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## ESSAY

# The Divergent Paths of Environmental Law Practice A Reply to Professor Manaster

JOHN E. BONINE\*

In my 2009 essay, *Private Public Interest Environmental Law: History, Hard Work, and Hope*,<sup>1</sup> I wrote about the rich possibilities for practicing *private public interest* environmental law, which means representing clients seeking environmental

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For review of his draft and valuable additions, Professor Bonine thanks in particular Professor Patrick M. McGinley, Charles H. Haden II Professor of Law at West Virginia University College of Law, Matt Kenna, Colorado private public interest environmental lawyer ([matt@kenna.net](mailto:matt@kenna.net)), and several others who shall remain anonymous. In addition, initial research and helpful comments were provided by University of Oregon law student Meredith Holley.

1. See John E. Bonine, *Private Public Interest Environmental Law: History, Hard Work, and Hope*, 26 PACE ENVTL. L. REV. 465, 478-79 (2009).

protection through a private-practice entity rather than in a non-profit.<sup>2</sup> Professor Kenneth Manaster responded in this issue of *PELR*,<sup>3</sup> expressing his admiration for *business* environmental law as a career choice, while ruing my failure to express the same enthusiasm in my own essay. In fact, he asserts that my essay painted a distorted picture of such practice. Respectfully, I submit that it is Professor Manaster's article that has the potential to mislead public interest-oriented law students regarding the reality of a business environmental law practice. My reply is intended to clarify my own perspective as well as highlight some of what he says about business and public interest environmental law practice.<sup>4</sup>

### I. INTRODUCTION: ONE DESTINATION?

Professor Manaster sees "many paths" of environmental law practice but concludes that they all lead to the same destination. It appears that in his view it matters little which

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2. I wrote about this earlier in an essay nearly a quarter-century ago. See generally John E. Bonine, *The New Private Public Interest Bar*, 1 J. ENVTL. L. & LITIG. xi (1986). As far as I can determine, I was the first to use the term "private public interest law," at least in the environmental law field. I chose the term to give a name to a phenomenon that, if better recognized, might grow and earn the respect that it deserves for its many contributions. That seems to have happened. The phrase gets about 25,000 hits in a Google search. Harvard and Columbia Law Schools have jointly published a guide on this topic. See generally CTR. FOR PUB. INTEREST LAW AT COLUMBIA LAW SCH. & BERNARD KOTEN OFFICE OF PUB. INTEREST ADVISING AT HARVARD LAW SCH., PRIVATE PUBLIC INTEREST AND PLAINTIFFS' FIRM GUIDE (2008), available at [http://www.law.harvard.edu/current/careers/opia/planning/career-resources/docs/2008private\\_pi\\_guide.pdf](http://www.law.harvard.edu/current/careers/opia/planning/career-resources/docs/2008private_pi_guide.pdf). The websites of numerous law schools mention the private public interest bar, although few give any real guidance on how to join it. The University of Oregon has recently joined some other law schools in creating a position specifically devoted to giving guidance on public interest and public service, so change may finally be in the air. As for scholarly study, see Scott L. Cummings & Ann Southworth, *Between Profit and Principle: The Private Public Interest Firm*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 183 (Robert Granfield & Lynn Mather eds., 2009).

3. Kenneth A. Manaster, *The Many Paths of Environmental Practice: A Response to Professor Bonine*, 28 PACE ENVTL. L. REV. 236 (2010).

4. I recognize that the meaning of "public interest law" can be contested. To me, the term means having a clear mission beyond client service. I recognize that not everyone will agree.

path one chooses. My own view was best expressed by New England poet Robert Frost in 1916:

Two roads diverged in a wood, and I—  
I took the one less traveled by,  
And that has made all the difference.<sup>5</sup>

Professor Manaster's primary concern with my earlier essay appears to be that instead of being focused on public interest choices, I should equally advocate practicing environmental law in business law firms. He appears to see little qualitative difference between the two roads. He argues that, even when they are litigating against environmental protection, at least business environmental lawyers are seeking "justice" for their corporate clients.<sup>6</sup> He admits that, even when business lawyers would like to do environmental work for citizen groups *pro bono publico*, they generally do not perform such work, assertedly because they encounter "conflicts of interest."<sup>7</sup> In place of environmental *pro bono* work by business lawyers, he posits that the paid defense of "polluters and developers" (his words) might actually be considered "public interest" work.<sup>8</sup> He wants us to know that the work of business environmental lawyers is "constructive" and expresses his concern that law students reading my earlier essay might perceive such a career choice as not worthwhile and honorable.<sup>9</sup> Professor Manaster asserts that "good guys" and "bad guys" are not really present in environmental matters, finding such characterizations to express an "outmoded, simplistic dichotomy."<sup>10</sup> He suggests in particular that lawyers on all sides are likely to have "shared values."<sup>11</sup> The argument seems to be that everyone is headed toward the same

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5. Robert Frost, "The Road Not Taken," in *MOUNTAIN INTERVAL* (Henry Holt And Company, 1916).

6. Manaster, *supra* note 3, at 255. *See infra* Part II.

7. Manaster, *supra* note 3, at 252.

8. Manaster, *supra* note 3, at 243, 257. However, he also accepts for the sake of convenience the grouping of environmental lawyers into three categories: business lawyers, government lawyers, and public interest lawyers. *Id.* at 244.

9. *Id.* at 245.

10. *Id.* 248.

11. *Id.* 256.

goal, or at least the differences between choosing the business path and what is traditionally considered the public interest path is minimal.

My own view is that the paths are quite divergent. I will answer each of these positions as well as Professor Manaster's criticisms of my earlier essay.<sup>12</sup> It is apparent that Professor Manaster and I do not see the world from the same perspectives. Our differences are likely born of our differing life experiences, rather than being differences of factual interpretation (although those do exist, and I will comment on some of them). Apart from his distinguished career as a law teacher and scholar, Professor Manaster has for decades been involved in consulting work for corporate clients (as well as representing a state regulatory agency and serving on a local governmental body).<sup>13</sup> In contrast,

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12. In passing, however, I note that in the first half of his response, Professor Manaster also offers a broader history from the mid-1960s to the early-1970s of some environmental law activities and complains that I did not fully report this history. *See id.* at 238-43. I will pass on the opportunity to answer or correct these criticisms of my essay, instead focusing on what really divides us. I will only observe that in Bonine, *supra* note 2, I was not writing about the broad history of all environmental law. My general focus was on the *pre-history* (earliest history, from the mid-1950s through just after the mid-1960s) of our field and specifically on one discrete aspect of the environmental law movement, namely the private public interest bar.

13. He serves in an "Of Counsel" status to a large corporate law firm, Pillsbury Winthrop Shaw Pittman LLP. With regard to environmental matters, Pillsbury advises clients in the timber, mining and other natural resources-based industries; helps corporations achieve compliance with environmental regulations; obtains permits for oil and gas production, refining, transport and marketing, power generation; and other projects. When a governmental body charges that one of its clients has violated the law, Pillsbury prides itself on seeking "resolution" of enforcement matters against its corporate clients or, if necessary "defend[ing] against enforcement actions." *See Environment, Land Use & Natural Resources*, Pillsbury, <http://www.pillsburylaw.com/index.cfm?pageid=12&itemid=1715> (last visited September 7, 2010). Professor Manaster also served for many years on a regional air pollution regulatory body. And prior to working for the Pillsbury law firm, he litigated on behalf of at least one oil refinery seeking to prevent the U.S. Environmental Protection Agency from enforcing its regulations under certain circumstances. *See* Brief for Golden West Refining Co. et al. as Amici Curiae Supporting Petitioner, *General Motors Corp. v. United States*, 496 U.S. 530 (1990) (No. 89-369), 1990 WL 10012881. As he mentioned in his article, at an earlier time in his career he litigated on behalf of the State of Illinois and for the Natural Resources Defense Council. He is apparently among those whom he mentions in his article as having moved from one side of the courtroom to the other.

since entering my own career in teaching and scholarship after working for the federal Environmental Protection Agency, I have largely devoted my free time to unpaid consulting work for ordinary citizens and their environmental organizations, in the United States and abroad.<sup>14</sup> Readers may wish to take these differing backgrounds in account while weighing our arguments.

The focus of my original theme was the importance of the “private public interest bar” as a career choice for law students and young lawyers whose hearts burn to advance the public interest. My goal was and is simple: to help such budding lawyers expand their vision beyond jobs with citizen groups or nonprofit law firms<sup>15</sup>—and in the process to help them avoid misunderstandings about the work most environmental lawyers actually do. Professor Manaster’s critique has shifted the debate to corporate versus public interest practice generally. Accordingly, my reply addresses his arguments on this somewhat different issue.

In sum, we agree that there are many paths of environmental practice. Our difference is that I see them as quite divergent and want to be sure that those entering our profession be aware that the paths lead to significantly different career destinations.

## II. ENVIRONMENTAL PROTECTION VERSUS JUSTICE (FOR SOME)?

The purpose of my essay, *Private Public Interest Environmental Law: History, Hard Work, and Hope*, was to broaden the horizons of law students and young lawyers whose

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14. Discussed *supra* note \*.

15. Professor Manaster’s first paragraph asserts that “public interest practice usually refers to jobs with citizens groups.” Manaster, *supra* note 3, at 236. He gives three “nationals” as examples and then notes that regional and local groups also have lawyers on staff, and lauds all for the development and enforcement of environmental law and policy for more than 40 years. *Id.* at 237. My article was carefully crafted to indicate that public interest practice is far broader than “jobs with citizen groups” and that there are as many lawyers pursuing public interest practices in a private law practice setting as there are in the non-profit groups mentioned by Professor Manaster. My examples of such private public interest lawyers bringing litigation, furthermore, went back nearly 60 years.

goals are enforcement of environmental laws and strong protection of the environment. Those whose goals are different—for example, those who simply want to work in an interesting field of law and earn a comfortable or lucrative salary while supporting their families (surely laudatory goals) but who do not have a public interest mission in life—need to look for advice elsewhere than in my earlier essay. They may be quite happy and satisfied with a business environmental law practice, as is Professor Manaster.

In Professor Manaster's view, my essay "especially mischaracterizes, to the point of demonizing, the practice of business environmental law."<sup>16</sup> In numerous places in his response Professor Manaster explains his own view of the business-environmental lawyer's role in providing legal services to business clients. This explanation comes in an oft-repeated invocation of "justice"—an idealistic-sounding term on its own, but one that must be understood for how it is being invoked. He writes of "the basic concepts of justice our society reveres."<sup>17</sup> He refers to "a variety of concepts of justice," "competing claims for justice," and, most revealingly, "tensions between environmental concerns and justice claims."<sup>18</sup> His own experiences have included helping a client deal with "heavy-handed treatment by a regulatory agency."<sup>19</sup> He quotes his own earlier scholarship in which he opined that "environmental lawyers serving regulated entities . . . seek to reconcile environmental protection goals with concepts of justice."<sup>20</sup>

This talk of "competing claims," "tensions" between environmental concerns and justice, and the need to "reconcile" environmental protection with concepts of justice suggests a kind of admission that the two are different. The lawyers serving regulated industries and businesses are serving the goal of "justice" even while their opponents are seeking protection of the environment, it would appear. This characterization of "justice" and "environmental protection" as opposing concepts in need of

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16. *Id.* at 245.

17. *Id.* at 260.

18. *Id.* at 255.

19. Manaster, *supra* note 3, at 254.

20. *Id.* at 251.

reconciling should by itself serve as a warning flag to the reader that Professor Manaster's discussion is not primarily about serving environmental ends.

Professor Manaster refers to "the need for balancing of *competing* interests" and the work of "*conflict* resolution."<sup>21</sup> He does not mention that Congress and State legislatures have often already struck a balance between business interests and environmental protection in the process of adopting regulatory statutes. What then does "balance" mean in the context in which the professor uses the term? There are obviously interests that are "competing" with environmental protection and there are "conflicts," of course. They occur primarily when someone is working *for* environmental protection and others are working *against* such protection. If the practice of environmental law were all *kumbaya*, there would be no competition and no conflict. So what are those competing interests that lead businesses into conflict with the government and citizen groups? What, precisely does Professor Manaster mean when he suggests that something can be placed on the scale to "balance" or even outweigh the environmental protection goals of regulatory statutes? To state this forthrightly would, I believe, be more candid— than to leave the concept of "balance" hanging in the rhetorical air like some kind of philosophical "golden mean" to which we all, naturally, should aspire.

Of course, in our legal system there is nothing inherently wrong with clients seeking to exploit every advantage the law may give them. Nor is it improper for lawyers to challenge both procedures and substantive regulations in order to serve their clients' goals of preserving profits. One is obviously free to label this the pursuit of "justice" or "balance." We should, however, be straightforward in letting law students know the kind of work they will be doing, depending on the career choices they make.<sup>22</sup>

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21. *Id.* at 256 (emphasis added).

22. See generally ALAN B. MORRISON & DIANE T. CHIN, BEYOND THE BIG FIRM: PROFILES OF LAWYERS WHO WANT SOMETHING MORE (2007); see also THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE (Austin Sarat & Stuart Scheingold eds., 2005). An earlier study by the same two editors is CAUSE LAWYERING : POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998). The still-classic study, which has been on my bookshelf for more than 30 years, is BURTON



Anything less than total candor would be a disservice to them. Professor Manaster's musings about business environmental lawyers seeking "justice" for corporate clients against heavy-handed governmental regulators and about them playing an important role in achieving "balance" could, without frank clarification, lead some law students to believe that a corporate law firm is a place to combine environmental work and justice, while satisfying a heart devoted to the public interest. I respectfully disagree that this is the typical dimension of such work.<sup>23</sup>

I should note that my discussion has not addressed the role of corporate in-house environmental lawyers—those who give legal advice to their employers rather than to clients. In that role, there may well be a more substantial opportunity for lawyers to move a company in a direction that is more positive for the environment. A number of my own public interest colleagues have reported to me instances in which this seems to have been the case,<sup>24</sup> including with two major corporations (one involving greening of corporate practices; the other involving a favorable settlement of litigation).<sup>25</sup>

### III. *PRO BONO*, CLIENT LOYALTY, AND SUPPOSED "POSITIONAL CONFLICTS"

In my original essay, I suggested that a lawyer in a business-environmental firm has minimal or no opportunities to do environmental law work for citizen groups. Professor Manaster actually ends up agreeing with this, using slightly different

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ALLEN WEISBROD ET AL., *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* (1978).

23. I am aware of precious little empirical evidence on this matter. In law journals authors at most seem to have engaged in wishful thinking. See, e.g., Herman F. Greene, *Hot, Crowded, and Not-So-Flat: The Changing Climate for Corporations*, 44 *WAKE FOREST L. REV.* 799, 831-832 (2009) (asserting that business environmental lawyers *should* show responsibility toward the future).

24. E-mails from public interest colleague to author (Sept. 13-15, 2010) (on file with author). (Several of author's contacts have chosen to remain anonymous and this, and subsequent citations to such e-mails therefore will not include any identifying information.)

25. E-mail from "H," public interest colleague, to author (Sept. 15, 2010) (on file with author).

terminology. He assures readers that his law firm affirmatively supports its lawyers contributing their services *pro bono publico*.<sup>26</sup> Despite being part of “repeated efforts” to engage the firm’s lawyers in *environmental* matters for citizen groups, however, he states that such efforts have not met with much success.<sup>27</sup>

Professor Manaster suggests that this is often due to true “conflicts of interest.” In my essay, I had questioned whether ethical problems are actually common, as opposed to a firm’s goal of building the confidence of clientele—a business decision rather than an ethical one. Professor Manaster thinks that I am “mostly wrong” in my views about the nature of “positional conflicts of interest.”<sup>28</sup> It probably does not matter who is correct about just why the firms turn down the citizen groups, since the result is the same regardless.<sup>29</sup> Some of my academic colleagues share my skepticism. For example, Professors Scott Cummings and Deborah Rhode state flatly: “Positional conflicts involve matters that do not require disqualification under ethical rules, but are likely to offend existing or potential clients or otherwise preempt business development.”<sup>30</sup>

In my essay I asserted that the actual reason for turning down cases much of the time is not an ethical judgment but a

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26. Manaster, *supra* note 3, at 252.

27. *Id.*

28. He says that I wrote that a positional conflict of interest arises if a lawyer argues for the business community in one case and against it another. *Id.* at 250-51. This is, however, a misreading. What I said, or tried to say, is that business law firms sometimes “dress up” their refusal to take cases against the business community as a conflict of interest when it is actually not. *See id.* at 250 (quoting Bonine, *supra* note 1 at 481).

29. Those interested in pursuing the question may wish to consult, among other analyses, John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457 (1993); Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395 (1998), Esther F. Lardent, *Positional Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 FORDHAM L. REV. 2279 (1999), Deborah L. Rhode, *Profits and Professionalism*, 33 FORDHAM URB. L.J. 49 (2005), Helen A. Anderson, *Legal Doubletalk and the Concern with Positional Conflicts: A “Foolish Consistency”?*, 111 PENN ST. L. REV. 1 (2006), and Scott L. Cummings & Deborah L. Rhode, *Managing Pro bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357 (2010).

30. Cummings & Rhode, *supra* note 29 at 2392-93 (2010).

business judgment—the business law firm’s need for “marketing” and its consequent desire to present the proper “image” to its corporate clients.<sup>31</sup> I observed that bringing suit for, or defending a citizens’ group, could raise questions about the law firm’s “loyalty” to its business clients.<sup>32</sup> Although bristling at the term “marketing,” Professor Manaster does not seem to disagree seriously. Instead of “marketing,” he prefers to call the avoidance of environmental groups as clients “part of building a practice,” building “the confidence of [business] clientele,” and, yes, “client loyalty.”<sup>33</sup> He agrees that “it is hard to represent ‘both sides of the street’ in environmental law,” as in other fields.<sup>34</sup> Some lawyers working in business law firms have used language that is more colorful than Professor Manaster’s:

Where our firm is focused in a particular type of practice it would simply be *stupid* to alienate our own client base by riding both sides of the fence. Where we have a concentration of business in an area or seek such a concentration it’s a simple business decision. Loyalty, ethical obligation, is part of it, but it’s self-defeating to do otherwise.<sup>35</sup>

The phenomenon is widely understood among regular environmental litigants. As the litigation director of a major public interest environmental law firm expressed it in a published study:

The problem of *so-called* positional conflict is very widespread in the environmental context. If a firm has a banking client that [does business with] the timber industry, they won’t work on our cases. We are a high voltage public interest litigant, so if you represent anyone tied to environmental issues, however remotely, chances are you won’t want your lawyers taking our

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31. Bonine, *supra* note 1, at 481.

32. *Id.* at 478.

33. Manaster, *supra* note 3 at 251.

34. *Id.*

35. Spaulding, *supra* note 29, at 1400 (quoting pro bono coordinator of private law firm) (emphasis added).

pro bono work. . . . The firms say, “Our clients would be mad if our lawyers were working on that case.”<sup>36</sup>

A published study made the same observation: “[B]ig firms avoid environmental issues that directly impact corporate client interests. They do not, therefore, accept pro bono environmental justice cases, in which community groups challenge the location of environmental hazards in low-income neighborhoods.”<sup>37</sup> I gave some examples of this phenomenon 25 years ago in my first essay on this topic, *The New Private Public Interest Bar*.<sup>38</sup> For example, one of my former students, in applying to a medium-sized law firm in Eugene, Oregon, asked if he would be allowed to take cases challenging timber sales for environmental citizen groups on a *pro bono* basis. The law firm gave a quick answer: “[O]ur clients would be opposed to that.”<sup>39</sup> My former student instead opened his own private public interest practice. More recently, a public interest lawyer reported to me an even more drastic response by some business law firms:

Indeed, some business law firms even frown upon their partners serving on the boards of directors of nonprofit environmental law firms. For example, law partners serving on one such board of directors (which includes prominent law professors, judges and former bar presidents) have been forced by their firms either to resign or to decline serving on the nonprofit board for fear of “upsetting” clients.<sup>40</sup>

The same lawyer subsequently reported an even more dramatic example in which *pro bono* work has been refused for apparent marketing reasons without even the fig leaf of conflict of interest: “Today a law firm widely known for its pro bono commitment turned down a request to help a community

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36. *Id.* at 1419 (emphasis added).

37. Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA. LAW REV. 1, 119 (2004) (citations omitted).

38. See Bonine, *supra* note 2.

39. *Id.* at xvi. In the original article, I disguised the lawyer with the female pronoun. It was, however, Neil Kagan, who has now allowed me to identify him as the lawyer in the matter.

40. E-mail from “C,” public interest colleague, to author (Sept. 13, 2010) (on file with author).

organization incorporate because they are planning to fight a coal plant—one which will never create an actual conflict of interest.”<sup>41</sup>

The assertion that business law firms are primarily concerned with ethical conflicts when presented with a public interest environmental law case acts to relieve the firms of the need to mention to law students and others applying for jobs that they generally and habitually refuse to offer their services to citizen groups on significant environmental matters. They may leave the impression with law students and young lawyers that every request to engage in environmental *pro bono* work will be evaluated on its merits. This is a sham when the hiring partners know that such cases are almost never allowed in the firm. Most law students, even with a strong public interest orientation, will be reluctant to probe too deeply into a firm’s policies and practices during a job interview, for fear of being passed over in favor of another, less troublesome, candidate. Consequently, they are not likely to learn the reality until they are already working for the firm and try to bring a public interest environmental case or represent an activist environmental group in an environmental citizen suit. By that time, the “golden handcuffs” may have already tightened to the point where they will have a difficult time leaving.

Finally, let us examine the notion that lawyers can do much other (*non-environmental*) work *pro bono publico* (for example, giving substantial amounts of free help to low income tenants or taking on important human rights cases on a regular basis) in a business law firm, as a way of satisfying a spirit devoted to serving the public interest. First, Professor Deborah Rhode’s own empirical research revealed that “[m]any surveys find that attorneys are foreclosed from taking on matters that would offend the political sensibilities of firm leadership or major clients . . . .”<sup>42</sup> Second, in a business firm it is basically impossible to shape a career that would merit the label “public interest” on the basis

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41. E-mail from “C,” public interest colleague, to author (Sept. 15, 2010) (on file with author).

42. Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 FORDHAM L. REV. 1435, 1443 (2009).

of *pro bono* work, considering the minuscule amount of time business lawyers devote to *pro bono*.<sup>43</sup> For example, according to Professor Manaster's firm's website, its lawyers on the average spend 48 hours per year doing *pro bono* work.<sup>44</sup> If the year were 100 or 200 hours long, that amount would be notable. But lawyers often bill in the range of 2,000 hours per year or more, so their work for the public amounts to about 2.5% or less of their time. The other 97.5% or more is devoted to paid work for the firm's clients, largely businesses and corporations. Of course, 2.5% is much better than nothing, and the work is surely useful to those who receive the help, even if the work is not environmental. However, 2.5% is going to be pretty unsatisfactory to those seeking a public interest life.<sup>45</sup>

#### IV. GOOD GUYS, BAD GUYS, MOVING THE BALL, AND SHARING VALUES?

Having conceded that environmental lawyers joining business law firms are not going to be doing much, if any, significant pro-environmental work *pro bono publico*, Professor Manaster seeks to persuade the reader that paid work for business clients is as good and satisfying for a young lawyer as doing public interest environmental law work. In fact, he particularly wants it understood that business lawyers are not doing bad things, that they are not "bad guys," and that the corporate clients they represent are actually doing good things for society (apart from activities that may be environmentally harmful).

Professor Manaster tells us that early in his career, when he was representing the State of Illinois, opposing counsel who

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43. Actually, Professor Manaster does manage to call a career working for business a public interest career. I will discuss this in the next part of this reply.

44. *Pro Bono & Community*, Pillsbury, <http://www.pillsburylaw.com/index.cfm?pageID=59> (last visited Sept. 21, 2010).

45. I am, of course, not the first person to note that *pro bono* work is both a tiny portion of the practices of large law firms and unlikely to involve their lawyers in environmental law work for the public. A large study, growing out of a conference on the subject, was published in 2009. *See generally* PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION (Robert Granfield & Lynn Mather eds., 2009).

represented one of the nation's largest steel companies persuaded the company to agree to an important litigation settlement:

It was the defendant's lawyer who had gotten the ear and respect of his client and successfully shown it the light—that there were requirements and responsibilities that had to be met.

My [government] colleagues and I had put the ball in play, but the defendant's lawyer had moved it way down the field. I was humbled by this realization, and ever since then I have tried not to underestimate how much good can be accomplished by an intelligent, responsible environmental lawyer representing business and industry.<sup>46</sup>

Professor Manaster may well be overstating the case. Any competent, ethical lawyer makes a conscientious effort to persuade clients to settle disputes rather than engage in prolonged, costly, and uncertain litigation, if settlement appears possible. Often such settlements simply reveal that a company (assisted by its legal counsel) has realized that it has no viable legal defense and has done a careful calculation of the costs and benefits of further resistance to a demand by an enforcement body. The possibility of an adverse decision at the end of the road obviously can play a significant role in settlement decisions. It is not necessary that such a company's lawyer be in favor of environmental protection. It is enough that the lawyer has spelled out the company's financial exposure and someone at corporate headquarters is smart enough to do the math. In the words of Kenny Rogers, the company knows "when to hold 'em and when to fold 'em."<sup>47</sup>

Nobody can quibble with the notion that it is an advantage to have people who *understand* environmental law on both sides of a settlement negotiation.<sup>48</sup> Some of my public interest

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46. Manaster, *supra* note 3, at 253.

47. Kenny Rogers, *THE GAMBLER* (United Artists 1978).

48. This point was supported in an e-mail to me from Karl Anuta, Oregon private public interest lawyer, and also in e-mails from public interest colleagues "C1," "C2," and "D,." See E-mail from Karl Anuta, private public interest lawyer (Sept. 15, 2010) (on file with author); E-mail from "C1," public interest colleague, to author (Sept. 15, 2010) (on file with author).; E-mail from "C2," public interest colleague, to author (Sept. 15, 2010) (on file with author);

colleagues go further and believe, as does Professor Manaster, that having a lawyer on the corporate side with “green” leanings may have made some difference in their negotiations. For example, one public interest colleague who is also a law professor wrote to me that “someone with good sensibilities and a commitment to the environmental can occasionally make a difference.”<sup>49</sup> The hard truth, however, is that a junior attorney in a firm is unlikely to be able to influence a firm or a corporation to make greener decisions. As one lawyer wrote to me:

Regardless of a lawyer’s environmental law school leanings, his first loyalty is to his client, and if the client is anti-environmental and wants to fight the case to the bitter end, including barely professional tactics, then the lawyer must follow those wishes, or decline to take the case in the firm. Although, many refusals to take cases, in these economic times, soon can leave you off of the partner track in the big environmental defense firms and I believe will likely will lead to your early exit.<sup>50</sup>

Yet another colleague commented, “In more than 20+ years of doing this stuff, I can say that not once have I had ‘more’ environmental protection achieved than was warranted under the facts of the case.”<sup>51</sup>

When I read the paragraph about Professor Manaster’s early experience to one of our mutual colleagues, Professor Patrick McGinley of West Virginia University, who often litigates for the communities and families harmed by the externalities of industrial activities, he had this reaction: “I have never had a case when the company lawyer moved the ball substantially down the field. In almost four decades of seeking to enforce environmental regulatory statutes, we have always had to practically put a legal gun to the other side’s head to get anything

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E-mail from “D,” public interest colleague, to author (Sept. 15, 2010) (on file with author).

49. E-mail from “R2,” public interest colleague, to author (Sept. 22, 2010) (on file with author).

50. *Id.*

51. E-mail from “S,” public interest colleague, to author (Sept. 15, 2010) (on file with author).



accomplished.”<sup>52</sup> Obviously, he has had a different life experience than that of Professor Manaster.

Apart from his evaluation of the good that business environmental lawyers do, Professor Manaster takes pains to assure the reader that they are not “bad guys.” I am not sure why this issue is even on the table. Nothing in my essay suggested these lawyers are necessarily bad guys. He writes that lawyers in a business environmental law practice share the same “values” as public interest lawyers.<sup>53</sup> This may well be true for many of them, but in support of this, Professor Manaster points to the fact that lawyers sometimes move from one job to another.<sup>54</sup> I do not see how changing one’s job proves anything about one’s values. One might just as easily conclude that a government lawyer or public interest lawyer joins a business environmental law practice because the money is immensely greater there. This is not a sin—but it does suggest personal value choices that are *different* from putting a high priority on environmental protection. It says nothing about whether the job-changer *shares* environmental protection values. Similarly, when a lawyer leaves a corporate law firm and sets out upon a career in public service or a public interest practice this does not show that the lawyers in the firm she has left held public interest values. The reason for the departure from a business law practice may instead be precisely that in her previous job she found little or no support for her personal values. (One of my colleagues who is a law professor had this to say about environmental law practice in a business law firm: “On reflection, all I remember really is huge internal dissonance.”<sup>55</sup>)

Finally, Professor Manaster posits that beyond his shared values argument, the “target” of an enforcement effort (that is, a company) also produces important benefits to society (such as useful products or employment). I don’t know any public interest lawyers who would deny that companies provide such benefits.

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52. Telephone conversation with Professor Patrick McGinley (September 5, 2010).

53. Manaster, *supra* note 3, at 256.

54. *Id.*

55. E-mail from “Law Professor C” to author (Sept. 15, 2010) (on file with author). (Professor C left a corporate environmental practice).

But are such benefits also being provided in a manner that is good for the environment (or are the clients actually in the business of producing environmental benefits, such as green energy companies)? That is what the *environmental* public interest lawyer or law student has in mind and why they choose careers that focus on improving the environmental side of any “balance.”

## V. JOINING THE CORPORATE BAR OR THE PUBLIC INTEREST BAR

Professor Manaster’s “concluding thoughts” involve global warming. He believes that his clients have a wide and deep appreciation about this threat. Yet he reminds us that “a fierce battle is under way” on this issue.<sup>56</sup> Does the very fact of this battle undermine his earlier assertion that all have shared values? At a minimum, it suggests that any shared values are set aside to do battle. To have a “fierce battle” there must be someone on each side of the battle. The reality in the climate change battle is that polluting industries are battling to resist, rather than embrace, regulation of their enterprises. Indeed, Professor Manaster notes that the goal of business environmental lawyers and their clients is not to promote environmental protection from climate change, but “to make sure they receive fair treatment in accordance with understandable, sensible, and reliable legal standards under the law.”<sup>57</sup> Their job is not to tell their clients to do something good for the environment. Their job is to argue for “sensible” (from their point of view) standards—in his word, “justice” for the corporations. Professor Oliver Houck has this to say about the job:

David Halberstam gave a commencement address to the law school here about eight years ago and he said (I wrote it down on my program), “You may be offered a large salary to go work for a corporate law firm. The reason they offer you a big salary is not

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56. Manaster, *supra* note 3, at 259.

57. *Id.*

because you are so much more skilful. It is because of what they are paying you to do.”<sup>58</sup>

For many law students and lawyers, the need to fight to protect the economic interests of the corporate client, even when the lawyers’ efforts may lessen environmental protection, is the antithesis of why they want to be environmental lawyers.

Of course, many business environmental lawyers do not engage in battles. Instead, they spend their time interpreting regulations, drafting permit applications, and counseling about regulatory requirements. One colleague believes that such work can be arrayed along a spectrum from more constructive to more harmful. She suggests that “more constructive” work would include counseling companies to improve their practices for existing operations (such as helping to write manuals, hiring staff to improve compliance and avoid risk, and explaining the benefits of internal audits); taking a cooperative approach when faced with an enforcement action; helping to streamline settlement negotiations among companies potentially responsible for past hazardous activities; and in bankruptcy proceedings helping ensure that site cleanup obligations are prioritized over other debt obligations. On the detrimental side, she lists the seeking of permits for new development projects and lobbying for legislative or regulatory amendments.<sup>59</sup> The potential harm of the latter was illustrated by another lawyer-professor colleague:

One of my jobs as a new associate was to track [a] tree ordinance [that a city] was considering passing at the time, with an eye toward weakening it (on behalf of our developer clients). When I told one of the partners that my friends in law school would be shocked to see me doing this kind of work, she said, “Oh, get over it.” I left within the year to take this job. 65% pay cut = 1000% more happiness.<sup>60</sup>

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58. E-mail from Oliver Houck, Professor of Law, Tulane Law School (September 16, 2010) (on file with author).

59. E-mail from “C3,” public interest colleague, to author (Sept. 21 2010) (on file with author).

60. E-mail from “R,” public interest colleague, to author (Sept. 21, 2010) (on file with author).

As one colleague, who is now in a major national nonprofit law firm after a decade in a big business law firm, wrote to me about an experience while at the business law firm:

I can't say my involvement changed any minds of our clients regarding environmental issues. . . . [O]ne client of mine bought a company that was in financial distress, and which had "deferred" RCRA compliance as a cost-saving measure. . . . We had a couple of (successful) meetings with the state environmental regulators to let them know what we were doing and ask for leniency on penalties. The regulators were understanding and we reached a good outcome. Of course, there are many other stories where my firm was definitely *not* working for the benefit of the environment.<sup>61</sup>

Regardless of the work that compliance counselors may do it is still not quite the same as joining the public interest posse to catch those who do abuse the environment. Another colleague told me his story, with a similar orientation:

After clerking for a supreme court and working for the U.S. Department of Justice, I went to a nonprofit environmental law firm. This meant a \$20,000 annual pay cut, plus no retirement plan to speak of, and only as much job security as the next funding cycle would offer. . . . I have never regretted the choices. Job satisfaction is through the roof. . . . And I like to lead a deliberate life rather than a passive one.

A couple of years ago I was the token public interest lawyer on a CLE. After the presentations, another panelist came up to me and asked me to lunch. Odd, I thought, as he was the head of the environmental law department of a large national firm and my typical exposure to such gents was on the other side of the courtroom. . . . The next time he was in town, we had lunch and I waited to hear why he wanted to do so. He said, "I wanted to have lunch because I have been a lawyer for 30 years, oversee 75 lawyers in our environmental law practice, deal with lawyers in

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61. E-mail from "F," public interest colleague, to author (Sept. 15, 2010) (on file with author) (emphasis in original).

many contexts, and it is rare for me to come across a lawyer who seems genuinely happy to be a lawyer. What is your secret?"<sup>62</sup>

Professor Oliver Houck of Tulane Law School has had similar encounters:

I have taught law students now for 30 years. I have since received a steady murmur of laments from very bright graduates who went to work for corporate firms, and ten years later found themselves disgusted with their lives. I have never once, not once, heard a similar complaint from any graduate who went into public interest practice, not even from the ones who later for financial reasons had to leave that practice. Not once.<sup>63</sup>

Another public interest colleague who is a law professor had this to say:

For me, and I think this is true of many of the students that choose programs like yours, . . . the practice of law has always been a secondary interest to solving environmental problems. . . . My students who go to practice as private lawyers are almost always surprised to discover that the role of a lawyer representing a business is to serve that business. . . . Businesses are obliged to make profits and they want lawyers who help them make profits, not play a leadership role or guide them to more socially responsible business choices. I suppose that a lawyer who became a CEO might have a different opportunity to change the corporation's environmental practices, but as a lawyer in a law firm, he or she typically would have little to say. And even the CEO's are obligated to serve the bottom line over all other concerns. That is not a value statement, just an irrefutable fact of corporate law and nothing that Professor Manaster says can change that.<sup>64</sup>

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62. E-mail from public interest colleague, to author (Sept. 13, 2010) (on file with author).

63. E-mail from Oliver Houck, *supra* note 58.

64. E-mail from "M," public interest colleague, Professor of Law, to author (Sept. 21, 2010) (on file with author).

## VI. CREATING A PUBLIC INTEREST LAW CAREER

Finally, having spent most of this article addressing Professor Manaster's comments about public interest versus corporate practice, I conclude by briefly returning to the theme of my original article, so that it is not lost. Once a lawyer has decided on public interest practice, she should consider *private* public interest practice, not just looking for an existing job in the non-profit sector. The public interest movement in environmental law needs far more advocates than it has. There are broad opportunities for young lawyers (and older lawyers who are dissatisfied with what they do and whom they represent and counsel) to join that movement to advance environmental protection goals. But looking at the limited jobs available in nonprofit law firms will often not turn up a position. The ones who are serious must figure out how to create their own private public interest law practice and choose "income-based repayment" of federal loans or even how to create their own, small-scale nonprofit law firm that can take advantage of the both the income-based repayment and cancellation provisions of the new federal law.<sup>65</sup>

As for the private public interest alternative, one lawyer explained some of the economics of making such a life possible:

Rent is no big deal for us - \$560/month. In fact, if you keep your overhead down, a small firm can be a pretty cheap shop to run as far as small businesses go. Electronic filing, a good Lexis deal. Charging/paying at low bono (\$50-75/hr) for the fee generating stuff is crucial to keeping some cash flow and to prevent exploitation of our newest colleagues, including a green

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65. College Cost Reduction & Access Act of 2007, Pub. L. No. 110-84, 121 Stat. 784, amending the Higher Education Act of 1965 (to be codified at 20 U.S.C. §§ 1001-1099e). Final regulations are published in the Federal Register, 73 Fed. Reg. 63232 (2008) (to be codified at 34 C.F.R. pts. 674, 682, 685). See generally FEDERAL STUDENT AID, LOAN FORGIVENESS FOR PUBLIC SERVICE EMPLOYEES (2009), available at <http://studentaid.ed.gov/students/attachments/siteresources/LoanForgivenessMarch18.pdf>.

martyrdom that often knocks some out of practice due to financial failure of the PIEL business/practice.<sup>66</sup>

The recent federal loan legislation provides a new alternative not previously available to those with a public interest heart: establishing their own nonprofit law firms and getting loan repayments deferred as a consequence. As explained by one young colleague:

Another option for young lawyers that might be worth mentioning is to start their own non-profit law firm. I graduated in 2009 with nearly \$200,000 worth of undergraduate and law school debt. Nonetheless, I knew in my heart I couldn't represent corporations that pollute or government agencies that issue permits to polluters. I couldn't go the private practice public interest route because the loan repayments were too high. With the new federal loan forgiveness law in place my choices were pretty much narrowed down to the non-profit world. The only non-profit litigation shop in town wasn't hiring, so a friend and I started our own.

Because I make so little, I don't have to pay a dime on my student loans. Granted, I'll probably make less than ten thousand dollars this year and next and I have considered food stamps a few times, but at the end of the day that isn't a big deal if you really want to help protect the planet.<sup>67</sup>

Whatever path they choose, those determined to do public interest work and willing to be creative can pursue an alternative

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66. E-mail from "F," public interest colleague, to author (Sept. 15, 2010) (on file with author). For a recent article giving some more tips on this path, although not in the public interest context, see Stephanie F. Ward, *Meet the Solo Who Wrote the Book on Virtual Law Practice*, LEGAL REBELS, (Sept. 21, 2010, 4:48 PM), [http://www.legalrebels.com/posts/meet\\_the\\_solo\\_who\\_wrote\\_the\\_book\\_on\\_virtual\\_law\\_practice/](http://www.legalrebels.com/posts/meet_the_solo_who_wrote_the_book_on_virtual_law_practice/). Another possibility is to join a big firm, pay off one's debt rapidly, save enough to live a year off the savings, and open a private, public interest practice. At least one law firm in Oregon started that way.

67. E-mail from John Meyer, Cottonwood Environmental Law Center to author (Sept. 13, 2010) (on file with author). The federal law providing this benefit for public interest and public service jobs is explained in some detail at *Student Debt Relief*, EQUAL JUSTICE WORKS, <http://www.equaljusticeworks.org/resources/student-debt-relief/public-service-loan-forgiveness> (last visited Sept. 14, 2010).

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path with the confidence that many of us will put them in touch with like-minded colleagues. These colleagues are eager to answer basic questions about law practice, mentor them as they launch their careers, and encourage them along the way. It is not as easy as signing up for on-campus interviews with corporate law firms. But for many, it will be the only satisfying career choice in environmental law.