called consensus school led by Louis Hartz and Richard Hofstadter. Although America's liberal culture has always had dissenters and it has permeated public life more than private realms, the dominance of liberalism nonetheless can hardly be denied. Indeed, political developments since the Reagan years have provided widespread evidence of America's deeply rooted liberal orientation. Debates take place, but the spectrum of competing views typically ranges from welfare liberalism on the political left to economic liberalism on the right. Only on the political fringe do we find proponents of distinctly non-liberal views, including

organic social visions that unite people into integrated wholes and promote the interests of the whole over the desires of individual human parts. In America, people count as individuals. We favor equality of opportunity among individuals; we promote the full democratic participation of all adult citizens. In the nineteenth century, courts would sometimes talk about the "rights of communities," which counterbalanced the rights held by individuals. Today, we can hardly conceive that a community as such might have rights.

As it exalts the individual human, liberalism necessarily detaches that human from all that surrounds her, not just other people but nature. Nature is the object; the human is the morally worthy subject; and moral worth attaches to the human as an isolated being, not as a part of something larger. Philosophers can wonder whether nature itself might have intrinsic value on its own, or whether some human might be needed to recognize or even create that value. For liberal Americans, lawyers included, this question seems frivolous. By liberal definition moral value attaches only to people, and thus nature can gain value only secondarily, through the forceful will of some human. Like economists, lawyers see value in nature only to extent that humans have given rise to that value. The issue for economists is whether humans are willing to spend money on nature; that is, whether a part of nature is a commodity that fetches money in the mart. Lawyers are a bit more catholic in recognizing value: a person can value something even outside the market. Still, value is human created, and exists only so long as some individual human recognizes it. Legal scholars might ponder whether trees have legal standing, but the underlying idea has no place to enter the law and has not done so. Value is a human construct, subject to ceaseless re-evaluation.

America's liberalism constrains legal discourse in another critical way. Since individual

humans are the sole moral actors in the universe, overall goals and ideas of right and wrong can only arise in one way: people establish them. Good land use is decided by people; the moral rightness of interactions with nature are judged by people. In the legal mind, this foundational reality is easily pieced together with liberal culture and with the fragmented, commodified landscape. To divide nature into parts—whether private property or political jurisdictions—is to specify more clearly *which* people get to make the decisions about good land use and about the moral rightness of human-nature interactions. Lawyers are highly attuned to this issue: *who* decides a question is often critical to the ultimate decision. In a liberal world filled with rights-bearing individuals, the individual is given as much freedom to decide as possible. When landscapes are fragmented, it's the owner of the fragmented piece, or the political jurisdiction with its legally distinct boundaries, that holds the power to act. It is thus up to the various decision-makers to decide for themselves how they'll define good land use and what moral value, if any, they'll recognize. Moral value is thus not merely a human creation: it's the result of countless decisions made by a countless number of human decision-makers, using whatever evaluation standards they deem appropriate.

When lawyers get involved in issues relating to nature, they do so in this context. It is the human decision-maker who gives rise to value, which is to say a human decision-maker who sets the goal. Trained in the use of law as a tool, lawyers are prone to pay attention to the *means,* rather to the *ends.* Indeed, to the extent lawyers have a speciality, it lies in their creative, flexible use of law as a set of tools. As specialists in the means, they pay less attention to the aims or ends, since that's not their job or their expertise. Nor do they, as noted, trace problems back to their underlying causes in American culture—to our ways of seeing nature, valuing it,

understanding our links to it, and so on. Legal scholars are more prone than practitioners to give critical thought to the ends, but only modestly so. Legal literature on environmental subjects is dominated by discussions about various legal tools and the relative merits of each. Should we use market-based methods or stick to command and control? Should we rely on public disclosure requirements or insist on a "hard-look" rule (such as the requirement to prepare environmental impact statements) that pushes decision-makers to study environmental effects and to explore alternatives? What level of government in our federal system should have the power to address which environmental problems? What powers should citizens have to challenge government action, and what deference are governments owed? What types of evidence should be put on the public record, and when should the factual record be closed? These and countless similar issues draw the attention of legal scholars, day in and day out. And they all, conspicuously, relate to allocations of power, methods of decisionmaking, and choices of legal tools, which is to say they all relate to the means. Rarely do legal scholars pause to consider normatively the kinds of goals that we ought to be pursuing. Are we as a species living well within the natural order? Are we using nature in ways that adequately respect the interests of future generations? Are we engaging in good land use? These and similar questions, relating to the ends of environmental law and policy, are simply not talked about very often. And when they are talked about, the level of discussion, sadly, is not very high. Legal scholars make little use of serious writing on the overall aims of environmental policy, just as they pay little attention to serious conservation writings challenging fundamental elements of American culture. They are embedded in current structures of power and work within those structures.

It is for these reasons that legal scholars, like economists, are prone to grab on to

simplistic ideas about the proper thrust of environmental policy. One popular proposal is that we should divide even more of nature into fragmented pieces, and assign a private owner to each piece. The idea here is that private owners largely take care of what they own. But do they? The question doesn't get discussed much, nor is the factual record really explored. Before even getting to the evidence, though, we can answer this question only if we first talk about what it means to take care of land. What standard or measure should we use in judging whether land is being well tended? Lawyers ignore the question—it's not their job, or not within their area of expertise. Having skipped the question they have no clear idea of the answer. Lacking an answer, they have no way to measure whether landowners really do take care of what they own. And not knowing then whether landowners do take care, it thus is easier for liberty-loving scholars to assert loudly that privatization is the cure-all for environmental ills. Who's to say otherwise? The same line of analysis can be applied to questions about allocating power within the federal system. Can states do an adequate job of environmental protection? It's hard to know, when we have no way to judge the outcome of their work. Even when a statute seems to establish a rather clear environmental goal—protecting endangered species, for instance—the clarity of the goal is often superficial, and we can't really evaluate competing tools effectively unless we dig beneath the surface to get a clearer sense of what we're trying to accomplish and why. Is the protection of endangered species part of some larger suite of environmental goals, and if so what are they? Even if protection is a free-standing goal, why have we set it, and what might our rationales tell us about how we define a "species" and how we decide whether "conservation" has taken place?

The failure of legal scholars to consider ends more clearly pushes them, not just to focus

their attention on the means, but to latch on to fundamental first principles or moral axioms that enable them to construct arguments deductively. Influenced by the vast literature on civil rights, lawyers have long been comfortable starting with premises about individual freedom and moral worth, and proceeding deductively to legal and policy conclusions. The tendency to reason this way received major pushes from the American Revolution and Jacksonian democracy. It got a further push—in ways that helped set America apart from other Western nations—with the Civil War, and the emphasis the war gave to individual liberty, negatively defined, as our highest cultural value. That notion of liberty, of course, was quickly picked up by defenders of free enterprise and used for the next half century as a potent rhetorical tool to ward off legislative attempts to contain industrial capitalism. Rights-based reasoning received another forceful push in the years before and during World War II, when the specter of Hitler's Germany encouraged the United States to define itself as everything that Nazism was not.

This tendency to reason from first principles, with the conclusion obtained at the final step, through rational processes, has had growing effects in legal scholarship. In the environmental arena, many environmental scholars exalt the primacy of private property, even though private property is quite a different type of individual right. Others exalt the liberty of economic enterprises. The more attention that such arguments draw, the less attention there is to devote to what ought to be our fundamental questions: how should we live on land, and what aspects of our social and cultural orders keep us from doing better at the task?

* * * * *

The commodification of labor and land that took place over a number of centuries

reached its peak in England around the middle of the nineteenth century. So extensive were the ill effects that commodification brought on--in terms of poverty, unemployment, urban ugliness, degraded families, disappearing towns, and the like--that counter-reactions were inevitable. In countless settings citizens rose up to place limits on the ways that market forces could treat people and land. Liberals of the day, defending the self-regulating market and free enterprise, claimed that misguided conspiracies were afoot to "collectivize" society. But the reality, it seems, was far different. The push to promote the free market was built upon a well-considered, well-articulated set of ideas. It was built upon liberal political thought, mixed with key precepts of classical economics. The reaction to market capitalism, in contrast, arose more haphazardly, and without real intellectual coherence. Its grounding was chiefly emotional, in the outrage engendered by the ever-present signs of beggars in the streets, children in factories, and landscapes scarred by noise and soot. Reformers pushed to contain the market, but they focused attention on the specific visible ills, rarely bothering to formulate a coherent critique of liberal and economic principles. The ills spoke for themselves and the aim of reform was to mitigate them, not to remedy systemic flaws.

The reaction to industrial capitalism began in the United States about the same time--earlier in connection with certain social ills, largely later with respect to land-use degradation. But the story in America was largely the same, in that reform efforts were often disjointed, sometimes worked at cross purposes, and were only loosely shaped by a coherent critique of the new age of enterprise. Looking back to the Progressive Era, it is common to discern two distinct strands to the conservation efforts--the utilitarian, sustained-yield work of Gifford Pinchot and the preservation efforts of John Muir. But though Pinchot and Muir did clash, the many reactions to

industrial capitalism did not at all break neatly into two categories. The reformers were many, and they divided up, not based on philosophy, but on the specific ills that aroused their ire. Reformers were driven by causes, mostly defensive in that they sought to protect or clean up places that the reformers held dear. Philosophy was secondary. As in England, the ills spoke for themselves.

We need to recall this history because it helps explain one of the chief traits, and perhaps severest deficiency, of the environmental movement today. "Archdruid" David Brower, arousing the Sierra Club troops in the 1950s, famously denied any need to develop a coherent philosophy. What environmentalists needed was a clear cause, he asserted–some obvious harm to challenge, or some natural area to protect. Brower's sentiment would largely govern the environmental movement then on the verge of rapid growth. It would be an activist cause, aimed at halting specific harms and protecting valued places, not chiefly at reshaping society based on new cultural values. Environmental groups proliferated in number, each playing a niche role. Groups largely worked in isolation, competing with one another for dollars and members. Little thought was given to how the activist pieces might fit together. The environmental movement, that is, was not a multi-group effort to achieve a single goal; it was a disjointed effort to achieve a wide variety of goals, nearly all defined narrowly. The specific aims by and large were to change the ways that people (businesses, mostly) interacted with nature. Groups sought to alter the ways people *behaved*, not the ways they *thought*. Cultural reform was secondary.

The environmental movement today continues to display these characteristics: groups are action oriented, they rarely work together, and they have no particular message or vision to offer the American people. As a whole, the movement has no goal, no visible public figures, and no

effective ways to counter the cultural criticisms leveled against it. Not surprisingly, it has become rather easy prey for opponents out to discredit it. The criticisms by now are familiar: environmentalists care only about nature, not about people; they favor owls over jobs; they're elitist and anti-democratic; they favor restrictions on liberty and undercut private property; they push measures that severely undercut the American economy. These and similar criticisms are wide of the mark, by and large, and could easily be countered. But they are not, because the movement as a whole has no institutional way to counter them. What are environmentalists out to accomplish overall? The question receives no answer, and few if any groups seem even to ask the question of themselves. Academics in some disciplines give the matter thought; some write about sustainability and sustainable development, others about ecological integrity and ecosystem health, still others about ecosystem services. Environmental law scholars, though, are rarely among them, not in any serious way. As lawyers they're prone to give little thought to overall ends. And as environmentalists—many of them, though hardly all—they're prone to attack the obvious ills close at hand, without standing back to critique American culture or to imagine far different ways of inhabiting the land. It should not surprise us, then, that the literature of environmental law pays little attention to larger questions about ends, just as it pays little attention to the deep-rooted cultural origins of environmental problems. Lawyers and activists alike work within the system, developing tactics to win small victories. In the flurry of work, few take time to survey the larger scenes.

*   *   *   *   *

These observations return us to the point of beginning, and to questions about the

likelihood that lawyers and legal scholars might find value in the humanities–in the work of literary writers about people and place, or the work of humanities scholars who comment critically upon and augment that primary literature.

The basic problem is this. Lawyers and legal scholars are looking for help in doing their specific work, day to day. The problems are obvious, the resistance is strong, and more powerful tools are needed to get the jobs done. Literary writers, though, aren't in the business of crafting tools or helping at specific tasks. Humanities scholars aren't inclined to dwell upon matters of implementation; of how we might reorient American culture to instill greater humility in our interactions with land.

We might sum up the situation by turning to the work of Mark Twain. Imagine one of his riverboat captains, attentively watching the river and trying to steer his boat clear of the countless snags. Lawyers and legal scholars aren't usually riverboat captains themselves. They're advisors, standing beside the captain, giving advice on how best to avoid dangers and get to the captain's desired end. The question at hand: if our riverboat crew also included a poet, what help might the poet provide? What could the poet say to the lawyer, to help the lawyer in his advisory work?

The answer, alas, is: probably not much. The interests and observations of the poet are simply too detached from the needs of the captain and thus of the captain's advisor. It's not only that the poet will want to talk about the river's beauty or the music it pours forth. It is that the poet's observations might well question why the crew is on a riverboat to begin with, why it is operating under steam power, and why it is heading to one place rather than another. These are big questions, too big.

The comments of literary writers and humanities scholars, taken seriously (as they should

be taken seriously), simply pose too much of a challenge to American culture. And the challenges they pose come all at once, as a whole. They raise questions about our over-reliance on reason and our tendency to stick to empiricism as the only way of knowing. They challenge the fragmentation of nature and the assignment of value to it based solely on the satisfaction of human needs. As they survey the scene, they do not distinguish clearly between human life and other life forms, as our dominant culture does. To the typical humanist, landscapes are filled with mystery and intangible components. Linking the many parts are not just ecological processes but narratives lines, open rather than fixed, dependent upon contingencies and morally complex in their unfolding. Resolutions are not in sight, at least not enduring ones. Stories never end, nor does the telling of them.

To the extent the field of environmental letters has something to say to legal scholars and lawyers, it might be this: stand back from what you're doing and take in the whole of things, even as you pay greater attention to the lesser, easily overlooked parts. Observe the many ways that nature and culture are interwoven, and how humans are integrated into landscapes. Imagine new forms of mindfulness, new ways of knowing, new scales of value, new ways of relating to one another and to other life forms.

Good advice, all of it, to be sure. But this is just now what lawyers or even legal scholars want to hear. And they don't want to hear it because it simply isn't useful to them. It doesn't fit into the cultural world in which they live and work. The humanities collectively invite us to imagine an entirely new world, but that's not the business that lawyers and legal scholars are in. If our leading environmental writers are right, true conservation cannot take place without fundamental changes in American culture. Lawyers, though, are problem solvers, first and foremost. Larger

questions, about ultimate aims and underlying causes, they leave to others. And thus they pay little attention to the poets. The humanist agenda is simply too vast to put to use. It doesn't start from where we are today and identify the next few steps. It imagines new places where we might go, while paying little attention to how we might get there.

If the humanities writers want to contribute effectively to the environmental effort, broadly defined, they'll need to make their work more relevant. The place to do that, perhaps, is by speaking, not to legal scholars and lawyers directly, but instead to the environmental movement as a social cause.

Much of what humanists want to talk about bears on the question of overall goals: what should the environmental movement be seeking to accomplish, in terms of our ways of living in nature and the various cultural ways that we see nature and value it. In the shaping of environmental goals and in the crafting of an overall environmental critique of modern culture humanists can play significant roles. But their attempts to have influence are much weakened by the liberal, fragmented characteristics of the environmental movement itself. Environmental activists show no more interest in humanistic writings than do legal scholars. Individual environmentalists have posed sharp challenges to American culture and offered refined ideas about how we might inhabit the land. But the movement as a whole hardly pays attention. Its cultural criticism is weak. Its visions of a better way are dim. And the prospects of changing the movement are not great, given the competition among groups and their abiding concern for institutional stability.

Still, if change seems remote, the possibility of it does exist. If lawyers and legal scholars attend mostly to tools, they are at least accustomed to being told what goals to promote, whether

by clients, by Congress, or by the courts. The law itself can also change significantly, as it has over time. The liberal culture of today, so respectful of the autonomous individual human, so disdainful of nature and of organic wholes, could evolve over time to something much different, and the law could evolve along with it.

For a glimpse of such change, we can end with a few lines from a contemporary writer on nature and culture who has given a good deal of thought to law and legal culture—Wendell Berry of Kentucky. Berry's father was a lawyer, as is his brother and a nephew. Lawyers appear regularly in his fiction. One of Berry's explorations of law and law practice appears in his extended story, "Fidelity," which recounts the final illness of Burley Coulter, one of Berry's most beloved, eccentric fictional characters. Burley is taken to a hospital and stuck with tubes, yet his prognosis is bleak. His son and others want Burley to die at home, where he was born and lived, so they kidnap him in the middle of the night. A police detective is soon on their trail, trying to find the kidnapper and bring him to justice. Standing in the way, though, is elderly lawyer Wheeler Catlett, loosely modeled after Berry's own father and one of the keepers of the agrarian flame. Wheeler challenges the police detective, in the detective's claim that it is wrong to remove a patient from a hospital without the hospital's permission. How can that be, Wheeler asks? If a patient needs permission to get out of the hospital, then he's effectively in jail.

From here, the scene comes to its climax, offering a glimpse of a different moral order that law and lawyers might promote, the kind of organic, place-based moral order that Wendell Berry has proclaimed in his writing for decades.

> "Well, anyway," Detective Bode said, "all I know is that the law has been broken, and I am here to serve the law.
>
> "But, my dear boy, you don't eat or drink the law, or sit in the shade of it or warm yourself by it, or wear it, or have your being in it. The law exists only to serve."

"Serve what?"
"Why, all the many things that are above it. Love."

Draft of September 28, 2005

Ends and Means in Environmental Law, or The Unlikely Marriage of Law and Letters

Eric T. Freyfogle

To sponsor a conference on environmental law and letters is to raise the possibility that two quite different scholarly perspectives on nature and culture might have more reason to talk with one another than they presume. Can environmental lawyers and legal scholars learn from the humanities? Do humanistic scholars, particularly those who dwell on people and land, have significant things to learn from the law? The communications here could well be two-way. But the more pressing issue, perhaps, has to do with the influence of humanities on law, and through lawyers and legal scholars on institutional frameworks of environmental policy. Would our environmental laws and policies improve if the people making them took account of humanistic insights?

My answer, in brief, is this: Humanistic perspectives could aid the law, but it's unlikely at present that they will do so, and influence won't occur, not significantly, unless humanists put their observations in more useable form. That means, mostly, directing their comments to the environmental movement as a whole, and only through that movement to the legal community itself.

"The law is a jealous mistress," so said Justice Story in 1821 in an unsuccessful attempt to keep bar admission standards from sinking down. More pertinent is to observe that lawyers *qua* lawyers are decidedly polygamous by disposition in their willingness to take up with diverse

intellectual partners. Lawyers certainly, and legal scholars largely, are not looking to marry. They look for business associates, intellectual colleagues who can help them at their work. To understand this professional trait in its various manifestations is to see why humanistic approaches now hold little appeal.

* * * * *

The place to begin is with the practice of law, American style, and with the skills and mental frames that lawyers begin learning in law school. Practicing lawyers make money off clients, who come for help with problems. A client usually has a goal and the lawyer helps achieve that goal, with little or no modification. Often the lawyer's work requires advocacy on the client's behalf, in courtrooms, negotiations or other legal settings. Advocacy is an art, the first rule of which is to know your judge or jury. Arguments are addressed to particular people and are designed to persuade those people. Arguments are good when they succeed in that task. For lawyers there's no need to await the verdict of history or the slow-developing critiques of book reviewers or colleagues. Win or lose, the feedback on work product is immediate. Truth in any abstract sense is relevant only insofar as truth has a greater power to persuade. Working lawyers and, to a lesser but distinct degree, legal scholars tend to see the world in terms of problems that need solving. Problems typically are discrete, and are best approached one by one.

As for the law itself, it is understood typically as a collection of tools, each intended to address a problem or to help people accomplish particular tasks. Laws are designed to achieve results, and are judged by their results. To the extent law approaches larger goals, change typically unfolds incrementally, step by legal step. Lawyers rarely consider the ways problems

are interlinked so as to make it necessary when solving one problem also to solve others; to use Wes Jackson's apt phrase, they don't attempt to solve for pattern. Even in the case of discrete problems, the law's tendency is to look for shallow roots. The law's guiding precept is proximate cause, which is to say that lawyers begin with a clear harm and then work up the chain of causation only to find the nearest person or big event that played a causal role. They don't keep working their way, link by causal link, to find ever-earlier causes. Thus, for lawyers water pollution is a distinct problem, not a symptom of some underlying economic or cultural malaise, and the party emitting the pollution is solely responsible for it. Lawyer look for someone to blame, and are disinclined to trace problems to economic or political systems, much less to cultural values and presumptions. Individual defendants can have deep pockets and serve time in prison; cultural values do not and cannot.

To put the point more simply, lawyers work within the system as they find it, pressing a bit here and there but rarely talking about fundamental change. The values and assumptions of the surrounding culture are the ones they employ. Thus, American lawyers place a high price on individual liberty, because society does. The typical lawyer respects the free market, honors private property, and promotes the efficient allocation of natural resources. Landscapes where lawyers live and work are divided into political jurisdictions and property boundaries, which is to say they are fragmented and subject to competing, conflicting managerial regimes. Nature's many parts are chiefly valued in the market. In the unusual case of claims of *nonmarket* value, the existence of such value is a factual claim demanding proof, just like other factual claims; what lawyers want to know is not whether nonmarket value *really* exists or whether reasonable people *should* recognize it, but merely whether a particular litigant in a case does or does not embrace

the value.

* * * * *

To get at the humanistic perspective on people and nature, we can begin where so many others have begun, with Nathaniel Hawthorne at Sleepy Hollow, famously gazing over the peaceful valley that is disrupted by a noisy railroad. Hawthorne was a humanist and was absorbed by the rural vista largely because it proved so suggestive. He was inclined merely and importantly to stand back from the scene and take it in as a whole, in all its contradictions and ambiguities. For Hawthorne as for humanists since, the scene was part of an unfolding narrative, stretching backward and forward in time and including the seen and the unseen. Hawthorne was observer as well as participant, both in the particular scene and in the larger contexts for which the scene stood as symbol or metaphor. Nature and culture were mixed, each influencing the other in an on-going dialectic. For Hawthorne, Sleepy Hollow was not a problem to be solved: it was a situation to be understood.

The gap here between the legal and humanistic perspectives can be wide indeed. The typical lawyer looking at Sleepy Hollow would not consider the railroad as cultural symbol or as metaphor of contradiction. If she feared that steam-engine technology could rise too high, demoting humans from masters into servant, her fear would be fleeting. Lawyers are accustomed to power and human dominance; their perspective is rarely long. Working within the Enlightenment tradition, lawyers embrace rational discourse and are comfortable with knowledge drawn empirically. They work with facts as given. When facts are in dispute or incomplete—as they nearly always are—the remedy is simple: present the evidence to a fact finder,

assign the burden of proof, and obtain the resolution. “Findings of fact” are thereafter accepted as true, with a confidence that could make a devoted scientist blush. Nature is a tangible object, existing in space and time and apart from humans. Value is assigned by people, individually or collectively, and human verdicts are final. Like scientists, lawyers ignore the intangible. Like philosophers, they are prone to use both utilitarian and rights-based moral reasoning while discounting other approaches. They are suspicious or disdainful of moral frameworks based on sentiment, on ideals of virtue, and on religious sensibilities, which are deemed too mushy and resistant to logical argument. Adding to the lawyer’s confidence in evaluating scenes is the conceit that law is a science—the fabulous idea that legal conclusions from case to case grow logically and coherently from within the law’s dark recesses. It’s an ill-supported myth, not something to withstand an argumentative wind, yet it blossoms and draws praise all the less, adding to the lawyer’s belief that his home turf is the most secure and sensible of intellectual grounds.

Far distant from this legal stance—farther, really, than is commonly understood—is the humanistic view of the landscape—of the machine in the garden; of humans at work manipulating nature as they see fit. If we can judge from much writing on nature and culture, humanists are far less committed to the tenets of the Enlightenment. For the humanist, the landscape appears in all its organic wholeness, not as a collection of resources and jurisdictional pieces. It is approached and understood by ways of knowing that reach beyond the empirical. It is valued by moral means that supplement or even displace the logical. The humanist likely has little faith in progress, and indeed may possess only a faint idea about what qualifies as progress. Unguided by evidentiary rules or burdens of proof, the humanists sees humans embedded in the landscape, complexly

woven in webs of interdependence. Truth is illusive and judgments are necessarily tentative. The story has no beginning and no end.

Taken seriously, much humanistic writing calls into question the course of Western culture. It proposes that we rethink our ways of knowing, that we question or discard our many dualities, and that we start afresh in imagining the ways we might live. They are heady lessons, but can the lawyer or legal scholar make use of them?

* * * * *

We can approach our subject from another angle.

Among the dominant developments in Western history over the past few centuries have been the coming of industrialization, market capitalism, and economic liberalism. How and why these tandem forces gained such strength is unclear, as are the complex ways that the forces intertwined. Parts of the story, though, are known, as they relate to nature and human uses of it.

In the feudal world at its height, land formed the base of society in pretty much all its aspects, political, social, economic, and even religious. Human activities of all types were complexly related to land. The ownership and use of land was extensively dictated by custom and law. Land was a source of economic income, to be sure, but even more it was a source of social, political, and military power. It was the instrument used to control people, binding them to one another and to a given place in a largely hierarchical arrangement. Within this arrangement power relations flowed in multiple directions. Thus, claims to land were typically multiple, as were the interests that land served. In his prominent study of a half century ago, Karl Polanyi summarized the situation as follows:

> Land, the pivotal element in the feudal order, was the basis of the military, judicial, administrative, and political system; its status and function were determined by legal and customary rules. Whether its possession was transferable or not, and if so, to whom, and under what restrictions; what the rights of property entailed; to what uses some types of land might be put—all these questions were removed from the organization of buying and selling, and subjected to an entirely different set of institutional regulations.

From this hierarchical, organic, interdependent world Western society moved step by unsteady step toward the present. We can measure those steps in many ways, but perhaps none is more revealing than to identify how the ties between people and land were gradually reduced in number. On the human side, people were gradually pulled away from land. From placed beings, embedded in a known social and economic world, they became largely rootless entities, chiefly valued for their labor and talked about increasingly as market commodities. In the feudal world peasants formed aggregates; in the coming world of market capitalism they were valued one by one. This process of commodifying labor was a long one, and it met strong resistance. Yet prevail it largely did (slavery aside), until the advent in the twentieth century of labor standards, worker protections, and minimum wage laws.

Matching this commodification of labor was the gradual commodification of nature. For that to come about, ownership rights needed radical simplification and the managerial powers of the remaining, individual owners needed widening. This commodification process began quite early, when feudal lords pressed against kings to gain greater powers to dispose of lands as they saw fit, while living and upon death. The biggest hurdles came when lords set out to strip their lands of the many customary rights and tenancies that peasants and commoners had in them.

That process would take centuries. In England, the waves of enclosure during the Tudor and Early Stuart eras continued apace, despite royal resistance. Landowners shed their tenants, combined their land holdings, and brought on the sheep. Then and for centuries thereafter, aided in the eighteenth and nineteenth centuries by Parliamentary Acts, common lands were also turned into private holdings, with customary users either cast aside penniless or bought off with overvalued allotments. If the details were many the outcome was nonetheless simple. Lands increasingly had one owner for each, and that owner had growing powers to use or transfer the land as she saw fit. Land use had become a business; land values were largely market-based.

With this commodification of land came a suite of new ideas about it and about the ways humans related to it. The ways that people actually used particular lands often declined in number and type, as modes of foraging and subsistence living gave way to the single-minded production of staple commodities for the market. Land boundaries became more definite and clearly marked, often with high shrubs and fences. Well into the nineteenth century, rural dwellers in America asserted the right to graze livestock on unenclosed rural lands, regardless of ownership; as many courts explained, the forest was a commons. But the tide, plainly, was turning. New ideas of ownership expanded a landowner's right to exclude outsiders, regardless of labor theories of natural rights that cast doubt on the ownership of unenclosed land. Foraging practices declined while roads were laid out and travelers expected to keep to them. Most surprising of all, the United States gradually embraced a land-use rule that it had once ridiculed England for upholding—the idea that a landowner could exclude local people from hunting on his lands. In America as in England, a person now had to own land in order to hunt.

So deeply embedded today is the idea of land-as-commodity that most Americans can

hardly conceive of a sensible alternative. Landscapes come divided into pieces, with a distinct owner for each. Particular natural "resources" are broken off for separate ownership—water flows, mines, grazing rights, and the like. In all cases, it's the market that sets the value. Americans argue ceaselessly about the proper *intensity* of landowner use-rights; they argue, that is, about whether intensive development will be allowed in a given place, or whether the law instead should protect more sensitive land users who are disrupted by their noisy industrial neighbors. But this argument over intensity leaves unchallenged the basic achievement of the centuries: nature is a collection of commodities; landscapes are fragmented; and the market largely dictates what gets done.

This tale of commodification gives us a second place where we might stand, to consider the wide gap between legal and humanistic perspectives. Lawyers and legal scholars have been at the forefront of the moves toward commodification. They largely accept it without question. They might chafe at some implications but rarely dream of alternatives. For many humanists, things could hardly be more different, though the pull of private ownership in personal life is not absent. The humanist writer on nature and culture is disinclined to worry about human-drawn lines on the map; about the legal allocation of rights to use nature. Lawyers, to be sure, are not entirely blind to problems that cross land boundaries—pollution, for instance. Indeed, to a large extent legally recognized harms arise only when there is a crossing of commodity boundary lines. For the humanist, though, the lines simply don't exist. Nature is an integrated whole and people are part of it. If the ownership of a land parcel gives a person a special attachment to it—as surely it does, and in good ways—the emotional attachment to place is still between the owner and the land, not between the owner and private property as an abstract bundle of legal rights. A

William Blackstone, steeped in the law, might wax poetically about his private property as that "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe," but no humanist would think about land in any such terms. Land is a real place, with particular soils and trees and wildlife, not an intangible legal construct.

In their instinctive acceptance of the commodification of nature, lawyers largely stand side by side with the average American, save for rural dwellers who live close to the land. It's the humanist who stands apart, who sees the land as an organic whole, who sees it stripped of the invisible, human-drawn boundaries that have such great effects when it comes to making sensible, collective decisions about how we ought to live.

* * * * *

Americans so readily accept the commodification of nature in part because the idea fits so sensibly within our nation's liberal culture. The dominance of liberalism—defined in its classic sense that exalted individual initiative—was articulated as an historical interpretation by historians in the 1950s, the so-called consensus school led by Louis Hartz and Richard Hofstadter. Although America's liberal culture has always had dissenters and it has permeated public life more than private realms, the dominance of liberalism nonetheless can hardly be denied. Indeed, political developments since the Reagan years have provided widespread evidence of America's deeply rooted liberal orientation. Debates take place, but the spectrum of competing views typically ranges from welfare liberalism on the political left to economic liberalism on the right. Only on the political fringe do we find proponents of distinctly non-liberal views, including

organic social visions that unite people into integrated wholes and promote the interests of the whole over the desires of individual human parts. In America, people count as individuals. We favor equality of opportunity among individuals; we promote the full democratic participation of all adult citizens. In the nineteenth century, courts would sometimes talk about the "rights of communities," which counterbalanced the rights held by individuals. Today, we can hardly conceive that a community as such might have rights.

As it exalts the individual human, liberalism necessarily detaches that human from all that surrounds her, not just other people but nature. Nature is the object; the human is the morally worthy subject; and moral worth attaches to the human as an isolated being, not as a part of something larger. Philosophers can wonder whether nature itself might have intrinsic value on its own, or whether some human might be needed to recognize or even create that value. For liberal Americans, lawyers included, this question seems frivolous. By liberal definition moral value attaches only to people, and thus nature can gain value only secondarily, through the forceful will of some human. Like economists, lawyers see value in nature only to extent that humans have given rise to that value. The issue for economists is whether humans are willing to spend money on nature; that is, whether a part of nature is a commodity that fetches money in the mart. Lawyers are a bit more catholic in recognizing value: a person can value something even outside the market. Still, value is human created, and exists only so long as some individual human recognizes it. Legal scholars might ponder whether trees have legal standing, but the underlying idea has no place to enter the law and has not done so. Value is a human construct, subject to ceaseless re-evaluation.

America's liberalism constrains legal discourse in another critical way. Since individual

humans are the sole moral actors in the universe, overall goals and ideas of right and wrong can only arise in one way: people establish them. Good land use is decided by people; the moral rightness of interactions with nature are judged by people. In the legal mind, this foundational reality is easily pieced together with liberal culture and with the fragmented, commodified landscape. To divide nature into parts—whether private property or political jurisdictions—is to specify more clearly *which* people get to make the decisions about good land use and about the moral rightness of human-nature interactions. Lawyers are highly attuned to this issue: *who* decides a question is often critical to the ultimate decision. In a liberal world filled with rights-bearing individuals, the individual is given as much freedom to decide as possible. When landscapes are fragmented, it's the owner of the fragmented piece, or the political jurisdiction with its legally distinct boundaries, that holds the power to act. It is thus up to the various decision-makers to decide for themselves how they'll define good land use and what moral value, if any, they'll recognize. Moral value is thus not merely a human creation: it's the result of countless decisions made by a countless number of human decision-makers, using whatever evaluation standards they deem appropriate.

When lawyers get involved in issues relating to nature, they do so in this context. It is the human decision-maker who gives rise to value, which is to say a human decision-maker who sets the goal. Trained in the use of law as a tool, lawyers are prone to pay attention to the *means,* rather to the *ends.* Indeed, to the extent lawyers have a speciality, it lies in their creative, flexible use of law as a set of tools. As specialists in the means, they pay less attention to the aims or ends, since that's not their job or their expertise. Nor do they, as noted, trace problems back to their underlying causes in American culture—to our ways of seeing nature, valuing it,

understanding our links to it, and so on. Legal scholars are more prone than practitioners to give critical thought to the ends, but only modestly so. Legal literature on environmental subjects is dominated by discussions about various legal tools and the relative merits of each. Should we use market-based methods or stick to command and control? Should we rely on public disclosure requirements or insist on a "hard-look" rule (such as the requirement to prepare environmental impact statements) that pushes decision-makers to study environmental effects and to explore alternatives? What level of government in our federal system should have the power to address which environmental problems? What powers should citizens have to challenge government action, and what deference are governments owed? What types of evidence should be put on the public record, and when should the factual record be closed? These and countless similar issues draw the attention of legal scholars, day in and day out. And they all, conspicuously, relate to allocations of power, methods of decisionmaking, and choices of legal tools, which is to say they all relate to the means. Rarely do legal scholars pause to consider normatively the kinds of goals that we ought to be pursuing. Are we as a species living well within the natural order? Are we using nature in ways that adequately respect the interests of future generations? Are we engaging in good land use? These and similar questions, relating to the ends of environmental law and policy, are simply not talked about very often. And when they are talked about, the level of discussion, sadly, is not very high. Legal scholars make little use of serious writing on the overall aims of environmental policy, just as they pay little attention to serious conservation writings challenging fundamental elements of American culture. They are embedded in current structures of power and work within those structures.

It is for these reasons that legal scholars, like economists, are prone to grab on to

simplistic ideas about the proper thrust of environmental policy. One popular proposal is that we should divide even more of nature into fragmented pieces, and assign a private owner to each piece. The idea here is that private owners largely take care of what they own. But do they? The question doesn't get discussed much, nor is the factual record really explored. Before even getting to the evidence, though, we can answer this question only if we first talk about what it means to take care of land. What standard or measure should we use in judging whether land is being well tended? Lawyers ignore the question—it's not their job, or not within their area of expertise. Having skipped the question they have no clear idea of the answer. Lacking an answer, they have no way to measure whether landowners really do take care of what they own. And not knowing then whether landowners do take care, it thus is easier for liberty-loving scholars to assert loudly that privatization is the cure-all for environmental ills. Who's to say otherwise? The same line of analysis can be applied to questions about allocating power within the federal system. Can states do an adequate job of environmental protection? It's hard to know, when we have no way to judge the outcome of their work. Even when a statute seems to establish a rather clear environmental goal—protecting endangered species, for instance—the clarity of the goal is often superficial, and we can't really evaluate competing tools effectively unless we dig beneath the surface to get a clearer sense of what we're trying to accomplish and why. Is the protection of endangered species part of some larger suite of environmental goals, and if so what are they? Even if protection is a free-standing goal, why have we set it, and what might our rationales tell us about how we define a "species" and how we decide whether "conservation" has taken place?

The failure of legal scholars to consider ends more clearly pushes them, not just to focus

their attention on the means, but to latch on to fundamental first principles or moral axioms that enable them to construct arguments deductively. Influenced by the vast literature on civil rights, lawyers have long been comfortable starting with premises about individual freedom and moral worth, and proceeding deductively to legal and policy conclusions. The tendency to reason this way received major pushes from the American Revolution and Jacksonian democracy. It got a further push—in ways that helped set America apart from other Western nations—with the Civil War, and the emphasis the war gave to individual liberty, negatively defined, as our highest cultural value. That notion of liberty, of course, was quickly picked up by defenders of free enterprise and used for the next half century as a potent rhetorical tool to ward off legislative attempts to contain industrial capitalism. Rights-based reasoning received another forceful push in the years before and during World War II, when the specter of Hitler's Germany encouraged the United States to define itself as everything that Nazism was not.

This tendency to reason from first principles, with the conclusion obtained at the final step, through rational processes, has had growing effects in legal scholarship. In the environmental arena, many environmental scholars exalt the primacy of private property, even though private property is quite a different type of individual right. Others exalt the liberty of economic enterprises. The more attention that such arguments draw, the less attention there is to devote to what ought to be our fundamental questions: how should we live on land, and what aspects of our social and cultural orders keep us from doing better at the task?

* * * * *

The commodification of labor and land that took place over a number of centuries

reached its peak in England around the middle of the nineteenth century. So extensive were the ill effects that commodification brought on--in terms of poverty, unemployment, urban ugliness, degraded families, disappearing towns, and the like--that counter-reactions were inevitable. In countless settings citizens rose up to place limits on the ways that market forces could treat people and land. Liberals of the day, defending the self-regulating market and free enterprise, claimed that misguided conspiracies were afoot to "collectivize" society. But the reality, it seems, was far different. The push to promote the free market was built upon a well-considered, well-articulated set of ideas. It was built upon liberal political thought, mixed with key precepts of classical economics. The reaction to market capitalism, in contrast, arose more haphazardly, and without real intellectual coherence. Its grounding was chiefly emotional, in the outrage engendered by the ever-present signs of beggars in the streets, children in factories, and landscapes scarred by noise and soot. Reformers pushed to contain the market, but they focused attention on the specific visible ills, rarely bothering to formulate a coherent critique of liberal and economic principles. The ills spoke for themselves and the aim of reform was to mitigate them, not to remedy systemic flaws.

The reaction to industrial capitalism began in the United States about the same time--earlier in connection with certain social ills, largely later with respect to land-use degradation. But the story in America was largely the same, in that reform efforts were often disjointed, sometimes worked at cross purposes, and were only loosely shaped by a coherent critique of the new age of enterprise. Looking back to the Progressive Era, it is common to discern two distinct strands to the conservation efforts--the utilitarian, sustained-yield work of Gifford Pinchot and the preservation efforts of John Muir. But though Pinchot and Muir did clash, the many reactions to

industrial capitalism did not at all break neatly into two categories. The reformers were many, and they divided up, not based on philosophy, but on the specific ills that aroused their ire. Reformers were driven by causes, mostly defensive in that they sought to protect or clean up places that the reformers held dear. Philosophy was secondary. As in England, the ills spoke for themselves.

We need to recall this history because it helps explain one of the chief traits, and perhaps severest deficiency, of the environmental movement today. “Archdruid” David Brower, arousing the Sierra Club troops in the 1950s, famously denied any need to develop a coherent philosophy. What environmentalists needed was a clear cause, he asserted—some obvious harm to challenge, or some natural area to protect. Brower’s sentiment would largely govern the environmental movement then on the verge of rapid growth. It would be an activist cause, aimed at halting specific harms and protecting valued places, not chiefly at reshaping society based on new cultural values. Environmental groups proliferated in number, each playing a niche role. Groups largely worked in isolation, competing with one another for dollars and members. Little thought was given to how the activist pieces might fit together. The environmental movement, that is, was not a multi-group effort to achieve a single goal; it was a disjointed effort to achieve a wide variety of goals, nearly all defined narrowly. The specific aims by and large were to change the ways that people (businesses, mostly) interacted with nature. Groups sought to alter the ways people *behaved*, not the ways they *thought*. Cultural reform was secondary.

The environmental movement today continues to display these characteristics: groups are action oriented, they rarely work together, and they have no particular message or vision to offer the American people. As a whole, the movement has no goal, no visible public figures, and no

effective ways to counter the cultural criticisms leveled against it. Not surprisingly, it has become rather easy prey for opponents out to discredit it. The criticisms by now are familiar: environmentalists care only about nature, not about people; they favor owls over jobs; they're elitist and anti-democratic; they favor restrictions on liberty and undercut private property; they push measures that severely undercut the American economy. These and similar criticisms are wide of the mark, by and large, and could easily be countered. But they are not, because the movement as a whole has no institutional way to counter them. What are environmentalists out to accomplish overall? The question receives no answer, and few if any groups seem even to ask the question of themselves. Academics in some disciplines give the matter thought; some write about sustainability and sustainable development, others about ecological integrity and ecosystem health, still others about ecosystem services. Environmental law scholars, though, are rarely among them, not in any serious way. As lawyers they're prone to give little thought to overall ends. And as environmentalists—many of them, though hardly all—they're prone to attack the obvious ills close at hand, without standing back to critique American culture or to imagine far different ways of inhabiting the land. It should not surprise us, then, that the literature of environmental law pays little attention to larger questions about ends, just as it pays little attention to the deep-rooted cultural origins of environmental problems. Lawyers and activists alike work within the system, developing tactics to win small victories. In the flurry of work, few take time to survey the larger scenes.

* * * * *

These observations return us to the point of beginning, and to questions about the

likelihood that lawyers and legal scholars might find value in the humanities—in the work of literary writers about people and place, or the work of humanities scholars who comment critically upon and augment that primary literature.

The basic problem is this. Lawyers and legal scholars are looking for help in doing their specific work, day to day. The problems are obvious, the resistance is strong, and more powerful tools are needed to get the jobs done. Literary writers, though, aren't in the business of crafting tools or helping at specific tasks. Humanities scholars aren't inclined to dwell upon matters of implementation; of how we might reorient American culture to instill greater humility in our interactions with land.

We might sum up the situation by turning to the work of Mark Twain. Imagine one of his riverboat captains, attentively watching the river and trying to steer his boat clear of the countless snags. Lawyers and legal scholars aren't usually riverboat captains themselves. They're advisors, standing beside the captain, giving advice on how best to avoid dangers and get to the captain's desired end. The question at hand: if our riverboat crew also included a poet, what help might the poet provide? What could the poet say to the lawyer, to help the lawyer in his advisory work?

The answer, alas, is: probably not much. The interests and observations of the poet are simply too detached from the needs of the captain and thus of the captain's advisor. It's not only that the poet will want to talk about the river's beauty or the music it pours forth. It is that the poet's observations might well question why the crew is on a riverboat to begin with, why it is operating under steam power, and why it is heading to one place rather than another. These are big questions, too big.

The comments of literary writers and humanities scholars, taken seriously (as they should

be taken seriously), simply pose too much of a challenge to American culture. And the challenges they pose come all at once, as a whole. They raise questions about our over-reliance on reason and our tendency to stick to empiricism as the only way of knowing. They challenge the fragmentation of nature and the assignment of value to it based solely on the satisfaction of human needs. As they survey the scene, they do not distinguish clearly between human life and other life forms, as our dominant culture does. To the typical humanist, landscapes are filled with mystery and intangible components. Linking the many parts are not just ecological processes but narratives lines, open rather than fixed, dependent upon contingencies and morally complex in their unfolding. Resolutions are not in sight, at least not enduring ones. Stories never end, nor does the telling of them.

To the extent the field of environmental letters has something to say to legal scholars and lawyers, it might be this: stand back from what you're doing and take in the whole of things, even as you pay greater attention to the lesser, easily overlooked parts. Observe the many ways that nature and culture are interwoven, and how humans are integrated into landscapes. Imagine new forms of mindfulness, new ways of knowing, new scales of value, new ways of relating to one another and to other life forms.

Good advice, all of it, to be sure. But this is just now what lawyers or even legal scholars want to hear. And they don't want to hear it because it simply isn't useful to them. It doesn't fit into the cultural world in which they live and work. The humanities collectively invite us to imagine an entirely new world, but that's not the business that lawyers and legal scholars are in. If our leading environmental writers are right, true conservation cannot take place without fundamental changes in American culture. Lawyers, though, are problem solvers, first and foremost. Larger

questions, about ultimate aims and underlying causes, they leave to others. And thus they pay little attention to the poets. The humanist agenda is simply too vast to put to use. It doesn't start from where we are today and identify the next few steps. It imagines new places where we might go, while paying little attention to how we might get there.

If the humanities writers want to contribute effectively to the environmental effort, broadly defined, they'll need to make their work more relevant. The place to do that, perhaps, is by speaking, not to legal scholars and lawyers directly, but instead to the environmental movement as a social cause.

Much of what humanists want to talk about bears on the question of overall goals: what should the environmental movement be seeking to accomplish, in terms of our ways of living in nature and the various cultural ways that we see nature and value it. In the shaping of environmental goals and in the crafting of an overall environmental critique of modern culture humanists can play significant roles. But their attempts to have influence are much weakened by the liberal, fragmented characteristics of the environmental movement itself. Environmental activists show no more interest in humanistic writings than do legal scholars. Individual environmentalists have posed sharp challenges to American culture and offered refined ideas about how we might inhabit the land. But the movement as a whole hardly pays attention. Its cultural criticism is weak. Its visions of a better way are dim. And the prospects of changing the movement are not great, given the competition among groups and their abiding concern for institutional stability.

Still, if change seems remote, the possibility of it does exist. If lawyers and legal scholars attend mostly to tools, they are at least accustomed to being told what goals to promote, whether

by clients, by Congress, or by the courts. The law itself can also change significantly, as it has over time. The liberal culture of today, so respectful of the autonomous individual human, so disdainful of nature and of organic wholes, could evolve over time to something much different, and the law could evolve along with it.

For a glimpse of such change, we can end with a few lines from a contemporary writer on nature and culture who has given a good deal of thought to law and legal culture—Wendell Berry of Kentucky. Berry's father was a lawyer, as is his brother and a nephew. Lawyers appear regularly in his fiction. One of Berry's explorations of law and law practice appears in his extended story, "Fidelity," which recounts the final illness of Burley Coulter, one of Berry's most beloved, eccentric fictional characters. Burley is taken to a hospital and stuck with tubes, yet his prognosis is bleak. His son and others want Burley to die at home, where he was born and lived, so they kidnap him in the middle of the night. A police detective is soon on their trail, trying to find the kidnapper and bring him to justice. Standing in the way, though, is elderly lawyer Wheeler Catlett, loosely modeled after Berry's own father and one of the keepers of the agrarian flame. Wheeler challenges the police detective, in the detective's claim that it is wrong to remove a patient from a hospital without the hospital's permission. How can that be, Wheeler asks? If a patient needs permission to get out of the hospital, then he's effectively in jail.

From here, the scene comes to its climax, offering a glimpse of a different moral order that law and lawyers might promote, the kind of organic, place-based moral order that Wendell Berry has proclaimed in his writing for decades.

> "Well, anyway," Detective Bode said, "all I know is that the law has been broken, and I am here to serve the law.
>
> "But, my dear boy, you don't eat or drink the law, or sit in the shade of it or warm yourself by it, or wear it, or have your being in it. The law exists only to serve."

“Serve what?”
“Why, all the many things that are above it. Love.”