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# On the Relation between Scholarship and Action in Environmental Law: Method, Theory, Change

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**Abstract:**

This chapter examines the intellectual phenomenon of theoretical aversion in legal scholarship, as it specifically manifests in environmental law. It first demonstrates how a proposed turn to methodology seeks to constrain theory within the strict contours of an epistemology that serves to support the scientific aspirations of legal scholarship. This notion of theory as epistemology is in turn linked to environmental law's overwhelming concern with controlling the relation between scholarship and action for the purpose of constituting itself as valid expert authority in the context of contemporary environmental discursive practices. Building on the critique of this view of theory as a pure research design element, the chapter articulates a different perspective, recovered from theoretical excess and inspired by the life and work of Michel Foucault, which merges the distinction between scholarship and action via the – correct – use of the metaphor of the 'tool box', often mishandled in Foucaultian scholarship. By reorienting this metaphor, the chapter argues that the contestation over the precise role of theory within environmental law relates to the historical evolution of the current role of the legal researcher who is expected to function solely as an expert on environmental change. The task of critical environmental law thus becomes to resist the assigned role within the established regime of environmental truth and to make novel and expansive contributions of the 'tool box' of environmental thought and practice.

**Keywords:** theoretical aversion, methodology, critical environmental law, Michel Foucault, tool box, intellectual history

# Contents

*'What rather threw me at the time was the fact that the question I was posing totally failed to interest those to whom I addressed it. They regarded it as a problem which was politically unimportant and epistemologically vulgar.'*[1]

## 1. REPULSION

It is revealing for the future directions of legal scholarship that a prominent handbook on legal research methodologies, written for an audience of aspiring PhD scholars and early career academics, diagnoses and partly seeks to 'dispel this fear or unease with "theory"'.[2] The source of these emotions is never fully explained, but there is a sense that being called a theorist should be unwelcome;[3] an intimation that 'particularly what some call "capital T" theory',[4] the 'arcane preserve of a small group of self-identified… Theorists',[5] is used 'to mystify and oversell mediocre ideas, or simply to sound clever'.[6] It seems that a mysterious malaise lingers in the halls of the late modern law school, transmitted through dangerous intellectual contact. Symptoms may include mystification, abstraction and generalisation. Be careful and

[1] Michel Foucault, 'Truth and Power' in Colin Gordon (ed), *Power and Knowledge: Selected writing and Interviews 1972-1977* (Pantheon Books 1980), 109

[2] Robert Cryer and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011), 5

[3] 'We rejected the use of the word 'theory' alone because in our experience many legal scholars… are uncomfortable with expressly identifying themselves as theorists', at ibid, 5.

[4] Ibid, 1

[5] Ibid, 1

[6] Ibid, 2

strike all references to promiscuous and self-indulgent scholarship from your CV, lest you become infected.

## 2. MALAISE: CRITICAL LEGAL THEORY

This malaise has had different names, some more well-known than others: originally critical legal studies, but also critical legal theory ('with or without modifiers'),[7] post-empiricist sociology of law,[8] general jurisprudence,[9] and even continental philosophy of law.[10] A product of 1960s counter-culture students and activists becoming legal academics in the 1970s, it has been called a 'heady brew' of the 'wilder aspects of American legal realism, 1960s Marxism, and […] postmodernism'.[11] But the caricature of self-indulgent theoretical meditations on the relation between law and politics peppered by vacuous neologisms derived from 'continental philosophy' is not always accurate; a central focus of critical legal theory has consistently been the modalities of thinking and acting adopted by the legal

[7] Mark Tushnet, 'Critical Legal Theory (without Modifiers) in the United States' (2005) 13 The Journal of Political Philosophy 99

[8] Austin Sarat, 'Off to Meet the Wizard: Beyond Validity and Reliability in the Search for a Post-Empiricist Sociology of Law' (1990) 15 Law & Social Inquiry 155

[9] Costas Douzinas and Adam Geary, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart Publishing 2005), 18-42

[10] Nick Smith, 'Introduction to the Special Issue on Continental Philosophy of Law ' (2009) 42 Continental Philosophy Review 1

[11] Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 Legal Quarterly Review 632, 638

profession,[12] and in particular the responsibility and role of legal academics within the university, as well as more broadly in society.

Critical legal studies went 'bust' in the 1990s in North American academia,[13] and only re-emerged as a politically restrained 'law and humanities' school.[14] Other schools of legal thought, such as socio-legal studies (or 'law and society' to give it its North American name), comparative law and more recently transnational law have flourished by constraining theory in the pursuit of their own substantive research programmes. Indeed, their current healthy state benefits at least partially from both the emigration of an older generation of critical legal scholars and a younger generation of scholars that have grown up with this fear and aversion to critical legal theory, under a series of intellectual and material pressures stemming from the changing modus operandi of what has now become the 'neoliberal university'[15] and the resultant alterations in the priorities of the various funding bodies and research councils. Despite these diminutions and abandonment, critical legal theory remains.

[12] I.e. including practitioners and academics. For an excellent diagram of the relation between legal research and legal profession see Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014), 34-42. For a survey of the early contestations by the US 'critical legal studies' school of the 'practices and ideology of the legal profession' see Tushnet, 100-101.

[13] Robert C. Ellickson, 'Trends in Legal Scholarship: A Statistical Study' (2000) 29 The Journal of Legal Studies 517, 525 and 528

[14] Peter Goodrich, 'Law by Other Means' 10 Cardozo Studies in Law and Literature 111. For a quick dismissal of this turn to literature for renewed direction see Costas Douzinas, 'A Short History of the British Critical Legal Conference or, the Responsibility of the Critic' (2014) 25 Law & Critique 187, 193

[15] On this notion see Stephen J. Ball, 'Living in the Neo-liberal University' (2015) 50 European Journal of Education 258

How then can the aspiring young researchers in the field of environmental law, which are still drawn to such unsettling meditations and critiques stay on 'the straight and narrow', and protect themselves from the spread of this seeming malaise? As the current orthodoxy will have it, there is a type of 'safe' theory – without the capital T – that can lead to valid erudition, as opposed to self-indulgent oblivion. Under this safe schema, arcane ostentation is to be dropped; they can understand theory simply as a foundational design element in the process of conceiving legal research projects, as another term for methodology. They then will be able to be guided by the understanding that 'every legal research project begins from a theoretical basis or bases, whether these are articulated or not',[16] without fearing that their scholarship would be affected by the malaise of capital-T theory.

Choosing this 'theoretical basis' will in turn determine the different conceptions and meanings attached to law both as an ideal and as practice, the types of questions deemed worthy of being posed and problems deemed worthy of being tackled, as well as the types of acceptable sources, materials and methods to be deployed. In short, what will protect the legal scholar is the equation of theory with making choices from a shopping list of available theoretical bases and methodological frameworks, with a process of reflective research design that safely structures the possible fields of enquiry for the legal scholar.

This turn towards methodology, in its almost self-evident common sense character, its quasi-religious element of renouncing bad influences and its careerist adoption of best research practice, is further analysed in the next section. The particular focus of analysis then shifts to the operation of this turn in environmental

[16] Cryer and others, 5

law, where legal scholarship's fear of theory becomes intertwined with ecology's suspicion against theorising in the face of environmental catastrophe. In the fourth section of this chapter, charting the mutual reinforcement between the two types of aversion ultimately exposes that the repulsion is driven by the field's very own particular admiration for the scientific model of enquiry and the concomitant authoritative access to political truth it provides in contemporary society.

By referring to the work of Michel Foucault, regarded as one of most dangerous influences leading legal researchers down the path of critical legal theory, the chapter further demonstrates that the rejection of critical legal theory also constitutes a rejection of a particular configuration of the relation between scholarship and action; of a certain political role of the legal researcher within the politics of change. However, the section also renders clear some of critical scholarship's own fetishes and complicity in its own downfall, focusing on the misappropriations of the concept of the Foucaultian 'toolbox'.

Finally, based on the Foucaultian concepts of the regime of truth and historical discontinuity, the chapter examines certain contradictions in the self-perceived responsibility of environmental law scholarship that the conception of theory as methodology is attempting to hide. From this analysis, the chapter concludes that the primary task for the environmental law researcher that wants to practically (re)navigate the relationship between scholarship and action, without succumbing to the fear of theory, is a difficult engagement with the idea of change.

## 3. PURITY: THEORY *QUA* EPISTEMOLOGY

In an interconnected globalised world in a continuing state of environmental crisis and with ever decreasing margins for taking action to prevent catastrophe,

environmental lawyers are not expected to be theorists. The fear and aversion to theory is heightened when, under the influence of the 'Science Wars' of the 1980s and 1990s, the latter is deemed the binary opposite of both scientific reason and rational, decisive action; a dreaded and derided abstract 'theorising' akin to fatal disassembling in the face of ecological crisis, or –even worse – the facilitator of ecological denialism and a 'fifth column' weakening the environmental cause from within. When the stakes appear so significant to relate to the welfare of the whole planet and all humanity, theoretical temptations must be kept in check at all costs. The message is often starkly clear: lay off Donna Haraway and pick up Francis Crick instead.[17] This is fertile ground for the full expression of theoretical aversion, and environmental law now forms a key element of the inoculation of legal research against theory.

The authors of a meticulous and much-debated study of how environmental law scholarship should assess itself as a scientific field of enquiry present an intriguing starting point for a notion of 'mature' legal research: that there is a need to separate between 'the "structural sources" of our scholarly problems' and 'legal solutions to environmental problems'.[18] They further explain this as the need to differentiate between environmental law as a course of legislative and policy reform underpinned by ecological values that seeks to achieve certain environmental goals,

[17] Michael E. Soule and Gary Lease (eds), *Reinventing Nature? Responses to Postmodern Deconstruction* (Island Press 1995), 3.

[18] Elisabeth Fisher and others, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 Journal of Environmental Law 213, 218

and environmental law as a mode of scholarly enquiry with its own theories, methods and problems, (i.e. its own 'structure').[19]

We thus find ourselves back on firm positivist ground, where the interpretation of the law is to be kept separate from the pursuit of political goals through legal reform; basic science kept separate from applied technology; theory kept separate from practice. In this perfect marriage of environmental law and science unified by theoretical aversion,[20] we are then left instead with research method as the single metric[21] of what constitutes mature legal scholarship on environment: scholarship that 'deploys *some thought-out* (emphasis in the original) method'.[22] In other words, when is theoretical reflection not abstract theorising? Answer: when it relates to research methodology and scholarly problems – as opposed to political positions. According to such a methodological path for attaining maturity as a legal scholar, the proposition quoted in the previous section of this article is in practice reworded as: 'every legal research project starts from a *methodological* (emphasis added) basis or bases'. When theory is transformed into methodology, it -in effect- becomes purified from the bad toxins of normative biases and value judgements. It mutates into a type of pure epistemology, a theory of scientific knowledge – i.e. of the correct methods by which valid knowledge is acquired within a field of scientific study. By

[19] Ibid, 217

[20] The joined-up aversion manifests in the authors' steadfast avoidance of terms, such as theoretical or philosophical. They prefer the unwieldy term 'jurisprudential environmental law scholarship', when setting out their typology of environmental law scholarship. Ibid, 218

[21] The authors explicitly mention David Feldman, 'The Nature of Legal Scholarship ' (1989) 52 Modern Law Review 498 as a basis for this definition, but leave out his engagement with theory, legal or otherwise, as well as his critique of the limitations of the scientific model.

[22] Fisher and others, 217

consequence, any discussion of theoretical bases of legal research is not distinguishable from the discussion of its epistemological bases.

Such an understanding of legal epistemology is manifested – and the notion of theory qua epistemology is also in turn confirmed – in the conception of theory as 'theoretical framework' that supports the production of mature legal scholarship. The framework constitutes the methodological and conceptual scaffolding that will securely underpin the construction of a proper legal enquiry; pruning obstacles and removing dangers to its scientific standing, and preparing it for its entry into the separate, applied phase. Theory qua epistemology thus becomes the subservient under-labourer (as opposed to the subversive other) of legal scholarship, restricted and palatable, domesticated in a 'structural', albeit auxiliary, role. Theory is the assistant scaffold, to be removed once the actual building itself (the legal enquiry) is completed.

Yet this conception appears to underplay the possibility that scholarship in the humanities broadly conceived – by its very nature – also requires theoretical clarity as to the social, cultural, ethical and other contexts – and effects – of the idea, phenomenon or problem being studied actually constitutes. This simple possibility is behind the long-standing concern of critical theory with the self-evidences and acquiesces on which our systems of thought rely.

This path of purity appears to be working. Theoretical scholarship has generally not been widely recognised as a viable path for environmental law scholars. 'Doctrinal', 'policy-orientated' and 'sociolegal' approaches form the standard classification in the UK.[23] In the field of international environmental law the

[23] For quick definitions see Richard Macrory, ''Maturity and Methodology': A Reflection' (2009) 21 Journal of Environmental Law 251, 252.

latter can also be replaced by an 'explanatory approach', underpinned by a form of international relations pointedly called political science, as opposed to political theory.[24] It is also worthwhile to note that self-identified environmental lawyers have been largely absent from the 'new approaches' or 'critical international law' school of thought.[25] In short, theoretical scholarship on the environment written by legal scholars is generally quite rare.[26]

## 4. OBSESSION: SCIENCE AS ASPIRATION

The proponents of this putative epistemological turn appear to advocate taking a pause from 'looking for legal solutions to environmental problems'[27], as well as the past interminable ontological debates about the nature of environmental law,[28]

[24] Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2010), 8-9

[25] E.g. notice the absence of the environment from Anne Orford (ed), *International Law and its Others* (Cambridge University Press 2006) and Jose Maria Beneyoto and others (eds), *New Approaches to International Law: The European and American Experiences* (T.M.C. Asser Press 2012).

[26] But not entirely absent, see Andreas Philippopoulos-Mihalopoulos (ed), *Law and Ecology: New Environmental Legal Foundations* (Routledge 2011), or the work of some of the contributors to this handbook.

[27] Fisher and others, 218

[28] E.g. Todd S. Aagaard, 'Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy' (2010) 95 Cornell Law Review 221; Macrory. For a comprehensive, albeit centred on the North American context, survey of the debate see A. Dan Tarlock, 'Is There a There in Environmental Law?' (2004) 19 Journal of Land Use and Environmental Law 213. On the extension of this debate to the international level cf Patricia Birnie, Alan E. Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009), 1-12 and Philippe Sands and others, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012), 3-20.

to consciously address and reflect on the methodological challenges that seemingly prevent the coherent maturation of the scholarly field.

Any environmental law scholar that has faced awkward questions about (not) saving the planet from friends and family at various social gatherings can appreciate this notion of a pure academic discipline kept distinct from the applied political project of achieving environmental protection through the force of law. Quite simply, it may be a relief to accept that environmental law scholarship cannot always be the equivalent of environmental law. Such an absolution of responsibility of course serves as an enticing lure pulling towards a 'healthy' epistemology and away from the tortuous malaise of theory. The question then becomes, is the lure also a siren call?

The intellectual value of attaining some type of clarity between scholarship and action on the environment is accepted in many scholarly quarters, including by theoretical scholarship that has been called critical environmental law.[29] Such a broad acceptance can give the impression that the path by which such clarity is to be achieved is straightforward or that a clear division between scholarship and action is desirable by all, both 'sensible' legal researchers and 'arcane' critical theorists. But the path is actually determined by the proximity to the scientific model of enquiry. The very mimicry of a binary division between basic 'scholarship' and applied 'action' on the basis of an epistemological conception of theory as theory of knowledge only serves a project of continuing rapprochement between the legal method and scientific method.

[29] See Philippopoulos-Mihalopoulos, 3-4 on how the failure to theorise the connection between law and ecology in terms of anything other than a blueprint for action fails to create the necessary distance from the 'processes and goals of environmental law'.

Thus, it ultimately supports the growing self-conception of legal scholarship as a form of social scientific enquiry, underpinned by appropriate methodological scaffolds and theoretical frameworks. This in turn further reinforces the classical positivist method of identifying the law, and thus the analytical idea that legal enquiry must aspire to and approximate as much as possible the model of scientific enquiry. Under this view, the legal researcher should function as a type of legal scientist, not to be influenced by the political biases of either the ecological movement or critical legal theory. In the end, such a conception of mature scholarship aligns legal with scientific positivism. It is clearly reliant on an ideal of scientific enquiry, of basic, pure science to be kept separate from applied technology. The mutual reinforcement of the two positivisms is implicit and unacknowledged in the context of the turn to epistemology.

This turn reinforces the field's pre-existing scientism, the reliance on scientific reason as the provider of the theoretical basis for a legal research project, and generally on scientific enquiry as an ideal and a prototype for all scholarship. This tendency is further embraced, from the empiricism of social sciences to the modelling of economics, particularly within environmental law scholarship, given its strong 'bond' with science.[30] While it is argued that 'environmental law as an object of scholarship and research does not yield easily to a single paradigm, methodology or explanation'[31] because of the complexity of environmental problems, the scientific origins and natural science background of environmental thought in fact provide a single deep structure that underlies legal enquiry. Under the sign of environmental law, legal and scientific positivism are bound together.

[30] A. Dan Tarlock, 'Who Owns Science?' (2002) 10 Penn State Environmental Law Review 135

[31] Fisher and others, 225

Therefore, the field's famed interdisciplinarity and its wide choice of available methodologies is not effectively an open research design choice, as the proponents of theory as methodology are wont to indicate. If the researcher wants validity or even attention to be paid to his work, certain methodologies are clearly superior to others; the more the distance traversed from the accoutrements of the scientific method, the lower the chances of being accepted – or indeed acceptable. Scientism guarantees that the panacea of interdisciplinarity is not such an open or holistic endeavour; if it is a call for other disciplines to enter environmental law scholarship, it is a call directed only to those that have attained or are in the process of attaining the status of science. For example, it can be considered that law and economics constitutes the scholarly manifestation of a neoliberal political agenda,[32] and thus almost the mirror opposite of the perceived leftist political bias of critical legal theory. Yet we can safely presume that economic theory is not part of the arsenal of 'capital-T' Theory that constitutes a malaise for legal scholarship. In fact, the enshrinement of both scientific and economic explanation as the primary source of authority and legitimacy in the field is already accepted.[33]

For the critical environmental lawyer therefore, submitting to the lure of separating scholarship and action is, in fact, a siren call. At best, it leads to co-optation and the excising of the inappropriate kinds of theory; at worst, refusing the call might identify the scholar as belonging to the lost cause of an abstract 'capital-T' theory camp. The goal of the application of the epistemological turn to environmental

[32] McCrudden, 640

[33] Stephen Humphreys and Yoriko Otomo, 'Theorising International Environmental Law' in Anne Orford, Florian Hoffmann and Martin Clark (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016), 2

law is therefore not solely the attainment of a higher quality of research method for the professional maturation of an aspiring academic field. It is, additionally, an act of establishing control over the relationships between truth and error and between scholarship and action. The epistemological field's self-definition of its role in society is at stake. 'Immature' scholarship is not related solely to the absence of methodological self-reflection, but, additionally, to the potential involvement of researchers, in their dangerous guise as followers of the wrong type of theoretical frameworks, into various causes outside the scientific field that would dilute its standing and authority.

The effectiveness of this epistemological turn lies in the fact that the relationship between scholarship and action – whether it is law and ecological politics or law and the politics of critical legal theory – is not substantively addressed. It is instead identified as a conflation to be cleared away and dismissed as an obstacle that obfuscates scholarship and prevents the clear acquisition of knowledge. A scientist speaks and is heard. Behind this subtle misdirection, we can finally visualise in stark terms what drives the fear and aversion to theory amongst legal circles. It is not just the fear of being dragged towards either of the two well-understood dangerous extremes of 'dilettantism' and 'single-minded pursuit of an end';[34] it is rather an obsession with impact agendas and prestigious social roles for the profession in the challenging context for universities and public research. And the lure of the turn to epistemology is that it offers a calming solution, even for those still enticed by critical legal theory: replace the latter obsession with an obsession over method. Thus, even somewhat adventurous legal researchers can choose to stay on

[34] Feldman, 502-503.

the middle path between the two extremes, without sabotaging their careers, surreptitiously satisfying their cravings for theory with morsels of theoretical framework at the initial stage of their research projects.

The rest of the chapter turns to the perceived malaise itself that causes such consternation to environmental law to examine whether such fear is founded. It is guided by the following questions: What type of knowledge constitutes 'good' and safe theory that can support mature legal scholarship, but also lead to effective action? How is the latter term to be defined? What is the appropriate place for legal researchers in the social and political practices related to the environment?

## 5. INTERVENTION: VISITING THE 'TOOL BOX'

Michel Foucault is the most cited thinker amongst critical legal scholars and his sui generis historical-philosophical work is regarded in many legal scholarship quarters as one of the primary enablers of the malaise of 'capital-T Theory'. This is odd, considering he rejected any notion of his work constituting an overarching and internally coherent theory, general method or system.[35] He was reluctant 'to be seen as a philosophical monument',[36] and was also suspicious of the controlling morality of 'our bureaucrats and our police' or the ordering of the specialised academic

[35] See Foucault's own interview remarks: 'Perhaps the reasons why my work irritates people is precisely the fact that I am not interested in constructing a new schema or in validating one that already exists. Perhaps it is because my objective is not to propose a global principle for analysing society' in Michel Foucault, 'Questions of Method' in James D. Faubion (ed), *Power: Essential works of Foucault, 1954-1984 : Vol 3* (New Press 2000), 237.

[36] David Macey, *The Lives of Michel Foucault* (Vintage 1994), 450

disciplines being applied to either his life or his work.[37] Due to this peculiar status, it is thus highly instructive to bring in the life and the work of Michel Foucault to the contestations outlined in the preceding sections over the status and role of theory in environmental law scholarship, and of that scholarship within society.

Foucault took great pains to distance his work from his own privileged status as a recalcitrant charismatic leader of a theoretical turn (called at varied times postmodernism or poststructuralism). Nevertheless, a particular pernicious way that this distance has been frequently overcome by other scholars has been via the reach for the seductive metaphor of Foucault's 'toolbox'.[38] This is the notion that his work constitutes a 'box' of theoretical instruments to pick and choose as needed for the scholar's discipline and research project, and without paying attention to the whole of the box or the relation between the instruments. Foucaultian scholars (including of law) read into that particular proposal an excuse to absolve themselves of the laborious need for understanding 'theoretical underpinnings' and intellectual

[37] 'Do not ask who I am and do not ask me to remain the same: leave it to our bureaucrats and our police to see that our papers are in order. At least spare us their morality when we write'. Michel Foucault, *The Archaeology of Knowledge* (A. M. Sheridan Smith tr, Routledge 2002), 19

[38] Michel Foucault, 'Power and Strategies' in Colin Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (Pantheon Books 1980), 145; Michel Foucault, 'Prisons et asiles dans le mecanisme de pouvoir' in Daniel Defert and Francois Ewald (eds), *Michel Foucault: Dits et Ecrits I 1954-1975* (Gallimard 2001), 1391. Some interview remarks regarding his work as a set of instruments that other scholars can use freely based on utility in their own domain became for years an excuse for poor scholarship.

lineages,[39] and thus articulating neutered critiques predicated on stylised obscurantism, verbose mystification borne out of the inescapable limitations of translating his work, and the vogue of opaque neologisms. Such scholarship has only served to confirm the worst fears regarding the malaise of theory, heightening exasperated sensations of aversion. But the toolbox was never meant as a license to consume Foucault's work for the purpose of one's own scholarship by haphazardly chopping it into bite-size pieces for those too lazy to 'chew' properly or, in Nietzschean terms, 'ruminate'.[40]

In a panel discussion in June 2011, the participants of *The Foucault Effect 1991-2011* Conference held by the Birkbeck Centre for Law and Humanities listened to Daniel Defert discuss the origin of the term; it was Foucault's favourite leather bar in New York.[41] Given the exhilarating fascination with America that Foucault displayed according to his various biographers,[42] one can perhaps see the infamous 'toolbox' as an almost playful jest to American audiences that spiralled out of control in tandem with his popularity; Foucault's very own 'Paul is Dead' myth. Details and

[39] E.g. '[t]hese tools have sometimes been used uncritically, without due attendance to their theoretical underpinnings' in Stuart Elden, *Mapping the Present: Heidegger, Foucault and the Project for a Spatial History* (Continuum 2001), 93.

[40] 'If this text strikes anyone as unintelligible and far from easy listening, the blame, as I see it, does not necessarily rest with me. The text is clear enough, assuming in the first place, as I do, that one has put some effort into reading my earlier writings.' See Friedrich Nietzsche, *On the Genealogy of Morals* (Oxford University Press 1996), Preface 1.8.

[41] Panel 1 discussion is available at: http://backdoorbroadcasting.net/2011/06/the-foucault-effect/. Last accessed: 24 July 2015.

[42] Didier Eribon, *Michel Foucault* (Faber and Faber 1992), 314-316; James E. Miller, *The Passion of Michel Foucault* (Simon & Schuster 1993), 251-255

precision have often be subsumed under the weight of this myth. His often-cited comment that he writes 'for users, not readers'[43] is prefaced by the hope that his work would be useful – in this specific way, i.e. as a toolbox – to 'an educator, a warden, a magistrate, a conscientious objector',[44] but pointedly not to a fellow scholar.

Gary Gutting highlights a discussion between Gilles Deleuze and Foucault[45] that outlines a different conception of the 'tool box' as specifically constituting a direct link between theory and practice, and not a methodological edict interpreted as directed at theory exclusively; or indeed a license for loose and postmodernist 'undisciplined' theorisations.[46] In this discussion, Deleuze, speaking in relation to the involvement of both philosophers in activism regarding the state of prisons in France during the 1970s, also conceives of 'theory' as a tool box. But his conception differs from simply constituting a methodological excuse for a particular form of theoretical scholarship: 'It must be useful. It must function. And not for itself. If no one uses it, beginning with the theoretician himself… then the theory is worthless or the moment is inappropriate.'[47]

He then further explains these comments by using the analogy, borrowed from Proust, of theory as 'a pair of glasses directed to the outside', as an instrument that – through its capacity to render visible – is used to develop a political position

[43] Foucault, 'Prisons et asiles dans le mecanisme de pouvoir', 1392

[44] Ibid, 1392

[45] Gilles Deleuze and Michel Foucault, 'Intellectuals and Power' in Sylvere Lotringer (ed), *Foucault Live (Interviews, 1961-194)* (Semiotext(e) 1989)

[46] Gary Genosko, *Undisciplined Theory* (Sage Publications 1998)

[47] Deleuze and Foucault, 76

that argues for some form of social, political or ethical change. This understanding accords with Foucault's earlier statement from the same discussion, that 'theory does not express, translate, or serve to apply practice: it is practice'.[48] This conception also accords with Gutting's observation that: 'From the time of Sartre on, philosophy itself has been seen as a means of political engagement. The leading French philosophers think for the sake of acting, of transforming a society they find intolerable'.[49] From the above, the tool box emerges at a connecting node between scholarship and action (or in Foucaultian vocabulary, between thought and practice), the latter understood as a type of emancipatory politics of change that theory serves to formulate. It is as a collection of instruments developed by the researcher to be used by the practitioner, the activist, the government etc. By extension, the goal of the scholar is to keep this toolbox stocked with new and useful instruments; and not to use it a shortcut for the simplification of his own work; in other words, not to use it as a type of theoretical framework.

### *5.1 The Intellectual and the Expert*

In expanding this analysis of possible configurations of theory and practice, Foucault proposes two competing figures and roles for the Western 'intellectual', a term obviously now fallen out of favour – if it ever enjoyed much - in the context of Anglo-American cultural pragmatism, but clearly defined along political lines as 'the person who utilises his knowledge, his competence, and his relation to truth in the

[48] Ibid, 75

[49] Gary Gutting, *Thinking the Impossible: French Philosophy since 1960* (Oxford University Press 2011), 19

field of political struggles'.[50] The first role is that of the 'universal' intellectual of the past; 'he was heard, or purported to make himself heard, as the spokesman of the universal… something like being the consciousness/conscience of us all'.[51] His 'sacralising mark' was the act of writing as a 'free subject', i.e. outside 'the state or capital'.[52] After 20th century critical theory's own fetishes contributed to making this figure, whose exemplar was Voltaire, disappear from Western society, the second figure to emerge was that of the 'specific' intellectual, professionally placed within academia and deriving his privileged position from his scientific knowledge and/or technical expertise.[53] According to Foucault's analysis of this role, the exemplars of this latter figure were the post-Second World War atomic scientist, Robert Oppenheimer, but also Charles Darwin. 'The death of the intellectual coincides with the rise of the expert.'[54]

The legal field is a crucial node for distinguishing between the 'old' and the 'new', between the 'writer of genius' and the 'absolute savant'.[55] The universal intellectual relied on the universality of the ideals of justice, right and the constitution – universally recognisable values that he (among the many fetishes, gender featured prominently) bore in his writings — to oppose the sovereign and challenge the abuses of power. An essentially uncritical and unacknowledged nostalgia for such a

[50] Foucault, 'Truth and Power', 128

[51] Ibid, 126

[52] Ibid, 127

[53] Ibid, 128

[54] Douzinas, 195

[55] Foucault, 'Truth and Power', 129

role has proven to be, at least in part according to some,[56] the downfall of the British branch of critical legal theory. For critical legal scholars quick to play the role of the victim, it is worthwhile to remember that the aversion to theory is not solely pragmatically-driven distaste for this universal, but not professionally trained, jurist that did not follow the scientific model of legal enquiry, but also for the necromantic attempts of critical legal theory to resurrect the corpse of something long dead. The era of these intellectuals is over.

Foucault then describes the 'specific' intellectual that instead intervenes politically on the basis of his expert access to a scientific truth that is not universal, but particular to a specific and localised political conflict, social issue, public debate, activist campaign etc., in which he is intervening. By consequence, it is not the morality or values he represents, but the access to scientific truth and knowledge at his disposal that makes him out as someone whose discourse is true and valid; someone who, as an expert, can recommend practical reforms. In Foucault's famous words, the intellectual is 'no longer the rhapsodist of the eternal, but the strategist of life and death.'[57] It is thus quite clear which of the two functions the turn to epistemology highlighted in this chapter is pointing towards. Methodology aims to guarantee the scientific credentials of environmental law researchers that would enable them to speak as 'specific' intellectuals, i.e. as experts.

When Foucault presents his work as a theoretical toolbox made for 'users', he is in fact casting himself in a role that approximates that of the specific, as opposed to the universal, intellectual, the expert contributing based on his extensive

[56] Peter Goodrich, 'The Critic's Love of the Law: Intimate Observations on an Insular Jurisdiction' (1999) 10 Law and Critique 343

[57] Foucault, 'Truth and Power', 129

knowledge of specific problems, such as those related to prisons and clinics. When the function of the toolbox is instead misinterpreted, a type of misbegotten theoretical scholarship emerges by modelling itself after a misconceived and nostalgic image of Foucault and his interlocutors and followers as misunderstood universal intellectuals living out of time. The result often displays all the characteristic tropes of arcane and obfuscating 'capital-T' theory.

It is easy to see why such anachronism emerges as snap reaction to the hostility towards theory. To associate some form of pure critical theory with the universal intellectual, and then deride the expert for his perceived hyper-specialisation, his co-optation within the marketplace of ideas, or indeed his unacknowledged scientism,[58] is indeed theoretical scholarship's very own attempt at purification, near equivalent to the turn to epistemology. It certainly absolves the scholar from having to reflect on the social context and standing of his research, and infantilises him by protecting him through a warm blanket made from dense and abstract 'theorising'. The atavistic image of the theorist as a member of an insular and arcane intellectual society - that critical legal theory at times cultivates – is, in the last instance, still supporting the modern binary between basic science (theory) and applied technology (practice) that Foucault sought to overcome through both his work and his life.

Turning back to environmental scholarship in general, and its descent from the modern environmental movement, it is instructive to remember that it has always been a field constructed by the discourse of the expert, rather than the universal intellectual. The early figures and leaders, such as Rachel Carson or Barry

[58] 'A secondary matter' according to Foucault, in ibid, 131.

Commoner, of the movement were concerned scientists; they followed in the footsteps of Oppenheimer. This should not constitute a source of quixotic refusals by critical environmental law or febrile acquiesces by legal researchers anxious to avoid being affected by the malaise of theory.

*5.2 The Regime of Truth*

And in acceptance lies the rub of the Foucaultian perspective once one take into account the function of the infamous 'tool box'. Acceptance of the role of the expert is to be combined with a continuing reflection and critique of the functions of this role, of what the role contributes to the toolbox of change. This is reflection on the relation between scholarship and action itself, and precisely neither the prescribed inoculation of the erstwhile critical theorist with necessary doses of scientism or economicism per the turn to methodology or epistemology (identified in the beginning of this chapter) nor the infantile refusal of the committed critical theorist to address his position within the society he is seeking to affect (identified in the preceding section).

Such reflection can be achieved through the examination of the different conceptions of truth at play in the expert interventions that occur at the border between scholarship and action. According to Foucault, 'truth isn't the reward of free spirits, the child of protracted solitude, nor the privilege of those who have succeeded in liberating themselves. Truth is a thing of this world: it is produced only by virtue of multiple forms of constraint'.[59] What Foucault called the 'politics of truth' refers to the political operation of a regime of truth, meaning the mechanisms by

[59] Ibid, 131

which true and false discourses are distinguished and operate as such, the methods by which truth is acquired, and indeed the status and credentials required for those experts that are identified as speaking the truth,[60] which is highly relevant to this chapter's discussion of the role of environmental law scholarship. It is these politics of truth that e.g. prioritise natural sciences and economics over theory as discourses capable of addressing environmental problems, as long as the truths of science and economics can be incorporated into mature legal scholarship using a well thought-out method.

Consequently, the expert, in addition to his place as a researcher within the university or other institutions, also occupies a position within this broader regime of truth that exists in society. The battle for truth exists as a political conflict 'around truth', and scientific truth does not equate political truth. This is not a conflict over the scientific truths to be 'proven' e.g. the reality of climate change, biodiversity loss or pollution, but over the political and economic realisation of such truths that have attained sufficient status within society's regime of truth.[61] In this way, the line that divides scientific and political truth, and consequently scholarship and action, is purposefully blurred in this Foucaultian schema, as the researcher continues to navigate and overcome the binary relation between the two. It is certain however that if the expert is interested is fermenting any type of change, as most outspoken interventions by environmental scholars, legal or otherwise, aspire to, then it is no use harking back to the retro fashion of the universal intellectual speaking truth against power. The intervention instead needs to address and challenge the politics of the regimes of truth.

[60] Ibid

[61] Foucault, 'Truth and Power', 132

To prepare for such an intervention, the role of the researcher within the regime of truth is to be apprehended and analysed historically. For Foucault, historicism is generally one of the most useful instruments of critical scholarship[62]– a directly political instrument that straddles scholarship and action; it is the constitution of a historico-political field, a strategic mapping of the relations of force and their disposition in the battle for truth.[63] This map of the conflicts over what is called truth is an invaluable instrument for the expert that both seeks to investigate the production of truth about existing orders and systems, as well as have input on their future evolution – or indeed revolution. In Foucaultian scholarship, history 'becomes the tool par excellence for challenging and analysing existing orders'.[64] It is proposed here that this includes the order that exists between scholarship and action. Therefore, it is through history that the limits of both thought and practice are to be located by the scholar seeking to furnish new forms of action.

Following the above Foucaultian insights, the next section begins the necessary historical analysis regarding the descent of the present relation between environmental law scholarship and action, focusing on its currently favourable disposition towards the epistemological turn. Based on these historical findings, the final section aims to provide some helpful points of departure to environmental law researchers, who are entering the field during a period of generalised, and multi-

[62] Which also accord with the fact that 'much' of the critical legal writing 'has been historical', see Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press 1987), 213-214.

[63] On the political uses of history see generally Lecture of 25 February 1976, in Michel Foucault, *Society Must Be Defended* (Arnold I. Davidson and David Macey trs, Penguin 2004), 166-187.

[64] Clare O'Farrell, *Michel Foucault* (Sage Publications 2005), 61

level, aversion to theory, but who also sense theory as something more than a methodological choice related to early stages of research design.

## 6. ANAMNESIS: ON THE HISTORICAL RESPONSIBILITY OF 'LAW AND ENVIRONMENT' STUDIES

If the field of enquiry is best identified in the broadest terms as 'law and environment studies', as esteemed scholars such as Patricia Birnie, Richard Macrory, Alan Boyle and others have frequently veered towards, then it would follow logically that the overarching object of analysis would be the relation itself between law and nature, following the intellectual tradition of 'law and…' studies. Instead, the way the methodological turn transitions into the defence of the authority of the legal researcher as another type of environmental expert makes it apparent that the principal object of study is rather thought to be the type and level of applied assistance that law should render to the task of addressing serious contemporary environmental challenges; from the Foucaultian perspective identified above, the goal may be understood as making a contribution to the toolbox of environmentalism.

Those two aims are connected, but they are not identical. Scholars increasingly do cast themselves into the role of the 'problem-solving doctors',[65] turning law into 'a plug and play instrument that is expected to deliver certain results',[66] abandoning the notion of studying law and nature or the environment altogether. But the very ambivalence of rejecting this direction in the name of pure scholarship, while also relying on it for professional recognition as an expert who is

[65] Bodansky, 37

[66] Fisher and others, 233

to be listened can be disorienting, and explains to an extent the fraught relationship between environmental law scholarship and environmental politics. At the core of this relationship is the perception of change. Thus, a contradiction often alluded to can now finally emerge: Is environmental law the study of change or the study of how to change? And which of the two pathways is preferable for the aspiring researcher?

The engagement with such questions brings the analysis back to the general aversion towards theory in the legal field charted in the beginning of this chapter. In addressing these questions, environmental lawyers run into the perceived dangers of political bias or irrelevancy, 'single-minded pursuit' or 'dilettantism'. These are very similar to some of the perceived dangers of critical theory associated with the spectre of the universal intellectual; dangers that the methodological/epistemological turn seeks to mitigate. First, the impartial and scientific nature of environmental law scholarship is in constant danger of being co-opted by various political biases and actions, against which the mature environmental law scholar must immunise, in the tradition of the best natural scientists. As regards the danger of irrelevance, this is mitigated by mimicking the fragmented structure of issue-specific environmental regulatory regimes. Hyper-specialised scholarship in a single isolated area[67] – often divided according to environmental media – such as marine pollution or climate change, is lamented as leading to the 'balkanisation of scholarly expertise'.[68] But that very lament contains the reason for the persistence of this mimicry in environmental

[67] Daniel Bodansky, Jutta Brunnée and Ellen Hey, 'International Environmental Law: Mapping the Field' in *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007), 4

[68] Fisher and others, 240

legal thought: it also creates environmental experts, with access to a type of a scientific truth and capable of being listened to.

A closer look at the history of environmental law scholarship itself (as opposed to environmental law) sheds further light on the formulation of the object of study and the possible origin of the contradiction identified above. Richard Macrory, the first professor of environmental law appointed at a British University, recounts how, in the process of starting out as an environmental law lecturer in the 1980s, he discovered a 'sympathetic and intellectually stimulating academic environment' in the environmental sciences rather than in a 'traditional law school'.[69] Significant national environmental legislation, such as the Control of Pollution of Act 1974, even predates the period that Macrory refers to. Across the Atlantic, David Driesen recounts how the reception of the same, unrevised article on international environmental law by North American law reviews shifted from blanket rejection to wide interest in the space of one year; from 1989 to 1990.[70] The US National Environment Policy Act 1969 predates Driesen's experience by twenty years, as well as most environmental law journals and reviews, such as the Ecology Law Quarterly and the Harvard Environmental Law Review amongst others. Richard Lazarus, writing in 1999 and examining only the US legal scholarship of the previous three decades, observes that in relation to mainstream law journals 'the paucity of published scholarship stands in sharp contrast to environmental law's remarkable

[69] Macrory, 251

[70] David M. Driesen, 'Thirty Years of International Environmental Law: A Retrospective and Plea for Reinvigoration' (2003) 30 Syracuse Journal of International Law and Commerce 353, 353

and dramatic emergence'.[71] Expanding this series of observations further, the present author can add his personal past experience as a student of international environmental law that was taught that its origins are not to be found in the 1980s, but in the *Trail Smelter* arbitration or even earlier treaties from the late 19th and early 20th century.

Such observations unearth disjunctions swiftly (re)arranged into evolutionary historical schemas of environmental law. The latter often take the standard legal historiographical form of teleological evolution from classical, to modern and contemporary, 'post-modern' eras.[72] These histories of the progress of environmental law subsume and conflate the legal scholarship aspect, partially confirming the argument of proponents of the methodological turn in environmental law about the need for separation. Alternatively, when these events remain unarranged and retain the character of personal anecdotes or recollections, as in the cases of some of the works cited above, then they usually convey a sense of maturation and achievement felt by the proud members of an academic discipline that went from non-existence to maturity in a relatively short time span of a few decades.

From a Foucaultian perspective, the tendency to structure events into a linear, smooth and 'continuist' histories of maturity and progress in order to derive historical explanations should be resisted, because such structures are post-facto

[71] Richard J. Lazarus, 'Environmental Scholarship and the Harvard Difference' (1999) 23 Harvard Environmental Law Review 327, 329

[72] E.g. Peter H. Sand, 'The Evolution of International Environmental Law' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007)

rationalisations and orderings of their significance by historians.[73] That is not to say that historical discontinuity, difference, anomaly and breaks should be fetishized[74] instead of continuity, structure, progress and maturity.[75] It is simply that the former can also be usefully indicative of historical transformations of significance lost in the smooth evolutionist narrative of progress towards the present.

Discontinuity is particularly useful tool for a scholarly field, such as environmental law, so intent on the study and pursuit of change. As indicated, perpetuating the notion of continuity enshrines a teleological understanding of history. In the case of environmental law, this understanding can either take the presentist attitude of legal history that seeks to re-order everything into a continuum of linear progress towards the contemporary moment or the idealist attitude of ecology as movement or its scientific utopia of a society underpinned by scientifically-derived norms; a world of 'genetically accurate and hence completely fair code of ethics'.[76]

By resisting such imposed historicisations, the observations of the authors that opened this section can have different implications. They can be seen to illuminate a reversal in the historical development of the legal epistemological field, between the start of the application of laws, at domestic and international levels, to

[73] This philosophy of history is applied in his book *The Order of Things* and further discussed in Michel Foucault, 'On the Ways of Writing History' in James D. Faubion (ed), *Aesthetics, Method and Epistemology: Essential Works of Foucault 1954-1984 Volume 2* (Penguin Books 2000).

[74] Foucault was 'bewildered' by his image as a 'philosopher of discontinuity'. See his comments in Foucault, 'Truth and Power', 111-113.

[75] 'The important thing is to avoid trying to do for the event what was previously done with the concept of structure'. See ibid, 114, and more generally Foucault, 'Return to History'.

[76] Edward O. Wilson, *Sociobiology : The New Synthesis* (Belknap Press 1975), 575.

address environmental concerns and their subsequent recognition as a valid object of legal scholarship; action before scholarship, practice before thought. Although there is no space in this chapter to fully investigate the factors and context of this reversal, it represents a useful starting point for thinking about the role of the legal researcher as an environmental expert.

As Macrory indicates, environmental law scholarship was initially a by-product of lawyers' interest in and engagement with ecological issues, concerns and causes. In his words, the 'sympathetic and intellectual environment' was located within the environmental sciences, rather than the law school. One only needs to think about the double meaning of the term ecology (as both a science and a social movement) to understand the close connection between thought and practice. Therefore, the formative years of environmental law scholarship had to contend with a legacy of –at the very least – proposals for law and policy reforms (if not concrete actions taken) to address specific environmental issues. The history of environmental law is filled with such instances of seemingly putting the cart before the horse, overlooked by legal history's commitment to perpetuating continuity within the legal field, as well between the development of scholarship and action.

For example, the concept of biodiversity was first formulated in an administrative context by biologists contributing a chapter on species and other forms of ecological decline to an US government agency's report.[77] Seven years later, when biodiversity emerged as a popular 'buzz-word' at a highly interdisciplinary forum organised by the US National Research Councils and the Smithsonian

[77] Elliot A. Norse and Roger E. McManus, 'Ecology and Living Resources: Biological Diversity' in *Environmental Quality 1980: The Eleventh Annual Report of the Council on Environmental Quality* (Council on Environmental Quality 1980)

Institute, legal scholars remained absent.[78] The concept remained under the control of specific scientific disciplines within North American academia. Only after the United Nations Environment Programme and the General Assembly authorised the start of negotiations for an international treaty on biodiversity conservation in preparation for the 1992 Rio Conference on Environment and Development,[79] did legal scholarship on biodiversity take off – coinciding with the recognition by law schools of environmental law as an academic field.

This historical pattern has now become a conceptual pattern that steadily repeats itself; a modus operandi whereby environmental lawyers are to be 'brought in' to the later stages of ecological debates as essentially technical experts of sorts, tasked with supplying both authoritative and effective legal solutions to highly complex and increasingly dynamic environmental problems that often extend beyond national jurisdictions. This assigned role within environmentalism's regime of truth might also go some way towards explaining the preoccupation with the twin dangers of 'single-minded pursuit' and 'dilettantism'. Further evidence of the acceptance of this role can be found in the opening sections of most pieces of legal scholarship on any given environmental problem, where the theoretical clarity as to the nature of the problem at hand is delivered by reference to some pre-existing configuration of the science, ethics and economics underpinning the particular conception of that problem to be tackled by the legal scholar, in her process of 'exploring the ways in

[78] As evidenced by the published proceedings in Edward O. Wilson (ed), *BioDiversity* (National Academy Press 1988).

[79] Under UNEP/GC Decision 15/34 (1989) & UNGA A/RES/44/228 (1989).

which law of whatever type can assist in meeting contemporary environmental challenges'.[80]

There is of course far more to be analysed regarding the historical descent of this certain functionalism – viewed as the transformation of an ethical and political commitment to ecology into a commitment to goal-orientated scholarship – in this particular regime of truth. But this short snapshot – this short deployment of the political instrument of history writing – begins to illustrate the ease by which the regime's operation can be discerned historically if its discontinuity is left 'un-smoothened'. Barely glancing at a historical reversal, we can already find traces of the current relationship between scholarship and action in environmental law as not something that has inevitably or consciously evolved over time to its present state, but something that contains the bitterness[81] and struggle of the early years of academic environmental lawyers. The pattern can always fall into place in a different way; or it can be encouraged to do so by legal scholarship that refuses to play the role of the restricted technical expert of the last instance.

## 7. ACCEPTANCE

The preceding analysis may appear counter-intuitive or even contrarian to some readers. On the one hand, the methodological turn is critiqued as masked subservience to the scientific model and aversion to theory is dismissed as careerist co-optation, driven by the self-serving motivation to maintain the relevance of environmental law as field of expertise in our contemporary world. On the other

[80] Macrory, 252

[81] Notice e.g. Richard Lazarus direct critique of Harvard Law School's treatment of the field of environmental law. See n. 71 above.

hand, theoretical scholarship is also indeed critiqued as a malaise identified by its flirtation with mystification and obscurantism; to add insult to injury, this critique is based on the work of Michel Foucault, frequently considered a source of much 'theory' of variable levels of quality.

The intention is twofold: to recover the Foucaultian perspective from some overzealous bundling together with critical legal theory, and to reconstruct its operation, as it relates to environmental law. It is not to advocate apathetic cynicism by suggesting that every avenue available to the inquisitive legal researcher is either blocked or pre-determined. It is not to reinforce the facile and binary fatalism of having to choose between adopting a careerist attitude and indulging a nostalgic fantasy. Quite simply, the erection of the strawman of the arcane critical theorist should not be met by the erection of the equivalent strawman of the co-opted expert. Beyond the counter-sneering, from both quarters, at irrelevancy or compromise, beyond the extremes of the scholar who is only validated when his work is quoted by a judge and the scholar who only feels sage when hiding behind the crutch of language, lies the acceptance of a difficult role – and responsibility – for environmental law to meaningfully contribute to the 'tool box' of environmental thought in the context of a scholarship that goes beyond legislative drafting, but equally does not lose all its tethers to the legal field.

The lure of establishing a pure demarcation between 'scholarly' and applied environmental problems is attractive to all schools of legal thought on the environment. But it remains a lure. The multiple social and political functions of the very idea of purity are already known to anthropology.[82] The links between notions of

[82] Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (Routledge 1991)

maturity in legal scholarship and methodological reflection, or between notions of malaise and critical legal theory, serve to control the relationship between scholarship and action. In the process, they detract from the task of addressing the larger challenge: environmental law exists to both study and manufacture change. The acceptance of the role of the expert requires demanding and constant reflection, responsibly navigating between scientific and political truth, on the multitudinous idea of change.

The brief overview of the historical reversal between scholarship and action included in this chapter easily rendered visible this centrality, in the motivations for the emergence of the field itself. More detailed historical studies will of course be capable of unearthing much more of the field's evolution and the operation of its regime of truth. But for now, we can posit that environmental law is a form of thought that does not fit neatly into the boxes of scholarship and action, theory and practice and so on. Whenever one of those boxes is isolated, irrespective whether it is by a policy expert, a doctrinal scholar, a sociolegal empiricist or an arcane critical theorist, a dangerous path is forged, eliding the difficult question of finding the right balance between studying and promoting change.

Despite the best efforts at epistemological purity by way of method and theory, environmental law is still a study of change inveigled with the study of how to change; a circle that cannot be completed, an irreconcilable *catch-22* disrupting the core of all these disciplinary labels and brand names that 21st century academics create for their little enterprising projects. Foucault was both a theorist and an expert in a way that critiqued the standard associations borne out of both labels. Transcending such labels should equally constitute the primary task of Foucault-inspired legal scholarship on the environment.

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