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# SYMPOSIUM: ENVIRONMENTAL SUSTAINABILITY

## LAW FOR SUSTAINABLE DEVELOPMENT: WORK CONTINUES ON THE RUBIK'S CUBE

J.B. Ruhl\*

Adding the word “sustainable” to proposals for just about anything is in vogue these days. The word has become shorthand for the claim that the proposed action or policy will advance economic, environmental, and equity interests, at all scales, in perpetuity.<sup>1</sup> The intended effect, of course, is to have everyone support the proposal or policy.

It would be nice if we could know that an action or policy actually would be sustainable in this euphoric sense in which the term has come to be used. But we cannot. In fact, it is quite simply and absolutely impossible for us to know that anything is this sustainable.<sup>2</sup> All we can know is when a particular course of action was unsustainable, as in the observed demise of a business or extinction of a species. So it is unlikely we will ever come up with the formula for the grand idea of “sustainable development,” which purports to elevate sustainability to national and global scales.<sup>3</sup>

So what is really going on when the phrase “sustainable development” echoes around the halls of the United Nations, Congress, a corporate boardroom, or an environmental advocacy group’s annual meeting? If everyone knows we do not know what it is, why use it? Is it window dressing? Is it a way of masking over problems? Is it a way of demanding more than is possible? Is it a way of promising more than is possible? It is all of these, which goes a long way toward explaining why it has become

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\* Matthews & Hawkins Professor of Property, The Florida State University College of Law, Tallahassee, Florida. I am thankful to Professor Irma Russell and the Tulsa Law Review for the opportunity to provide this introduction to what has turned out to be a significant contribution to the legal literature on sustainable development.

1. In prior work I have outlined in more detail this “five-dimensional” conception of sustainability. See J.B. Ruhl, *Sustainable Development: A Five-Dimensional Algorithm for Environmental Law*, 18 Stan. Envtl. L.J. 31 (1999).

2. See *id.* See also Gregory Todd Jones, *Sustainability, Complexity, and the Negotiation of Constraint*.

3. Rather than provide the background and citations on the origins and intent of sustainable development policy, I refer the reader to the main articles in this volume. They do a much better job of it than I could.

so powerful a policy concept.

To be sure, many people mean well when they slide the term into action and policy proposals and analyses. It is a way of signaling, "I care about advancing economic, environmental, and equity interests, at all scales, in perpetuity, and this action/proposal does/does not do so." But like an overplayed hit song, people are growing weary of hearing about sustainable development without seeing details and results.

Nevertheless, as much as I agree that the sustainable development concept has been overused, misused, and abused, I believe it would be a mistake to give up on the idea. It has, after all, focused people and policy on the need to take into account the interrelationship of economy, environment, and equity, at all scales, over intergenerational timeframes. Few concepts can claim that, so let us not abandon one that can.

Rather, realism must prevail over the giddy joy usually associated with claims of sustainability. Working on sustainable development will be difficult, tricky, and frustrating. Like the Rubik's cube, when it looks like one side of sustainable development is coming together, we may find the other sides are no further along or even more out of order. Unlike the Rubik's cube, however, there is no end point for sustainable development—we don't "solve" it. At best, we develop policy approaches that keep the cube in play.

Policy talk is cheap and lazy. It might put the sustainable development cube in play, but it will not keep it in play. To keep the cube in play, we will need economists, ecologists, and social scientists developing robust, empirically supported models of systems that apply reasonably well at multiple scales and over long timeframes. But most of all, what is needed will be hard law to apply. Law that is informed by the models. Real law. Law with details, standards, incentives, regulations, enforcement, and all the other stuff lawyers do.

Sustainable development is not there yet, but a growing number of lawyers are working hard on it. And not just in the form of academic meta-theory. Practicing lawyers recognize the need to move beyond policy talk and get into the details of law for sustainable development.<sup>4</sup> As the contributors to this volume evidence, many academic lawyers do as well.

This volume of the *Tulsa Law Review* assembles an impressive cast of authors who have produced a remarkable collection of works on the law of sustainable development. Far more than a technical review of statutes and regulations, this collection offers the full spectrum of coverage from theoretical frameworks to illuminating case studies. Moving from the general to the specific, it is my pleasure to introduce the contributions.

A pair of articles sets the stage by examining the *language* and *complexity* of sustainable development. Emphasizing the need for cross-disciplinary dialogue, Professor John Mixon's *Linguistic Silos as Barriers to Sustainable Environment* examines how the specialized languages of the different disciplines could impede the translation of economic, ecological, and social models of sustainable development into law. Indeed, perhaps the most difficult task ahead for sustainable development will be

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4. See e.g. 19 Nat. Resources & Env't. 3 (Fall 2004); 12 Nat. Resources & Env't. 83 (Fall 1997) (symposia on sustainable development).

putting it into actual statutory text in a way that accurately captures the scientific input and communicates the same to agencies, courts, and citizens. His focus is on the citizens, for sustainable development law ultimately has to be more than law—it must convince the people that the planet is at stake and that they must *want* to save it, not that they must be coerced into doing so.

Yet as Professor Gregory Todd Jones explains in *Sustainability, Complexity, and the Negotiation of Constraint*, the problem is that sustainable development is inherently complex. He means more than it is complicated. Rather, he means complex in the sense used in complex adaptive systems theory—the study of dynamic systems made up of large numbers of interacting parts learning from and adapting to each other. As in a society striving to achieve sustainability. Any lawyer hot to go make sustainable development happen should take a cold shower in complex adaptive systems theory. The message is it is going to be hard, very hard. Harder still will be taking translating that complexity into text agencies, courts, and citizens can apply without losing that message.

Next, another pair of articles grounds the language and complexity themes in the practical interdisciplinary context of economics and ecology. The volume is fortunate to have a contribution from Professor Christopher Lant, a geographer, to illustrate the importance of contextual models. In *Natural Resource Sustainability from the Geographical Side of Ecological Economics*, Lant explores the discipline of ecological economics and pushes it into sustainable development's spatial and temporal dimensions, which are the domains of geography. To build truly useful models for law and policy to use, sustainable development scientists must work in all five of the dimensions. Sustainable development lawyers must be well versed in how those models work as well. Lant's work thus is a critical read for those interested in busting out of Nixon's "linguistic silos" to shape law for sustainable development.

Taking this theme into account, in *The Hand is Invisible, Nature Knows Best, and Justice is Blind: Markets, Ecosystems, Legal Instrumentalism, and the Natural Law of Systems*, Professor Bruce Pardy argues that law cannot make sustainable development happen, but rather law must learn from its underlying subject matter of dynamic markets and ecosystems. Sustainable development rests at the convergence of these dynamic systems. As such, sustainable development cannot be grounded in the instrumentalist ideal of law as a means to an end, because there is no "end" to a dynamic system. Pardy offers his vision of "market-protecting" and "ecosystem-protecting" laws built around a conception of law itself as a dynamic system.

From here, the volume moves to the level of legal detail. Providing an overarching view, in *Navigating the U.S. Transition to Sustainability: Matching National Governance Challenges with Appropriate Legal Tools*, Professor John Dernbach examines sustainable development's current state of play in United States law. One of the first legal academics to slog into the details of sustainable development law, Dernbach remains a leader in the field.<sup>5</sup> His assessment, unfortunately, is that our nation is lagging despite its avowed commitment to sustainable development. Progress,

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5. See e.g. *Agenda for a Sustainable America* (John C. Dernbach ed., ELI Press 2009); *Stumbling Toward Sustainability* (John C. Dernbach ed., ELI Press 2002).

moreover, has been largely “bottom up,” motivated by state and local initiatives while Congress and the White House, putting government ahead of governance, fail to put sustainable development on the national agenda in any meaningful way. Professor Dernbach’s review is thus a sobering but necessary starting point for tapping into the remaining contributions to the volume, which cover specific legal domains and case studies.

A trio of articles next examines sustainable development law in three large contexts—energy, federal lands, and biodiversity. In *The Sustainability Principle in Sustainable Energy*, Professor Irma Russell and students in her Spring 2008 International Environmental Law Seminar pitch sustainable energy as a cross-cutting policy necessary for sustainable development to keep its five-dimensional project viable. Indeed, energy is a key player in working the sustainable development cube—we cannot live without it, but we seem to be having difficulty living with it. Getting more of it, therefore, can be good in some respects and bad in others, depending on how much “more” and what form “it” is. With “drill baby drill” still fresh in the media, albeit perhaps less so in policy, Russell and her students explore a vital component to the law of sustainable development. Consistent with the complexity theme, they counsel the need for a careful, methodical approach to balancing the many interests gravitating around sustainable energy policy.

The federal public lands will play an important role in our nation’s sustainable energy policy, but they go well beyond contributing to energy sources. Rather, as Professor Robert Glicksman explores in *Sustainable Federal Land Management: Protecting Ecological Integrity and Preserving Environmental Principal*, the federal lands are charged with “multiple use” and “sustained yield” mandates which make them at the same time amenable to incorporating sustainable development ideals, but thus just as amenable to suffering from sustainable development’s lack of detail and direction. Glicksman offers a detailed history of the “sustainability” law of federal public lands, which as he explains has tilted toward a commodity production and resource extraction orientation that has short-changed the ecological protection component of sustainable development. His vision for how the federal public land management agencies can truly fulfill the goal of intergenerational land stewardship involves a complete transformation of their mission from managers to natural resource trustees responsible for protecting the “ecological principal” of the federal public lands pursuant to specific fiduciary standards.

Closing out this trio, the interdisciplinary team of Anna Moritz, Kassie Siegel, Brendan Cummings, and law professor William Rodgers, Jr., take on the topic of biodiversity. In *Biodiversity Baking and Boiling: Endangered Species Act Turning down the Heat*, they make the compelling and indisputable case that biodiversity is a necessary ingredient to sustainable development, but that it is on the decline due to neglect from our legal system. Focusing on the Endangered Species Act (ESA) as the legal instrument and climate change as the policy target, they offer prescriptions for reversing this trend. Like other commentators that have addressed the intersection of the ESA and climate change, they grapple with the question of whether and how the statute can be used to regulate sources of greenhouse gas emissions. They take an aggressive stance, arguing that the ESA can easily and appropriately be used to force sources to reduce emissions,

though they acknowledge that others, myself included, are more skeptical of the statute's legal and practical capacity to impose such mandates.<sup>6</sup> That debate is only one of many that will have to be worked out as the law of sustainable development begins to coalesce in hard law to apply.

Finally, a set of case studies takes the law of sustainable development to ground zero. One question sustainable energy policy will raise is where all the carbon dioxide is going. One answer is carbon sequestration. One method of sequestration, explored by Professor Alex Klass and Sara E. Bergan in *Carbon Sequestration and Sustainability*, is known as underground geological sequestration—basically, capturing carbon dioxide emissions from sources and pumping them into the ground. Consistent with Russell's depiction of sustainable energy policy as a complex set of trade-offs, Klass and Bergan argue that this method does not support sustainability in the long run, because it may facilitate further reliance on fossil fuels, but that it may provide an important short-term bridge for reducing emissions during the period in which, with hoped-for political and polity will, we wean off of fossil fuels.

It is unlikely carbon dioxide will ever be pumped into the Everglades, but plenty else has been done to render this ecological marvel unsustainable. As Professor Fred Light covers in *Beyond the Myth of Everglades Settlement: The Need for a Sustainability Jurisprudence*, now we are trying to undo our Everglades transgressions and return Florida's "river of grass" system to sustainability. Billions of dollars later, not much progress has been made. To be sure, as Light explains, the Everglades restoration project trumpets sustainability and wraps it in process designed around "adaptive management." But no real "sustainability jurisprudence" has been built, and thus disputes over how to proceed—over how to be sustainable—have wallowed in the mud (no pun intended). Light's coverage of the Everglades thus speaks volumes to the need to go beyond policy platitudes and planning notebooks, as well as beyond just throwing money around, and to build a true law of sustainable development.

If the Everglades case study does not convince you of that, then Professor Oliver Houck's two case studies from far beyond should move you over the line. In *A Case of Sustainable Development: The River God and the Forest at the End of the World*, Houck entertains and teaches with two stories of profit and peril, one from Greece and the other from Chile. Both are stories of how countries with far less economic base than the United States will struggle over the balance to be struck with sustainable development. As he puts it, if we have trouble forgoing short-term profit to put sustainability in motion, imagine how much harder the choices between short term and long term will be for less prosperous countries. Yet in both cases, nations with more to lose economically managed to muster some political will and question how well one form of green protected the other. A master storyteller, I will let his words tell the tales of the river and the forest.

Reading through these authors' marvelous contributions has been a privilege for me. I hope you will treat yourself to the same. If you are like me, you will come away with mixed feelings about sustainable development. Where is it going? Is this the best

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6. See J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 B.U. L. Rev. 1 (2008).

concept around which to build policy? Is there any better? But then, given the subject matter of economy, ecology, equity, space, and time, these are questions that will never rest. I am encouraged that minds like these are working on them.