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Cases and Materials on Environmental Law, by Oscar S. Gray

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BOOK REVIEWS

CASES AND MATERIALS ON ENVIRONMENTAL LAW. By Oscar S. Gray. Washington, D.C.: The Bureau of National Affairs, Inc. 1970. Pp. xx, 1252.¹ \$12.00.

As even the most occasional reader of newspapers and magazines must be aware, the environment — whatever that may be² — is at the moment tainted with fashionability and controversies. And we do have problems: poisoned air, poisoned water, poisoned tuna fish, urban sprawl, scarred landscapes, power failures, dying species foretelling our own mortality, and a sea still gong tormented but soon perhaps no longer dolphin torn.

From all sides come cries for help. Victims of cement dust,³ oil spills,⁴ and alleged illegal conspiracies that poison the air with exhaust fumes⁵ have turned to lawyers for support. Utilities required by law to render essential services are challenged by ecologists and landscape architects;⁶ highways are aborted by aesthetes;⁷ Walt Disney's ski resort in the High Sierras is attacked by more pedestrian types.⁸

Into these skirmishes the legal profession has rushed forth, all unprepared, to succor the oppressed. Apparently not content to see lawyers advance into battle armed only with the resurrected Rivers and Harbors Appropriations Act of 1899,⁹ Congress has responded with a flood of environmental legislation.¹⁰ The publishers have

¹ Exclusive of the August 1970 pocket supplement.

² If it has any meaning at all, the word "environment" is, like "being" or "time," probably too basic to admit of a satisfactory definition. "Environmental law," on the other hand, is probably too new a term to be defined; it is a label in search of a content, a new bottle waiting hopefully to be filled with old wine. The book under consideration certainly makes no attempt at a definition.

³ See, e.g., *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

⁴ See, e.g., *County of Santa Barbara v. Hickel*, 426 F.2d 164 (9th Cir. 1970).

⁵ See, e.g., *In re Multidistrict Private Civil Treble Damage Antitrust Litigation*, 1 ENVIRONMENT REP. 1643 (C.D. Cal. 1970).

⁶ See, e.g., *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

⁷ See, e.g., *Citizens Comm. v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970).

⁸ See, e.g., *Sierra Club v. Hickel*, 1 ENVIRONMENTAL L. REP. 20010 (N.D. Cal. 1969), *rev'd*, 433 F.2d 24 (9th Cir. 1970), *cert. granted sub nom.* *Sierra Club v. Morton*, 401 U.S. 907 (1971) (No. 939).

⁹ 33 U.S.C. §§ 407-15 (1964).

¹⁰ See, e.g., National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331-35, 4341-47 (Supp. V, 1970); Water and Environmental Quality Improvement Act of

armed us with the *Environment Reporter*¹¹ and the *Environmental Law Reporter*.¹² But no one has prepared a battle plan.

Perhaps when the hurly-burly's done, we shall find ourselves living in a better world. But before we lawyers can solve all the problems of the sublunar world, before those halcyon days come when every kingfisher fits comfortably into his environmental niche, it might just be necessary to discover exactly what our environmental problems are and how the "law" — whatever we mean by that — relates to them. It seems improbable that random litigation and hasty legislation will necessarily usher in a new Eden, unless some coherent purpose informs the growing profusion of statutes and decisions that constitute the body of "environmental law."¹³ What we need now, desperately, are texts and casebooks that will aid us to think rationally about the chaos we have created both in the environment and in the law.

It would therefore appear to be a cause for rejoicing that Professor Gray has compiled, and the Bureau of National Affairs (BNA) has published, a text entitled *Cases and Materials on Environmental Law*.¹⁴ But sadly, there is no reason to rejoice. This book is a monumental disappointment and a gross disservice to its readers. Obviously the publisher wished to have on its list the first casebook on environmental law, and in that it was successful. But unfortunately, the book is not usable.

If this "casebook" is designed primarily as a "teaching tool for law schools,"¹⁵ it will serve its intended function only if thrown at a recalcitrant student's head. If it "may serve the practicing attorney as an introductory handbook,"¹⁶ that will be one of the messiest introductions since Brer Fox shook hands with Tar Baby. If it "may also be of interest to conservation and design professionals and the administrators of affected operating activities,"¹⁷ their interest will only be frustrated.

1970, Pub. L. No. 91-224, 84 Stat. 91; Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

¹¹ The *Environment Reporter* first came out in late 1970.

¹² The *Environmental Law Reporter* first came out early in 1971.

¹³ See note 2 *supra*.

¹⁴ O. GRAY, *CASES AND MATERIALS ON ENVIRONMENTAL LAW* (1970).

¹⁵ *Id.* at v.

¹⁶ *Id.*

¹⁷ *Id.* "[A]dministrators of affected operating activities" is typical of Professor Gray's federal prose style. Would that the Government Printing Office but follow the example of Her Majesty's Stationary Office and publish an American counterpart to Sir Ernest Gower's *Plain Words*.

This undoubtedly is a harsh indictment. But *Cases and Materials on Environmental Law* is not merely another casebook; it is the first attempt to gather in one text the statutes and decisions that form the core of environmental law.¹⁸ If, as I fear, the mere existence of this tome will prevent others from preparing teaching materials and texts to aid us in comprehending — and ultimately in doing what we can to solve — our environmental problems, then the publisher who launched this preemptive strike has done us all a sad disservice.

The blame for this abortive work can be placed only on the editors at BNA. Professor Gray, seduced perhaps by a Xerox machine, has at the worst been guilty of preparing a casebook that is not very good. The onus must rest on the midwife who mutilated this compilation at its birth. Simply stated, the book is not edited. The currency of its materials shows the haste with which it was prepared. Its volume testifies to Professor Gray's labor. But its erroneous citations, typographical errors, and scrambled organization show that BNA is bringing to the information business those techniques of Commodore Vanderbilt which made the Penn Central what it is today.

This edition is so corrupt that whatever the book's virtues might have been, one cannot rely upon it for any purpose. Consider the following bloopers:

"This is a bill in equity . . . appealing from a decision on the board of appeals (board) of the town of Duxbury (town) denying the plaintiff a special permit to excavate and fill a portion of the board of appeals (board)"¹⁹

In what purports to be the full text opinion of *Crowther v. Seaborg*,²⁰ approximately 16 paragraphs are omitted without warn-

¹⁸ Other recent entries into this field include: J. BRECHER & M. NESTLE, ENVIRONMENTAL LAW HANDBOOK (1970); LAW AND THE ENVIRONMENT (M. Baldwin & J. Page eds. 1970); and J. SAX, DEFENDING THE ENVIRONMENT (1971). None of these, however, are intended to serve as casebooks.

¹⁹ O. GRAY, *supra* note 14, at 252. The quoted material is taken from a purported reprint of *MacGibbon v. Board of Appeals*, ___ Mass. ___, 255 N.E.2d 347 (1970). The mistake is corrected in the August 1970 pocket supplement at S-20. Perhaps out of shame the supplement does not contain a separate section of errata.

²⁰ 312 F. Supp. 1205 (D. Colo. 1970). *Crowther* is the kind of case on which one could base an entire course of environmental law. It contains, among other matters, one of the best lower court discussions on the questions of standing, justiciability, sovereign immunity, and scope of review, and facts such as only the Atomic Energy Commission or a black humorist could invent. It ends with the despairing conclusion that the amount of risk to be taken with the unknown dangers of nuclear radiation involves a "value judgment" which Congress reserved for "politically responsive institutions" like the Atomic Energy Commission. *Id.* at 1232.

ing, including the key discussion of the propriety under the Atomic Energy Commission's radiation protection standards of the defendant's plans to flare radioactive gas into the atmosphere.²¹

The opinion of the district court in *Citizens Committee v. Volpe*²² is cited to the wrong page of the official reporter, not only where the text of the opinion is set out in the casebook,²³ but also in the full text version of the court of appeals opinion.²⁴

Recurrent errors such as these tend to totally destroy the book's credibility. The sheer bulk of its material suggests that it is intended to serve as a compilation of source materials. But what use can be made of a corrupt edition of even the most complete sources?

Furthermore, the assembled materials, particularly the statutory materials, include a great deal of solid waste. Consider the following nuggets of information: the Secretary of the Interior is authorized to contract for medical attention for employees of the National Park Service;²⁵ the Convention on the Continental Shelf "shall, until 31 October 1958, be open for signature . . .";²⁶ when a plaque is awarded to an industrial organization or political subdivision under section 22 (f) of the Federal Water Pollution Control Act,²⁷ "[t]he President of the United States, the Governor of the appropriate State, the Speaker of the House of Representatives, and the President pro tempore of the Senate shall be notified of the award . . .";²⁸ the report required under paragraph 8 or [*sic*] Bureau of the Budget Circular No. A-82, Revised . . . will be required for the period July 1, 1968, to June 30, 1969."²⁹

That the editors have performed so badly does not, however, totally disguise the fact that the conception of the book is also unfortu-

²¹ The gas became radioactive when the Atomic Energy Commission exploded an atomic bomb at the bottom of a well. The idea was to see if such a technique would increase the amount of natural gas recoverable from the well. In *Crowther*, the plaintiffs brought suit, without success, to enjoin this experiment. Surely, somewhere there must be a shaggy dog story ending, ". . . so, if you ever want some radioactive natural gas . . ."

²² 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970).

²³ O. GRAY, *supra* note 14, at 930. The erroneous page citation given in the text is 302 F. Supp. 283 (S.D.N.Y. 1969). This error is corrected in the pocket supplement at S-87.

²⁴ O. GRAY, *supra* note 14, at 937. This error is not corrected in the pocket supplement.

²⁵ *Id.* at 56.

²⁶ *Id.* at 301.

²⁷ 33 U.S.C.A. § 1172(f)(3) (Supp. 1970).

²⁸ O. Gray, *supra* note 14, at 469-70.

²⁹ *Id.* at 1056.

nate. Its organization is chaotic. The stuff of lawsuits and human interest, the material which will mean the most to the average law student or lawyer, is all lumped at the back of the book starting on page 1079. All that precedes this page is a statutory never-never land. Perhaps the greatest obstacle to applying legal techniques to the solution of environmental problems is that the federal government is not yet organized in a manner that allows it to deal with these problems effectively.³⁰ Unfortunately, Professor Gray has elected to structure his book on the present organizational pattern of the federal government.

Chaos is not a description of chaos. Professor Gray's book tends to obscure, rather than isolate, the various doctrines and problems that may justify the treatment of environmental law as a separate area of study.³¹

For example, Professor Gray has included a section on standing to sue,³² but none of the cases set out in that section deal with environmental matters. *Scenic Hudson Preservation Conference v. FPC*,³³ the first case recognizing that associations of environmentalists can have standing to seek review of administrative decisions without showing an economic injury, is hidden away under the heading of "Federal Power Commission." *Citizens Committee v. Volpe*,³⁴ the leading case holding that environmental associations have similar

³⁰ The Nixon administration has, to its credit, begun to attack the worst of its structural problems by creating the Environmental Protection Agency. See Reorganization Plan No. 3, 1970 U.S. CODE CONG. & AD. NEWS 2996.

³¹ In addition to the confused organization of Professor Gray's book, there are some glaring omissions. For example, both the Clean Air Act, 42 U.S.C. § 1857(a)(3) (Supp. V, 1970), as amended, Pub. L. No. 91-604, 84 Stat. 1676 (1970), and the Federal Water Pollution Control Act, 33 U.S.C.A. § 1151(b) (Supp. 1970), place the primary responsibility for pollution control on the states. Yet Professor Gray's book hardly deals with state antipollution laws.

Moreover, except for a brief reference to the ninth amendment and *Griswold v. Connecticut*, 381 U.S. 479 (1965) (O. GRAY, *supra* note 14, at 1198-99), there is no mention made of the possible constitutional limitations on the government's power to degrade the environment. Cf. *Environmental Defense Fund v. Hoerner Waldorf Corp.*, 1 ENVIRONMENT REP. 1640 (D. Mont. 1970), where in dicta the court recognized "that each of us is constitutionally protected in our natural and personal state of life and health." *Id.* at 1641.

³² O. GRAY, *supra* note 14, at 347. In addition to citations to four law review articles, this section merely contains the following three opinions: *Flast v. Cohen*, 392 U.S. 83 (1968); *Association of Data Processing Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970).

³³ 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). The citation in the text, incidentally, is to 348 U.S. 941 (1966). O. GRAY, *supra* note 14, at 857.

³⁴ 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970).

standing under the Administrative Procedure Act,³⁵ is lumped under "Department of Transportation."

Although there is a section on the "public trust" doctrine,³⁶ it contains only a limited number of cases, which never mention the doctrine itself, and a brief summary of Professor Sax's article³⁷ that popularized the doctrine. The *one* case on which all public trust arguments must ultimately rely, *Illinois Central Railway Co., v. Illinois*,³⁸ is printed over 900 pages away with no cross-references to the doctrine which it fostered.

The problem of energy resource allocation underlies almost all environmental problems, pollution being almost invariably a function of energy consumption or production; but it would be monstrosly hard for a student to recognize that this problem brings a basic unity to the materials which have been randomly inserted into Professor Gray's book. Naturally, there is a section on pollution control in the book,³⁹ but it centers primarily on legislation that is either outdated⁴⁰ or ineffective.⁴¹ The most important federal antipollution statute (whatever its drafters' intent might have been), the Rivers and Harbors Appropriations Act of 1899,⁴² is catalogued un-

³⁵ 5 U.S.C. § 702 (Supp. V, 1970).

³⁶ O. GRAY, *supra* note 14, at 1160-69. The public trust doctrine assumes that certain property (wetlands or public parks) is owned by the government subject to a "trust" for the benefit of the public. The trust somehow limits the owner's power to dispose of or otherwise deal with the property. It should be apparent, but it certainly is not in Professor Gray's book, that any attempt to analyze such a doctrine, particularly in terms of the law of trusts, requires the mental gymnastics of a Zen Buddhist.

³⁷ Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

³⁸ 146 U.S. 387 (1892), *reprinted in* O. GRAY, *supra* note 14, at 224.

³⁹ O. GRAY, *supra* note 14, at 387.

⁴⁰ The Air Quality Act of 1967, 42 U.S.C. §§ 1857-57L (Supp. V, 1970), *amending* the Clean Air Act, 42 U.S.C. §§ 1857-71 (1964), *reprinted in* O. GRAY, *supra* note 14, at 392-417, was completely revised by the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, which were too recent to be included in either the text or the pocket supplement.

This is not the only instance where Professor Gray's attempt to catch the *Zeitgeist* on the wing has led him to emphasize ephemeral matters. The most striking examples of this are his reprinting of and reliance on the full district court opinions in *Sierra Club v. Hickel*, 1 ENVIRONMENTAL L. REP. 20010 (N.D. Cal. 1969), *rev'd*, 433 F.2d 24 (9th Cir. 1970), *cert. granted sub nom.* *Sierra Club v. Morton*, 401 U.S. 907 (1971) (No. 939), and *Zabel v. Tabb*, 296 F. Supp. 764 (M.D. Fla. 1969), *rev'd*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910. See O. GRAY, *supra* note 14, at 35, 137. Both decisions were reversed on appeal, and although the appellate court opinions are extremely important, the district court opinions now appear to be doomed to oblivion.

⁴¹ The Federal Water Pollution Control Act, 33 U.S.C.A. §§ 466-66g, 1151-60, 1171-75 (Supp. 1970), *reprinted in* O. GRAY, *supra* note 14, at 435-71.

⁴² 33 U.S.C. §§ 407-15 (1964).

der the Corps of Engineers; and the few "nuisance" cases dealing with pollution that Professor Gray reprints are buried at the back of the book.

And so it goes. Hopefully, into oblivion.

Of course, today's environmental concern may be largely a fad — what did ever happen to poverty law? — and so perhaps we should not regret this book too much. Maybe it will only serve as a tombstone for a great deal of irritating rhetoric. If it has not delayed the appearance of more serious works, no great harm has been done. Still one wants to bring it to the attention of those other faddists, the protectors of the consumer. Twelve dollars is a lot of money for a lead balloon, and it might hurt if it were dropped on one's foot.

PETER D. JUNGER*

WORLD TRADE AND THE LAW OF GATT. By John H. Jackson. Indianapolis: The Bobbs-Merrill Company, Inc. 1969. Pp. xxxv, 948. \$27.50.

"Anyone who reads GATT is likely to have his sanity impaired." Thus does Professor Jackson introduce his 948 page work on the General Agreement on Tariffs and Trade (GATT), quoting Senator Millikin at the 1951 Hearings held by the Senate Finance Committee.¹ If Senator Millikin is right, Professor Jackson has successfully played the role of psychiatrist, for his book goes a long way toward the restoration of rationality.

As those familiar with this agreement are aware, GATT is the ill-prepared understudy which was required to step before the international economic footlights when one of the scheduled stars, the International Trade Organization (ITO), expired before curtime. The ITO was originally designed as an international institution whose function would be to assure the orderly expansion of international trade. It was to take its place alongside two other international institutions, and the three together were to form a sort of "three sister" act for world economic affairs. The second sister was designed to deal with world monetary problems and became the International Monetary Fund. The third was intended to cope with capital development and was given the rather unwieldy title of In-

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