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## Teaching Intrapersonal Intelligence as a Lawyering Skill: Introducing Values Systems into the Environmental Law Syllabus

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# Teaching Intrapersonal Intelligence as a Lawyering Skill: Introducing Values Systems into the Environmental Law Syllabus

MICHAEL BURGER\*

## I. INTRODUCTION

The ranges and types of problems with traditional law school curricula, pedagogies, and learning cultures are well-rehearsed, and have been framed, narrated, and analyzed in a number of prominent venues, along with suggested improvements and proposals for systemic reform.<sup>1</sup> This Essay addresses one aspect of the ongoing and pervasive critique: the need to develop in law students the diverse intellectual competencies that the practice of law requires. Working within the framework of Professor Howard Gardner's theory of multiple intelligences, I argue that intrapersonal intelligence and the self-reflexive analytic process it invokes are important tools in the practicing lawyer's toolbox, and describe an in-class/take-home/online exercise specifically designed to challenge and teach to students' intrapersonal intelligence (the "Values Systems Exercise"). The Values Systems Exercise pairs nicely with intrapersonal intelligence—a capacity for self-reflection often overlooked in law school—offering the opportunity to get students thinking about how their own predispositions influence their legal interpretations and policy prescriptions. The exercise is conducted during and

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\* Associate Professor, Roger Williams University School of Law. With thanks to Keith Hirokawa, Vanessa Merton, Jamie Baker Roskie, and all of the participants in the *Practically Grounded* conference.

1. See, e.g., WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (commonly referred to as the Carnegie Report); ROY STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007); A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992), available at [http://www.americanbar.org/groups/legal\\_education/publications/maccrate.html](http://www.americanbar.org/groups/legal_education/publications/maccrate.html) [hereinafter MACCRATE REPORT]; Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515 (2007).

between the first two classes of the semester in a survey course in Environmental Law.

Part II of this Essay begins by defining intrapersonal intelligence and identifying its salience to legal education and practice. It then introduces the andragogical problems the Values Systems Exercise attempts to answer. These include problems particular to environmental law as a subject—establishing a conceptual framework and common vocabulary for the perspectives offered by economics, ecology, and ethics (the values systems in the Values Systems Exercise)—as well as problems common to legal education as a whole, such as accounting for a diversity of student goals and learning styles, and creating a classroom dynamic conducive to productive discussion. Part III describes the Exercise in detail, addressing issues of design and offering examples of its outcomes. Part IV concludes with some suggestions of ways to improve the exercise in future iterations.

## II. PROBLEMS OF COURSE DESIGN AND INTENTION

The Values Systems Exercise is intended to address a number of pragmatic difficulties that present themselves at the outset of an Environmental Law survey course. Some of these difficulties are inherent in the material, while others derive from my own still-emerging, hopefully ever-evolving, approach to teaching it. First on the list: coping with the legal and technical complexity of environmental law as a subject and a practice, and the strain it places on students' expectations. Students coming into Environmental Law often expect one thing—a class on how to save Nature—and quickly learn that they are to engage with another; it strikes me as important that their expectations match reality. Second: establishing the classroom dynamic. From the first class of the semester, I want to engage with the range of students in the classroom, and with their diverging motivations, interests, and rationales for taking my class. Third: introducing the foundational material for Environmental Law, particularly the frameworks and vocabularies of economics, ecology, and

ethics. These frameworks and vocabularies—what I refer to here as “value systems”<sup>2</sup>—inform just about every classroom conversation that will follow. Fourth: integrating multiple intelligences theory into the course and classroom design. The sections that follow discuss each of these in greater detail, beginning with the overarching goal of incorporating multiple intelligences theory into a doctrinal classroom setting and teaching intrapersonal intelligence.

### A. Teaching Intrapersonal Intelligence

Howard Gardner, a professor of education at Harvard, introduced his theory of multiple intelligences in 1983, listing seven distinct intelligences that characterize human thought and action: mathematical-logical, linguistic, interpersonal, intrapersonal, musical, spatial, and kinesthetic.<sup>3</sup> He has since added one (moral intelligence), and considered the possibility of yet another (spiritual intelligence).<sup>4</sup> Gardner’s theory of multiple intelligences posits that human intelligence is composed of a number of independent faculties or abilities, each of which entails a set of skills that enable the individual to solve real-world problems.<sup>5</sup> The theory was developed in direct response to the traditional emphasis on logical and linguistic intelligence captured by early psychometric measurements such as IQ tests.<sup>6</sup>

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2. I am thankful to Mr. Lawrence Stanley, a lecturer at Brown University and a former teacher of mine, who pointed out to me that in talking about economic, ecological and ethical approaches to environmental law and policymaking I am really talking about systems of values, rather than more individual values. I am also again thankful to Professor Roskie, this time for distributing an excerpt from *The Lawyer’s Guide to Balancing Life & Work: Taking the Stress Out of Success*; the excerpt defines values as “human qualities we practice or admire.” See GEORGE W. KAUFMAN, *THE LAWYER’S GUIDE TO BALANCING LIFE & WORK: TAKING THE STRESS OUT OF SUCCESS* 161 (2d ed. 2006). It was this excerpt that finally crystallized for me the importance of distinguishing between values and values systems.

3. See generally HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* 73-237 (1983).

4. See generally HOWARD GARDNER, *INTELLIGENCE REFRAMED: MULTIPLE INTELLIGENCES FOR THE 21<sup>ST</sup> CENTURY* 47-78 (1999).

5. See GARDNER, *FRAMES OF MIND*, *supra* note 3, at 60.

6. See, e.g., GARDNER, *INTELLIGENCE REFRAMED*, *supra* note 4, at 7-25.

The analogy between IQ tests and the Langdellian case method and the Socratic style of teaching that predominate in law school classrooms underlies, or is implicit in, much of what has been written to date on the role of multiple intelligences theory in legal education.<sup>7</sup> However, much of this scholarship has concentrated on clinics and simulation-based “skills” courses where the various challenges presented to, and diverse roles required of, the practicing lawyer are a primary subject. The incorporation of multiple intelligences theory into these settings makes intuitive sense. The potential role for multiple intelligences is less easily discernible, however, in the doctrinal context. Unsurprisingly then, teaching to multiple intelligences as a means of furthering students’ professional education in the doctrinal setting appears to have received less attention, both by teachers and scholars.<sup>8</sup>

As the classroom experimentation described by the participants in this conference makes clear, there is no real reason to maintain this dichotomy, perhaps especially in regards to Environmental Law and Land Use Law. As documented elsewhere in this volume, there are a variety of alternative approaches to teaching these substantive courses one can—and should—take, many of which focus on developing practical skills and diverse competencies. Yet, teaching doctrine does pose a distinct challenge. As Professor Peggy Cooper Davis explains, a traditional doctrinal classroom “does not usually address, and is not often the best setting in which to address, the work of fact-

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7. See, e.g., Peggy Cooper Davis, *Slay the Three-Headed Demon!*, 43 HARV. C.R.-C.L. L. REV. 619 (2008); Peggy Cooper Davis & Aderson B. Francois, *Thinking Like a Lawyer*, 81 N.D. L. REV. 795 (2005); Kirsten A. Dauphinais, *Valuing and Nurturing Multiple Intelligences in Legal Education: A Paradigm Shift*, 11 WASH. & LEE RACE & ETHNIC ANC. L.J. 1 (2005); Angela Olivia Burton, *Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm into the Clinical Setting*, 11 CLINICAL L. REV. 15 (2004); Ian Weinstein, *Testing Multiple Intelligences: Comparing Evaluation by Simulation and Written Exam*, 8 CLINICAL L. REV. 247, 257 (2001).

8. But see Davis, *Slay the Three-Headed Demon!*, *supra* note 7, at 623. For an important early articulation of the need to diversify teaching in doctrinal settings, see Sarah Berger et al., *“HEY! THERE’S LADIES HERE!!!”*, 73 N.Y.U. L. REV. 1022 (1998); Sturm & Guinier, *The Law School Matrix*, *supra* note 1, offers a systemic critique that reaches into doctrinal classrooms, as well as professional offices.

development or persuasion. Nor is it the ideal setting for acquiring the judgment that should be brought to understanding, shaping, furthering, or frustrating a client's desires."<sup>9</sup> How, then, does one overcome this challenge? Professor Davis gives sage counsel: "Socratic discourse should acknowledge the psychological, rhetorical, and cultural dimensions of doctrinal interpretation and consider interpretation in the contexts of counseling and advocacy as well as in the context of judicial decision-making."<sup>10</sup>

One avenue by which to reach the "psychological, rhetorical and cultural dimensions" is to teach to students' intrapersonal intelligence. "Intrapersonal intelligence refers to the ability to distinguish and respond to our own feelings, needs, desires and motivations,"<sup>11</sup> and to build accurate mental models of ourselves, which we then use when making important personal and professional problem-solving decisions.<sup>12</sup> According to one apt characterization: "Intrapersonal intelligence, the development of self-knowledge, is the ability or aptitude to access one's own feelings and draw upon them as a means of understanding and guiding one's behavior, and by example to gain insight into the behavior of others."<sup>13</sup> There can be little question that "[t]he analysis of doctrine is deeper if one has the intrapersonal intelligence to grasp multiple perspectives."<sup>14</sup> Beyond the benefits of empathic projection, however, I would posit that a reflexive awareness of values systems will help one better comprehend what is going on in judicial opinions and policy decisions, and that a self-reflexive awareness of one's own values systems will further sharpen one's interpretive and analytic capacities.<sup>15</sup>

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9. See Davis, *Slay the Three-Headed Demon!*, *supra* note 7, at 621.

10. *Id.* at 623.

11. Burton, *supra* note 7, at 39.

12. See *id.*; GARDNER, INTELLIGENCE REFRAMED, *supra* note 4, at 42-43.

13. Weinstein, *supra* note 7, at 257.

14. Berger et al., *supra* note 8, at 1062.

15. This point is beyond the scope of this Essay, though I look forward to returning to it in depth in the future. One useful starting point for this line of inquiry is GEORGE LAKOFF, *THE POLITICAL MIND: WHY YOU CAN'T UNDERSTAND 21ST-CENTURY AMERICAN POLITICS WITH AN 18TH CENTURY BRAIN* (2008).

Intrapersonal intelligence also plays an important role in other aspects of professional life. According to Gardner, self-knowledge is at the core of each person's ability to control his or her own behavior.<sup>16</sup> Self-discipline, self-regulation, and enduring motivation through years of sustained effort are often required to succeed in a single environmental law case, never mind a whole career. In addition, self-knowledge informs the exercise of professional judgment that is central to being a lawyer,<sup>17</sup> as well as the ethical, moral and personal judgments that constitute one's professional identity.<sup>18</sup> Finally, the understanding of, and empathizing with, others' points-of-view enabled by a functioning intrapersonal intelligence may improve an attorney's performance, both as a counselor interacting with a client and as an advocate targeting a number of different audiences in any variety of different settings.

Comprehended and employed in this way, teaching to students' intrapersonal intelligence fits well with the larger movement toward legal education reform. The MacCrate Report, for instance, identifies ten essential lawyering skills,<sup>19</sup> and intrapersonal intelligence is relevant to each one. Even more than skills-development, though, intrapersonal intelligence resonates with the essential values to the legal profession identified in the report: the provision of competent representation; striving to promote justice, fairness and morality; and striving to improve the profession.<sup>20</sup> Intrapersonal intelligence strengthens an attorney's ability to embody each of these values. It does so by increasing competence; informing, or perhaps even defining the terms of, one's quest for justice,

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16. Weinstein, *supra* note 7.

17. See Burton, *supra* note 7, at 39; Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 550 (1994).

18. See, e.g., Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL'Y & L. 1173 (1999).

19. See MACCRATE REPORT, *supra* note 1, at 138-40 (identifying skills as problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and ADR procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas).

20. *Id.* at 140-41.

fairness and morality; and empowering one to understand the limits of the profession as it is and to imagine new possibilities.

Taking a broader approach, the Carnegie Report<sup>21</sup> names three apprenticeships that should contribute to professional education: (1) the cognitive apprenticeship, which focuses on academic knowledge of the profession and analytical thinking; (2) the practice apprenticeship, including the practical skills shared by competent professionals; and (3) the identity apprenticeship, encompassing the purposes, values, roles, and responsibilities of the profession.<sup>22</sup> By and large, according to the report, law schools fail to focus on the development of the “ethical and social dimensions of the profession,”<sup>23</sup> and thereby short-change law students of an appropriate identity apprenticeship. Accordingly, the Carnegie Report calls for a “theoretical and practical emphasis on the inculcation of the identity, values, and dispositions consonant with the fundamental purposes of the legal profession.”<sup>24</sup> Although intrapersonal intelligence is an important component of the cognitive and practice apprenticeships, it is most obviously and indisputably a component of this identity apprenticeship.

## **B. Dealing with the Difficulties of Environmental Law**

Environmental law is hard to teach, hard to learn, and hard to practice. It is difficult to teach, in part, due to the problems of student perception. It seems Environmental Law suffers from the broad-but-shallow environmentalism that characterizes popular sentiment in this country. Students enter expecting to learn about saving polar bears, keeping rivers wild and clean, and the solutions to global warming. They can, should, and hopefully often do get all of that, but they are also confronted with the far more densely layered “stuff” of environmental law: an extraordinarily complex regulatory system defined by elaborate and self-contradictory statutes. Environmental law is a rapidly and ever-changing universe of legislation, rulemaking,

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21. SULLIVAN ET AL., *supra* note 1.

22. *Id.* at 27-28.

23. *Id.* at 188.

24. *Id.* at 194.



adjudicatory decisions, policy statements, interpretive rules, guidance documents, technical studies, and so on. The reality is one of constant technological, political and regulatory innovations, and the need to both respond to and create them.<sup>25</sup> Students quickly come to realize that the subject is subtle, technical, and most likely different in kind from what they had in mind when they registered for the class a couple months earlier.

The density and complexity of environmental law is unavoidable; it is a substantively difficult area of law. In addition, it suffers from a high degree of fragmentation, perhaps bordering on incoherence. Given the ways in which environmental law is taking shape I often wonder whether it is accurate, in talking about anything other than the Public Trust doctrine, to refer to environmental law as a “doctrinal” subject.<sup>26</sup> At the same time, the course necessarily involves the integration of several core doctrinal subjects, including property, torts, constitutional law, and administrative law. In sum, environmental law is a hybrid and an amalgamation, messy and diffuse.

Beyond the classroom, the practice of environmental law requires much from the law school graduates who are fortunate enough to find themselves in the field. Environmental lawyers must possess an interdisciplinary knowledge that incorporates ecological sciences, risk assessment and management, economic

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25. This state of affairs is similar to that confronting Land Use law. See Patricia Salkin & John Nolon, *Practically Grounded: Convergence of Land Use Law Pedagogy and Best Practices*, 60 J. LEGAL EDUC. 519 (2011). The overlap between environmental law and land use, of course, is inescapable, as land use decisions directly affect air quality, water quality, preservation of endangered species and biodiversity, as well as quality of life and open space. See, e.g., John Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365 (2002). In addition, siting decisions for conventional and renewable energy facilities cut across land use and environmental law, engaging local zoning laws as well as federal environmental statutes. See, e.g., Patricia Salkin & Ashira Ostrow, *Cooperative Federalism and Wind: A New framework for Achieving Sustainability*, 37 HOFSTRA L. REV. 1049 (2009); Michael Burger, *Consistency Conflicts and Federalism Choice: Marine Spatial Planning Beyond the States’ Territorial Seas*, 41 ENVTL. L. REP. (forthcoming July 2011).

26. See generally, Emerson B. Tiller & Frank B. Cross, *What is Legal Doctrine?*, 100 NW. U. L. REV. 517 (2006); Todd S. Aagard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221 (2010).

theory, ethics, political science, history, moral philosophy, and literature, or, if not an actual knowledge, at least the capacity to quickly accumulate, absorb, and work with information flowing from these knowledge areas. They must be able to locate, create, use, and otherwise work with technical documents of all shapes and sizes, with local codes as well as federal regulatory regimes, and with case law emanating up and down the jurisdictional hierarchy. Working in an area of public law, environmental lawyers must also possess the ability to operate in shifting political coalitions, and an abiding awareness of ethics and professional identity.

For me, this last issue is paramount. Environmental law is an area where underlying value systems matter. The things that are at stake in environmental cases are public and natural goods – places, human health, ecological health, wildlife, ecosystems, and the emotional, philosophical, religious, spiritual, and/or communal experience of what I will, for lack of a better term, call Nature. This is why students come in to class thinking about polar bears, wild rivers, and global warming. The complexity and difficulty of the field should not detract from discussion of these subjects; they should be the context in which such discussions take place.

### **C. Teaching to the Range: Capturing Students' Passion, Capturing Students' Passing Interest**

I divide my Environmental Law class into two populations – “aspiring enviros,” and future divorce attorneys.<sup>27</sup> Not everyone I classify an “aspiring enviro” wants to be a staff attorney at a non-profit environmental group; some want to do government work, represent real estate developers or extractive industry, or enter the green economy on the business side. What links them together is that all of them envision a career requiring a working knowledge of environmental law. Similarly, only a few, if any, of the students I call “future divorce attorneys” want to or will practice matrimonial or family law. The point is that they do not

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27. Some may read either or both of these characterizations as in one sense or another disparaging. Please take my word that neither is intended in that way.

imagine practicing environmental law, and they quite possibly plan to practice some form of private law that bears little-to-no resemblance to environmental law. The challenge is to discover how to engage both populations at once, as well as those between them on the spectrum, and to help each student realize his or her own learning goals for the course.

*Aspiring Enviros:* It is an accurate-enough generalization that people who come to law school to study environmental law most often believe themselves to be motivated by public interest and preservationist passions.<sup>28</sup> As an environmental law professor, I believe that I owe those students a kind of special duty; I want to support their passion, and feed those primary instincts that brought them to law school.<sup>29</sup> As adults who have made the choice to suffer through these three years, they deserve attention to both the motivations and interests that brought them here and the development of a positive vision for what life in the profession might involve.<sup>30</sup> This approach runs counter to the conventional doctrinal course, “with its emphasis on the objectivity and neutrality of law and its insistence on training law students to distance themselves from their emotions.”<sup>31</sup> But the conventional course is too passive; all law students want to have their passions fed, and for a subset of law students this is the place to accomplish that.

*Future Divorce Lawyers:* As mentioned above, many students are drawn to register for environmental law because of the general allure of the subject, viewed from a distance. The issues are of obvious importance, are the subject of a good amount of media attention, and, after all, everybody cares at least a little about the environment. These students require a slightly different set of prompts to get them to the point of caring enough to learn.

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28. I recognize this may be different now from when I attended, in that the environmental law field has a much larger corporate presence, and the increasing consciousness of energy and other fields’ intersections has broadened the field and the roles lawyers may profitably serve it.

29. See generally Deborah Maranville, *Infusing Passion and Context into the Traditional Law School Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51 (2001).

30. *Id.* at 52.

31. *Id.* at 53.

### D. Contextualizing Environmental Law

The final problem the Values Systems Exercise attempts to address is establishing an intellectual setting for the class. This problem actually involves achieving three different goals: (1) providing a conceptual framework for the values systems that inform environmental law; (2) developing a common vocabulary for ongoing discussions about these values systems and the ways in which they manifest in judicial opinions and policymaking; and (3) creating a classroom dynamic in which students feel free to raise questions and concerns about, or share their own insights regarding, the role values systems play.

In regards to the first two goals, many if not all Environmental Law casebooks include somewhere near the beginning of the book a chapter, or at least a section, that provides an introduction to economics, ecology, and ethics.<sup>32</sup> Many of these casebooks excerpt from or cite a similar body of literature.<sup>33</sup> These values systems provide a way of

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32. See, e.g., J.B. RUHL ET AL., *THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW* 14-30 (2d ed. 2010) (discussing scientific uncertainty, market failures, mismatched scales, conflicting values and environmental justice as “drivers of environmental conflicts”); ZYGMUNT PLATER, *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 3-31 (4th ed. 2010) (discussing the ethical and ecological bases of the “environmental perspective” and the “problem of the commons” as “basic themes in environmentalism”); DAVID DRIESEN ET AL., *ENVIRONMENTAL LAW: A CONCEPTUAL AND FUNCTIONAL APPROACH* 108-114 (2d ed. 2011) (discussing “ecology, rights, and ethics,” “human health and prevention,” “economic efficiency,” “equity and environmental justice,” and “sustainable development,” in response to the question, “what should the goals of environmental law be?”); ROBERT PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 8-52 (6th ed. 2009) (addressing “environmental values and policies” by providing an overview of “sources and values” of “American environmentalism,” introduction to economics approaches including cost-benefit analysis and valuing ecosystems services, readings on ecological science, and approach to common pool resources); ROBERT GLICKSMAN ET AL., *ENVIRONMENTAL PROTECTION, LAW & POLICY* 3-27 (5th ed. 2007) (focusing on overlap and challenges posed as between ecology, economics and ethics).

33. A necessarily partial bibliography of this material follows: ALDO LEOPOLD, *A SAND COUNTY ALMANAC: AND SKETCHES HERE AND THERE* (1949); JOHN MUIR, *THE MOUNTAINS OF CALIFORNIA* (1st ed. 1893), *available at* [http://www.yosemite.ca.us/john\\_muir\\_writings/the\\_mountains\\_of\\_california/](http://www.yosemite.ca.us/john_muir_writings/the_mountains_of_california/); RODERICK NASH, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* 55-87 (1989); CHRISTOPHER STONE, *SHOULD TREES HAVE STANDING? AND OTHER ESSAYS ON LAWS, MORALS AND THE ENVIRONMENT* (1996); PETER SINGER, *ANIMAL*

understanding both sources of and solutions to environmental problems. Thus, for instance, one might understand the cause of overgrazing to be an economic or market failure, along the lines of Garrett Hardin's "Tragedy of the Commons." Alternatively, one might attribute overgrazing to ethical failures, such as an individual's or society's focus on the profit motive and derogation of the notion of mutuality, or else on the propagation of an idea of property as a form of capture rather than a responsibility for care.<sup>34</sup> Depending on what one considers the source of the problem, different solutions will emerge. Government may correct market failures through market systems or regulation. Society may correct ethical failures through education, or substantiation of the principles of deliberative democracy.

This foundational subject matter tends toward abstraction, and it risks putting off students without an environmental studies or social sciences background. To address my third concern, classroom dynamics, these theories and vocabularies require a concrete context. My instinct was to take a situation

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LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS (1975); BILL DEVALL & GEORGE SESSIONS, *DEEP ECOLOGY: LIVING AS IF NATURE MATTERED* (2d ed. 1985); ROBERT D. BULLARD, *THE QUEST FOR ENVIRONMENTAL JUSTICE, HUMAN RIGHTS AND THE POLITICS OF POLLUTION* (2005); Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Setting or Market Dynamics?*, 103 YALE L.J. 1383 (1994). RACHEL CARSON, *SILENT SPRING* (1962); Eric Freyfogle, *A Sand County Almanac at 50: Leopold in the New Century*, 30 ENVTL. L. REP. 10058 (2000); G. TYLER MILLER, *LIVING IN THE ENVIRONMENT: PRINCIPLES, CONNECTIONS & SOLUTIONS* (11th ed. 1999); Jonathan B. Wiener, *Beyond the Balance of Nature: Environmental Law Faces the New Ecology*, 7 DUKE ENVTL. L. & POL'Y F. 1 (1996); Daniel B. Botkin, *Adjusting Law to Nature's Discordant Harmonies*, 7 DUKE ENVTL. L. & POL'Y F. 25 (1996); Fred P. Bosselman & A. Dan Tarlock, *The Influence of Ecological Science on American Law: An Introduction*, 69 CHI.-KENT L. REV. 847 (1994); Talbot Page, *A Generic View of Toxic Chemicals & Similar Risks*, 7 Ecology L.Q. 207 (1978). WILLIAM F. BAXTER, *PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION* (1974); Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243(1968), available at <http://www.dieoff.org/page95.htm>; TERRY L. ANDERSON & DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM* (Palgrave MacMillan rev. ed. 2001) (1991); R. KERRY TURNER, DAVID PEARCE & IAN BATEMAN, *ENVIRONMENTAL ECONOMICS: AN ELEMENTARY INTRODUCTION* (1993); FRANK ACKERMAN & LIZA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (2005); Carol Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1 (1991).

34. See generally Keith Hirokawa, *Property as Capture and Care*, 74 ALB. L. REV. 175 (2010).

from real-life and acquaint students with actual institutions and actors, the types of players who would populate the cases they would be reading. I also wanted to begin to give students a sense of what some environmental lawyers do, such as developing proposals for regulatory reform, and to challenge them to ground their “book learning” in some practical application.

### III. THE VALUES SYSTEMS EXERCISE

This Part describes the Values Systems Exercise, as designed and executed in the fall 2010 semester. It includes explanations for the choices I made, several samples of the student work that resulted, and some reflection on how to advance the exercise in future incarnations.

#### A. Casebook/Substantive Material

As noted above, the Values Systems Exercise is intended to both introduce a conceptual framework for understanding the perspectives afforded by economics, ecology and ethics and to develop a common vocabulary with which the class can discuss and integrate these perspectives throughout the semester. In advance of the first class, the students were assigned the casebook readings covering this material.<sup>35</sup>

The exercise is also intended to introduce another conceptual frame, what I will refer to as “choice of controls,” which is the process of identifying, assessing, and deciding among options for controlling polluting behaviors. The process and list of available options are phrased differently and treated with varying degrees of specificity in different casebooks, but, in the nutshell version, include liability, direct regulation, taxes, and subsidies.<sup>36</sup> Where the decision to regulate has been made, there remain several analytic steps: identifying the regulatory target(s); establishing an appropriate basis for control; and choosing among regulatory mechanisms (such as prohibitions, design standards, performance standards, ambient standards, market mechanisms, or planning

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35. *See supra* note 32 (identifying sections in casebooks).

36. ROGER FINDLEY & DANIEL FARBER, ENVIRONMENTAL LAW IN A NUTSHELL 93-96 (8th ed. 2010).

requirements). To lay the groundwork for my students, I lectured on this material, and gave them the option of reading the appropriate sections after the class.

## **B. Creating the Factual Scenario and Legal Frame**

The selection of the factual scenario is critical to engaging the range of students in the classroom. I thought a dynamic, timely topic would work best. For fall 2010, there was no real contest: the BP/Deepwater Horizon blowout was the most significant environmental event in decades. I had no doubt that students would be interested in learning and talking about it. In fall 2011 I will probably follow the same newsy vein, and in the wake of the nuclear disaster at the Dai-ichi Nuclear Power Plant in Fukushima, Japan, pick a nuclear power plant issue, such as relicensing the Vermont Yankee plant in Vermont or the Indian Point plant in New York State. The flooding of the Mississippi River, and the Army Corps' of Engineers' management of it, would also provide an excellent basis for the exercise.

I provided students with a PowerPoint presentation that included relevant background information in a number of areas, including technological explanations for the blowout, ecological impacts from the released oil and the use of dispersants, public health impacts, economic impacts, and social and cultural impacts.<sup>37</sup> Next, the presentation gave students a brief overview of parts of the existing legal landscape, including: liability regimes, direct regulation, taxes, and subsidies. Then, the presentation updated students on the legal maneuvers that had transpired to date in relation to the blowout. These included British Petroleum's establishment of a \$20 billion compensation fund, the consolidation of more than three hundred lawsuits in federal district court in Louisiana, President Obama's moratorium on permitting new wells in the Gulf of Mexico, and a district court judge's temporary restraining order preventing the moratorium from taking effect. The presentation ended with the question: "What, if anything, should be done NOW???"

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37. A copy of the PowerPoint presentation was included with the CLE materials distributed to conference attendees. I am also happy to share a copy.

### C. The Take-Home/Online Assignment

After class, students were directed to post on the online Discussion Board

at least one proposal for legal reform that you believe would help prevent, protect against, or hold accountable, those responsible for another disaster like this summer's BP/Deepwater Horizon blowout, along with a one-paragraph discussion of the values your proposal embodies. If your conclusion is that the existing regime appears to be sufficient, explain.

Students were also directed to "respond to one of your classmates' proposals and/or values rationales." Students were cautioned that "[c]omments can be in support of or against, but in all events must be constructive."

The assignment seeks to realize the goals discussed in Part II. First and foremost, students are required to demonstrate engagement with and comprehension of at least some part of the values systems material, and to self-reflexively discuss the way their own judgments came to play a role in their analysis. Second, students must demonstrate some comprehension of the basic choice of controls material. Finally, students must respond to one another, thereby, hopefully beginning to build a classroom community that values dialog and collaborative learning. A secondary benefit is to afford students the opportunity to give and receive peer evaluation.<sup>38</sup>

To be clear: The self-reflexive component to the assignment is where the intrapersonal intelligence is challenged, and brought to bear on an essential legal task. Students are called upon to recognize their own values and preferences and how these influence their judgment as to what makes for good law or policy.

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38. The exercise also conforms to the recommendations for non-experiential teaching methods recommendations for leading a class discussion, as outlined in *Best Practices for Legal Education: A Vision and a Road Map*. The best practices include using discussion for appropriate purposes, such as engaging students and helping them to learn material more deeply, asking effective questions, maintaining a somewhat democratic classroom, validating student participation, using caution in responding to student errors, establishing an environment conducive to discussion, and providing students time to reflect on the questions being asked. STUCKEY, *BEST PRACTICES*, *supra* note 1, at 226-231.



The intended effect of this is to challenge the notion that policymaking or legal decision-making is a unilateral application of reason to a given problem, with the long-range goal of encouraging students to question the paired notions that their own logical-mathematical and linguistic intelligence-based legal analysis is value-neutral, and that the appellate decisions that make up much of the syllabus represent a similar algorithmic reasoning.

#### D. Outcomes

The assignment, though ungraded, was mandatory, and it generated one hundred percent participation. By and large, students put real thought and effort into their work. Below, I provide three examples. I have edited the student proposals and responses for length, and highlighted those moments where students are either grappling with values systems concepts and vocabularies or else exercising some degree of self-reflexive analysis:

Proposal 1: “Ideally, effective legal reform in this area would include the elimination of all deep water and shallow water drilling for oil and refocusing our efforts for energy production on cleaner methods like wind-generated or solar-generated energy. This is almost impossible to change immediately; our society is too dependent on oil as a resource. However, the change can happen if taken in peacemeal [sic] steps. The first step would be to establish a unified government agency for the management of the Ocean . . . The National Ocean Council could also educate people as to the need of sustainable development and the need for an eco-system based management regime that respects the interconnectedness of all of nature (including non-living and living beings). This would generate more support for clean energy and it would promote the idea of adaptive management (which recognizes that things change and the law must catch up with the changes in the universe/ecosystem.)”

Response 1: “I like where you are going with this in terms of education. As much as many of us would like to see a rapid transition to an eco-system based environmental plan, it will not happen until we educate the people so they understand why. However, that is no easy task either. In fact, a rather daunting

one.” [Student proposed government create a “An Inconvenient Truth” analog for offshore drilling that would mobilize public support.]

Proposal 2: “I believe that the only surefire way to prevent another oil spill, and especially one of this proportion, is to pass legislation banning offshore drilling altogether. This viewpoint comes from both an eco-centric environmentalist perspective and an ecological perspective: oil spills of this magnitude are undoubtedly extremely harmful to marine ecosystems and a wide variety of global ecosystems, and also feeds the global addiction to oil, instead of encouraging development of greener energy technologies. Offshore drilling tends to be much riskier and more harmful to surrounding areas than other kinds of oil production (though, admittedly, that’s a matter of degree).”

Response 2: “A total ban on offshore drilling is certainly an option; however, I doubt that such a course of action can be justified under a cost-benefit assessment. If we ban offshore drilling, such a move will make another gulf oil spill impossible which is good. On the other hand, we would be giving up a major economic sector of our economy. Giving up an entire economic sector can be justified, but can it be justified by a once in every 60 year event.”

Proposal 3: “Many of the discussion posts discuss passing legislation to ban offshore drilling or drilling for oil all together. However, if the country is to ban offshore drilling, then my question is where do you suppose drilling should be allowed? . . . Drilling for oil is devastating to an ecosystem it is placed in, just perhaps in different ways, so to say that offshore drilling is the worst, is not true. Placing a ban on offshore drilling also makes legislatures deal with the attitude of NIMBY (Not In My Back Yard). No one wants to look out their window to see oil rigs nearby and the population that will be most affected by this change will be the poor and underprivileged, who are already dealing with a host of environmental injustice problems without adding this as well. . . . The best solution would be to tighten regulations to make it as safe as possible, continue to police to make sure the companies are complying with the regulations . . . Stricter oversight of the drilling process while investing in research and technologies to allow for the removal of oil from our lives is currently the best solution to the problem.”

Response 3: "I think this post brings up an important point in the criticism of plans to outright ban offshore drilling. Drilling for oil may be necessary for the time being to quench this country's and the world's tremendous appetite for oil. Unless and until sustainable energy sources are available on a massive scale at somewhat affordable prices, drilling for oil, both on land and offshore, seems to be the only practical solution. It should simply be made as safe as possible until that time when the world can make the switch to other forms of energy. Also, this post highlights the somewhat limited scope of proposals banning offshore drilling. NIMBY attitude seems to be part of the drive to stop offshore drilling in the U.S. Though admirably stressing environmental concerns, these proposals are often narrow in scope. If offshore drilling is outlawed in the U.S., where will the necessary drilling take place? If banning offshore drilling in the waters of the U.S. will have a positive effect on the U.S. environment, what will the aggregate environmental effect be? [Argues that oil companies will flee to less regulated nations.] I think that as long as oil extraction remains a necessary evil, it should be done under circumstances where the oil companies can be held to strict standards of regulatory enforcement and be expected to compensate for wrongs committed. Few countries have as adequate a legal system as the U.S."

In these proposals and responses, one can see students recognizing their own and their classmates' eco-centric and anthropocentric perspectives, wrestling with variously weighted schemes for balancing ecosystems and economies, and identifying distributional impacts and the ethical implications such impacts give rise to. They are, in short, exercising intrapersonal intelligence in relation to the task of analyzing the legal and regulatory response to an environmental catastrophe.

#### **E. Feedback/Assessment/ Evaluation**

Feedback on student work, ideally, should be prompt, supportive, and should reinforce students' intrinsic motivation to learn rather than serve their desire to score well.<sup>39</sup> More

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39. Maranville, *supra* note 27, at 72-73.

feedback is not always better, and students benefit when some degree of self-assessment is incorporated.<sup>40</sup>

Given the number of students in the class and the very real time constraints, students posted their proposals on a Friday, responded by Sunday, and we were back in class on Monday at 9 a.m.; extensive feedback on individual assignments was infeasible. It was also unnecessary. Students already had to assess their own analytic processes and locate values preferences, and had spoken to and heard from their peers about their work. Rather than provide written feedback, I devoted approximately forty-five minutes in the second class to an in-class discussion of the proposals and responses, using specific examples of student work as a means to talk further about the substance of the values systems, the diversity of controls, and the ways in which predilections and preferences played into legal and policy analysis. This time served as an opportunity to review the substantive material, to validate student participation, to pose next-level challenges to students, and to open things up to further questions.

Subsequently, over the course of the semester, the class was able to return to these concepts, vocabularies, and this way of understanding legal analysis, when deciphering judicial opinions and considering regulatory regimes.

#### **F. Room for Improvement**

There are many ways in which the exercise may be improved. At the top of my list:

- The exercise relies on a degree of didacticism that is less than ideal. Much of the information on the values systems, the choice of controls, and the factual scenario is provided, either in the form of background readings or else through the PowerPoint presentation. Giving the exercise more time would allow for some further complexity and skill-building. For instance, students could engage in independent research in order to generate their own narratives about (1) what went

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40. *Id.* at 73.

wrong, (2) what the range of impacts are, and (3) what the relevant laws and regulations are. I also think the choice of controls component is given too little attention. An independent, in-class exercise to familiarize students with this material would be a smart addition.

- The exercise involves an environmental problem—the BP blowout, the nuclear disaster in Japan, or the flooding of the Mississippi—that is geographically distant. Visual information can help bridge that distance, as can the instinctive human response to major catastrophe, but the exercise might focus on a more localized issue. This would also enable the class to incorporate a field trip, which might bring home the salience of the issue in a more visceral way.
- The exercise involves statutory, regulatory, and other management schemes such as offshore oil and gas leasing, nuclear licensing, and management of the Mississippi River and its flood plain, that are outside the core materials of the course. An alternative approach would be to locate a factual scenario that relates to a substantive area to be covered in the course, such as the Clean Air Act, the Clean Water Act, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), or another core environmental statute.
- The exercise was ungraded. This was a conscious decision, intended to free students from concern about consequences and to engage more openly in the exercise. However, the values systems material also did not appear as a question on the final exam. In future iterations, I would like to incorporate this portion of the class into student evaluation, either by grading the exercise or, perhaps more likely, by incorporating its substance into the final exam.

These, of course, are only a few possibilities. I welcome other suggestions.

#### IV. CONCLUSION

I think the Values Systems Exercise succeeded in many respects. It engaged students, produced a lively and informative discussion, and set the precedent that students' own perspectives, as informed by economics, ecology and ethics, would be welcome topics for classroom dialog. Moreover, by coupling these conceptual frameworks and vocabularies with an actual instance of choice of controls, the exercise counteracted some predictable resistance to a degree of self-reflexivity that might strike some students as "touchy-feely."<sup>41</sup> It may well be that allowing the exercise some more time to unfold would give students a deeper learning experience, but in its current form it works as an introduction to core concepts, vocabularies, and principles. I am hopeful that in the coming years it will continue to evolve, and to provide students, from across the range, with a compelling entry into Environmental Law.

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41. See, Davis, *Thinking Like a Lawyer*, *supra* note 7; Weinstein, *supra* note 7, at 258-259.