

JOHN NAGLE'S SCHOLARSHIP ON THE MEANINGS
OF POLLUTION: FROM SMOG AND CELL PHONE
TOWERS TO CAMPAIGN FINANCE AND
PORNOGRAPHY

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INTRODUCTION

John Nagle was a valued friend of ours and a valued colleague. We wrote a casebook together¹ and enjoyed each other's company at environmental law workshops and conferences.² He wrote on an impressively wide range of topics and was perhaps best known for his scholarship on the Endangered Species Act. In deciding how to honor his memory, we decided to highlight a long-running focus of his scholarship that is not as well known but, we believe, merits the attention and respect of scholars today and going forward. This Essay, therefore, reviews his work on pollution in all its forms.

Pollution is, of course, the central problem of environmental law. Picture a landscape crying for protection and a scene likely comes to mind of chimneys belching smoke into the air, pipes disgoring effluent into a murky river, and barrels of leaking waste sent goodness

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1 J.B. RUHL, JOHN COPELAND NAGLE & JAMES SALZMAN, *THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW* (3d ed. 2008).

2 One of our fondest such memories was funded by a generous grant we received from the Rocky Mountain Mineral Law Foundation to support the expenses of meeting to plan the casebook. After researching travel and lodging options, we found that flying to Jacksonville and renting a beach condo on Amelia Island was less expensive than the three of us gathering at one of our home locations. With perfect weather, we punctuated working on a deck overlooking a lushly forested golf course fairway with walks to the beach and forays into the Atlantic. We are confident the casebook benefited significantly.

knows where, but nowhere good. Most of our environmental laws have been developed to address variants of this Dickensian landscape. Approaching fifty years old, modern environmental law is well established and has developed sophisticated strategies to combat traditional pollution threats.

John Nagle's great insight was to realize that pollution comes in many forms. He established that the concept of moral pollution long predated the contemporary understanding of environmental pollution, though that is now the common meaning of the term. He recognized that the tools and insights developed to address traditional pollution threats could equally inform how we can address the threats posed by *non-traditional pollution*—from the societal pollution of pornography to campaign finance. He equally recognized that the environmental toolkit did not work well when applied to visual or aesthetic pollution—from the Mojave Desert and Theodore Roosevelt National Park to cell phone towers.

His analysis of the different forms of pollution was so ingenious that it defies a simple categorization. For this Essay, we have created a simple division between aesthetic pollution in the environment, described in Part I, and societal pollution, explored in Part II.

I. NON-TRADITIONAL POLLUTION IN THE ENVIRONMENT

In his 2009 essay, *Cell Phone Towers as Visual Pollution*, Nagle uses battles against construction of cell phone towers as an example of the broader targeting of visual pollution.³ In this category, he includes ugly buildings, billboards, flags, and signs, among other aesthetic clutter on the landscape.⁴ As he wrote, “[t]hese offensive sights are polluting agents because their appearance is found objectionable.”⁵ Unlike the health impacts of air and water pollution, though, visual pollution gives offense, inhibits enjoyment of the place, and may even lower property values. So what is to be done?

The law has long struggled over how, and even whether, to recognize visual pollution as an actionable harm. Traditionally, aesthetic complaints were not regarded as an actionable nuisance.⁶ This gave way through the twentieth century to zoning laws explicitly regulating visual appearance in communities and, thanks to the efforts

3 John Copeland Nagle, *Cell Phone Towers as Visual Pollution*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 537 (2009).

4 *Id.* at 538.

5 *Id.* at 539.

6 *Id.* at 542.

of Lady Bird Johnson and others, statutes regulating billboards under the incongruously named Highway Beautification Control Act.⁷

Tracing the history of courts and legislatures managing the aesthetics of first power and then cell phone towers, Nagle sets out three different strategies of how society responds to pollution. The first is toleration.⁸ Environmental law recognizes that a certain amount of pollution is actually a good thing. Our drinking water is regulated not by the Pure Drinking Water Act but by the Safe Drinking Water Act.⁹ We don't require distilled water to flow through our taps because it would be too expensive. We just mandate removal of the most dangerous contaminant. Same for air and water pollution, and tolerance levels for pesticides. The second strategy is prevention.¹⁰ This is admirable as an aspiration but, for the reasons described above, rarely achievable in practice. As a result, the third and most common strategy is avoidance.¹¹ Our laws encourage dilution, treatment, and filtering of pollution so we can avoid the worst harms.¹²

Nagle makes clear that the desire of some groups to be free entirely from the polluting effects of unwanted signs and towers is understandable but not achievable because no environment is free from pollution.¹³ The key question is how much pollution is acceptable.¹⁴ Avoidance has been the dominant response to the visual pollution of cell phone towers, but Nagle regarded this as a moving target, and he has been proven right.¹⁵ In the twelve years since he wrote this essay, toleration has moved to the fore as people become habituated to cell phone towers in the landscape. They may be camouflaged to look like a pine tree, but they have become an accepted part of the landscape.

Nagle considered the challenges of scenic pollution of national parks in two articles published in close succession, *The Scenic Protections of the Clean Air Act*,¹⁶ and *See the Mojave!*¹⁷

Like many of Nagle's articles, *See the Mojave!* is as much history as legal analysis. Regarded in early American history as a dreaded landscape and dangerous territory for settlers to cross, the Mojave

7 See *id.* at 544.

8 See *id.* at 549–50.

9 Safe Drinking Water Act, 42 U.S.C §§ 300f–300j.

10 See *id.* at 550–51.

11 See *id.* at 551–53.

12 See *id.*

13 *Id.* at 566.

14 *Id.*

15 See *id.* at 567.

16 John Copeland Nagle, *The Scenic Protections of the Clean Air Act*, 87 N.D. L. REV. 571 (2011).

17 John Copeland Nagle, *See the Mojave!*, 89 OR. L. REV. 1357 (2011).

Desert lies between Los Angeles and Las Vegas.¹⁸ Later eyes saw it as a mining resource, and then the military regarded it as a valuable location for defense installations.¹⁹ Only in the last few decades has it come to be seen very differently—as a site of stunning natural beauty worthy of protecting.²⁰ The stakes are even higher today as the newest sets of eyes regard the Mojave as ideal territory for large scale solar power.²¹

Over time, then, the Mojave has been viewed as a wasteland, a valuable resource, or a beautiful landscape. The challenge is that all three coexist today. Nagle uses these different (and often mutually exclusive) aesthetic understandings of the Mojave to explore how, indeed whether, the state should even seek to regulate aesthetic sensibilities. Is the Mojave wasteland, resource, or a scenic landscape, and how should this be decided? It's not easy. As he puts it, "The law has struggled with such contrasting perceptions of the same sights."²²

In tracing the legal management of the Mojave, from 1970s bills to protect the desert to the California Desert Protection Act and creation of Joshua Tree National Park, he shows that the aesthetic appreciation of the Mojave is quite recent. His article was more prescient than he could have known, for the conflict between scenic preservation and large-scale renewables has only intensified since he wrote the piece, with no easy way to resolve the different values. The three different strategies he proposes to manage this impasse—the Bureau of Land Management determining prospectively where facilities may be built, Congress deciding this, or case-by-case judgment—describe well the current thinking on this very challenge.

His overarching message is that the law does a poor job considering the significance of visual aesthetics particularly when, unlike a traditional national park, there is strongly held disagreement over perceptions of the same landscape. With his typically adroit turn of phrase, he writes, often "the same sight that some people treasure is a sight that others find offensive."²³ In such cases, which are more common than we appreciate, he calls for a decisionmaking process structure to solicit public involvement that not only identifies the contrasting perceptions but seeks to honor them.²⁴

The Scenic Protections of the Clean Air Act was published just a year later and explores many of the same themes but in the context of air

18 See *id.* at 1357–58, 1363.

19 See *id.* at 1361–66.

20 See *id.* at 1358.

21 See *id.* at 1378–79.

22 *Id.* at 1358.

23 *Id.* at 1360.

24 See *id.*

quality in national parks.²⁵ As he cleverly puts it, “Like the proverbial falling tree in the forest, is a sight really spectacular if no one can see it? The sightseeing quality of national parks disappears if the sights cannot be seen.”²⁶ When each of our national parks was established, air quality was taken as a given. The fact that the natural wonders could be seen was the very justification for their legal protections.

Nagle uses the example of Theodore Roosevelt National Park in North Dakota’s badlands as his vehicle to explore the challenges in preserving park visibility. When proponents of the park lobbied Congress in the 1950s, they used the economic benefits of tourism as a key argument.²⁷ They did not foresee, though, the boom in oil, coal and gas development that would follow just three decades later.²⁸ Protecting the park’s scenic beauty, the economic justification for park designation, is now in direct conflict with the economic benefits from the resource extraction just outside the park boundaries.²⁹ How should we mediate the original calls for preservation of the park’s scenic values versus newer demands on behalf of fossil fuel production’s economic benefits?

The Clean Air Act (CAA) speaks clearly to this challenge.³⁰ National parks are subject to special, more stringent protections than other airsheds.³¹ In practice, though, these protections have been difficult to ensure. They have not protected the views at Theodore Roosevelt National Park and many other parks around the country.³² In assessing the reasons for this failure, Nagle studied carefully the comments at a public hearing on EPA’s proposed disapproval of North Dakota’s plan to comply with the CAA. He concludes that:

the implementation of the CAA’s provisions will not necessarily accomplish the statutory goal, the public commitment to scenic values is not as strong as the statutory requirements for protecting those values, and the cooperative federalism framework embedded in the CAA confronts special difficulties in the context of visibility issues.³³

In a fascinating final section, Nagle points out the challenges facing each actor in this drama. The EPA has no discretion to relax standards. “The EPA is in an impossible position if the law requires it

25 See Nagle, *supra* note 16.

26 *Id.* at 572.

27 *See id.* at 573–75.

28 *See id.*

29 *See id.* at 574.

30 *See id.* at 589.

31 *See id.* at 574.

32 *See id.* at 595–601.

33 *Id.* at 575.

to do one thing, but we want it to do something else.”³⁴ The National Park Service has no authority at all over the polluting activities. And North Dakota’s plan is subject to EPA approval. Not surprisingly, the saga continues.

II. THE IDEA OF POLLUTION BEYOND ENVIRONMENTAL LAW

Nagle’s extension of the pollution concept to aesthetic concerns was novel, but he pushed even harder in a line of his scholarship to establish the pollution concept as a useful model for sorting through controversial social issues far beyond those intersecting the environment. This turn in his work began with *Corruption, Pollution, and Politics*, a book review essay published in the *Yale Law Journal* in 2000.³⁵ The review opens with a quote from Senator John McCain praising the book, Elizabeth Drew’s *The Corruption of American Politics*, for its condemnation of the corrosive effects of money in American politics.³⁶ The review thoroughly summarizes the book and places it in the context of the broad debate in America about campaign finance and other ways money influences politicians,³⁷ but Nagle ultimately questions Drew’s perspective³⁸ and is deeply critical of Drew’s central claim of corruption.³⁹ Nagle observes that Drew never defines corruption, fails to engage the extensive scholarship on political corruption, and offers no empirical dimension to justify the corruption claim.⁴⁰ Nagle then offers his own conceptualization of what corruption means and how it can be detected, but ultimately rejects corruption as the metaphor through which to assess the influence of money in politics.⁴¹ He proposed replacing it with . . . pollution.⁴²

Nagle acknowledges that the pollution metaphor had been used before to describe the effects of money in politics, but those usages were only as a metaphor, not as a platform for analytical exploration.⁴³ Why is the pollution metaphor better than the corruption metaphor? Nagle argues that the pollution is more helpful in several respects. First, it better captures the problem of money as an agent

³⁴ *Id.* at 600.

³⁵ John Copeland Nagle, *Corruption, Pollution, and Politics*, 110 YALE L.J. 293 (2000) (reviewing ELIZABETH DREW, *THE CORRUPTION OF AMERICAN POLITICS: WHAT WENT WRONG AND WHY* (1999)).

³⁶ *See id.* at 294.

³⁷ *See id.* at 297–307.

³⁸ *See id.*

³⁹ *See id.* at 307–16.

⁴⁰ *Id.* at 308.

⁴¹ *See id.* at 309–16.

⁴² *See id.* at 316–30.

⁴³ *See id.* at 316–17.

coming from outside the ecosystem—in this case politics—and influencing how the system works.⁴⁴ Second, it takes the focus off of individual blameworthiness, recognizing that the outside agent of money pollutes the system writ large.⁴⁵ Third, the ways in which we “clean up” pollution may offer insights into how to clean up campaign finance.⁴⁶ And lastly—and herein lies the glimmer of his work to follow—Nagle observes that the pollution metaphor had been used by advocacy movements against other social ills arising from expressive activities, such as internet indecency and hate speech, that ultimately faced First Amendment obstacles.⁴⁷ He concludes that campaign finance reform could run into the same wall.⁴⁸ Indeed it did.⁴⁹

One year after his book review essay on campaign finance, Nagle published *Moral Nuisances* in the *Emory Law Journal*.⁵⁰ An abbreviated history of environmental law might describe common-law private and public nuisance claims as the mainstays of pollution control until the 1970s, when the common law was eclipsed by a new and far more extensive federal statutory regime. This is a gross and in many ways inaccurate simplification, but it aligns with Nagle's purpose of reminding us that at one time nuisance law was also a legal mechanism for controlling morally offensive conduct. Nuisance law lumped immorality in with environmental pollution as being in the same class of offenses.

Nagle uses a contemporaneous real-life case study to resurface the idea of moral nuisances as a still-viable legal concept.⁵¹ A couple purchased riverfront property in Oregon that turned out to be adjacent to a public beach frequented by nudists—lots of them—who often engaged in explicit sexual conduct within view of the couple's property.⁵² Suffice it to say things did not go well from the couple's perspective and they sued the state agency that managed the park, alleging the agency was committing a private nuisance.⁵³ The trial court dismissed the claim out of hand, but the appellate court reversed, advising the lower court to apply standard nuisance fact analysis.⁵⁴ The trial court did, finding that instances of nudity and sexual conduct on the beach that were visible from the couple's

44 *Id.* at 318–19.

45 *See id.* at 319–24.

46 *See id.* at 324–37.

47 *Id.* at 327–28.

48 *See id.* at 328–29.

49 *See Citizens United v. FEC*, 558 U.S. 310 (2010).

50 John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265 (2001).

51 *See id.* at 265–66.

52 *Id.*

53 *Id.* at 266.

54 *Id.* at 266–67.

property constituted private nuisances.⁵⁵ Nagle leverages this amusing story to argue that, just like environmental pollution nuisances, moral nuisance law is not dead. The parallels are striking. Immoral conduct—brothels, saloons, billiard halls, and a long list of undesirables—was fodder for nuisance claims through the nineteenth century.⁵⁶ Like pollution control law, however, many states began outlawing immoral conduct through statutory public nuisance regimes.⁵⁷ And constitutional and other developments in civil rights law began to extend preemptive protections to speech and other expressive activities.⁵⁸ Morals also changed. The role of nuisance doctrine in managing morality waned over time.⁵⁹ Yet, just as nuisance doctrine has seen a resurgence in the pollution context, even serving as the basis for climate change lawsuits, Nagle documents that it also has seen renewed action in the morality setting.⁶⁰

Nagle steps back to ask whether this is legitimate terrain for nuisance law, concluding that it is.⁶¹ He argues that many injuries to a landowner suffered from a neighbor's immoral actions fit within the nuisance doctrine framework, including weeding out the hypersensitive plaintiff.⁶² He contends that the traditional doctrine, combined with extant statutory and constitutional protections of some controversial expressive actions, will prevent nuisance from becoming a runaway train of morality management.⁶³ Nagle's last reason pulls in concepts from environmental law's model for pollution control—the citizen suit. Nagle argues that much like the “private attorney general” purpose of the citizen suit provisions found in many environmental laws, private moral nuisance actions could fill gaps in morality management left open by unwilling or overburdened public enforcement authorities.⁶⁴ Such a role may be especially useful in contexts beyond offensive nudity, Nagle suggests, such as neighborhood drug dealing and other urban blights.⁶⁵

Nagle's work on campaign finance and moral nuisances laid the platform for his more conceptual treatment of the pollution metaphor in *The Idea of Pollution*, published in the *UC Davis Law Review* in 2009.⁶⁶

55 *Id.* at 269.

56 *Id.* at 266.

57 *Id.* at 267.

58 *See id.*

59 *See id.* at 267–68.

60 *See id.* at 267.

61 *See id.* at 321.

62 *See id.* at 275–302.

63 *See id.* at 302–15.

64 *See id.* 309–11.

65 *See id.* at 315–21.

66 John Copeland Nagle, *The Idea of Pollution*, 43 U.C. DAVIS L. REV. 1 (2009).

This is an impressive, sweeping, lively, multidisciplinary examination of the concept of pollution in use throughout history and across many contexts. We cannot do it full justice here—our aim is to situate it in Nagle's work and justify recommending for a deep reading.

Nagle was a cherished member of the environmental law academic community, so he wisely opened the article in the abstract with the recognition that “[p]ollution is the primary target of environmental law.”⁶⁷ But he quickly advises us that “environmental pollution is hardly the only type of pollution.”⁶⁸ A broader view of pollution includes all “defilement” of human environments, natural and cultural, and remains a theme in contemporary anthropological literature, which studies the pollution beliefs of cultures throughout the world.⁶⁹ Moreover, as Nagle had developed in his prior work, the law responds or can respond to complaints of cultural pollution such as hostile workplaces and pornography.⁷⁰ The article thus explores how the idea of pollution can help society better understand and respond to the undesired introduction of agents, whether they be chemicals or words, into both natural environments and human environments.⁷¹

For lawyers, *The Idea of Pollution* offers a fascinating account of how the concept of pollution has been used by English and American jurists dating back centuries, and that its use came first in the cultural context, not with respect to pollution of natural environments. Judges described judicial bias, immoral conduct, political corruption, foreign influence, prostitution, slavery, and other cultural harms as forms of pollution.⁷² But as pollution became the term of art for the developing field of environmental science and began being picked up by legal institutions to describe water and air degradation, the term gradually became a defining feature of environmental law.⁷³ Although most people now think of pollution in that context, judges still use the metaphor to condemn degradation of human environments, such as workplace discrimination and hostility,⁷⁴ and anthropologists use the concept to describe forces degrading cultures.⁷⁵

Notwithstanding this history, however, Nagle ultimately concludes that neither environmental law nor other fields of law and science have

67 *Id.* at 1.

68 *Id.*

69 *Id.* at 1–2.

70 *Id.* at 2.

71 *See id.* at 78.

72 *See id.* at 10–16.

73 *See id.* at 16–18.

74 *See id.* at 9–20.

75 *See id.* at 24–28, 49.

defined pollution coherently so as to clearly designate what is and is not pollution.⁷⁶ What constitutes pollution is context-based and can change over time. So, what is the idea of pollution good for? Nagle offers two broad responses, both of which turn on his underlying project of breaking the idea of pollution out of its environmental law box. First, the broader conception of pollution shows that, even in the environmental degradation context, pollution beliefs and pollution claims are ultimately normative.⁷⁷ As he put it, “[p]ollution beliefs force people to ask what belongs where.”⁷⁸ The second is that pollution is a more complex causal phenomenon than is usually framed in environmental law. The essence of pollution is harm; thus, pollution beliefs demand a firm understanding of what causes pollution’s harms.⁷⁹ Nagle challenges us to carefully ask, when and how does the emission of a chemical rise to constitute harm to a natural environment so as to be deemed pollution? Likewise, when and how does display of sexual images constitute harm to a human environment so as to be deemed pollution (a.k.a pornography)? These have not been easy questions for the law. *The Idea of Pollution* thus encourages further thought regarding how the law responds to pollution claims in *all* of the places that are of concern to society.

The final installment in this line of innovative scholarship is *Pornography as Pollution*, published in the *Maryland Law Review* in 2011.⁸⁰ Nagle referred to pornography many times in his three previous articles as an example of cultural pollution, so it seems inevitable that he would eventually make it the topic of a full article.⁸¹ But *Pornography as Pollution* has a twist to it, especially coming on the heels of *The Idea of Pollution*. Whereas the earlier piece sought to restore the idea of pollution to extend beyond its modern environmental law meaning,⁸² *Pornography as Pollution* argues that policy should use the environment law concept to better manage pornography in our culture.⁸³ As Nagle explains, “[p]ornography [as a legal matter] has long been seen as a First Amendment problem—

76 See *id.* at 50–72.

77 *Id.* at 72–73.

78 *Id.* at 72.

79 See *id.* at 72–73.

80 John Copeland Nagle, *Pornography as Pollution*, 70 MD. L. REV. 939 (2011).

81 See generally, Nagle, *supra* note 35, at 296 (observing that “[c]ultural pollution caused by . . . pornographic . . . entertainment media” has led to a debate about the need for government regulation); Nagle, *supra* note 66, at 28 (suggesting that the “idea of pollution can aid in analyzing . . . pornography”).

82 See Nagle, *supra* note 66, at 28.

83 See Nagle, *supra* note 80, at 940.

unavoidably and rightly so. But, pornography is not just a First Amendment problem.”⁸⁴ It is also a pollution problem.

Nagle acknowledges that rhetorical references to pornography as pollution are common, but he takes the description more literally and applies principles of environmental law to consider how to design a law of pornography.⁸⁵ He describes environmental law as seeking to “(1) *prevent* some pollution from occurring at all, (2) *control* other pollution so it does not enter the environment, (3) facilitate the *separation* of pollution that does reach the environment from those it could harm, and (4) *tolerate* the presence of some pollution.”⁸⁶ Nagle recognizes that pornography is not like environmental pollution in all respects—in particular, pornography that is not obscene may be constitutionally protected speech⁸⁷—but makes the case that these four strategies could usefully be applied even if pornography cannot legally be regulated the same way as industrial pollutants.⁸⁸

Our purpose here is not to walk through his framework and arguments on the specific matter of pornography. Rather, our focus is on Nagle’s innovative conception of pollution as a metaphor through which to step back from environmental law, where it is so firmly and nearly exclusively entrenched, and consider how the idea informs many other social and cultural legal challenges. Indeed, Nagle closes the circle of this theme in *Pornography as Pollution*. After all, he observes, “[e]nvironmental law is familiar with discussions of pollution, a term that derived from a sense of moral defilement.”⁸⁹ In *Pornography as Pollution*, student becomes teacher, as environmental law’s strategies for managing pollution of nature offer lessons for how law can manage a cultural defilement such as pornography.

CONCLUSION

Although we were aware that John had a diverse scholarship footprint, we knew his work primarily through the collaboration on our casebook, for which he took the lead on materials covering biodiversity, public lands, and climate change. Those were the lenses through which we thought of John, and our original intention for this tribute was to focus on his scholarship in one of those realms. When we examined his publication history, however, we realized he had

84 *Id.*

85 *See id.* at 940–41.

86 *Id.* at 941.

87 *Id.* at 951.

88 Using the example of China, Nagle also observes that even when such legal constraints do not exist, simply regulating pornography away is exceedingly difficult. *See id.* at 955–59.

89 *Id.* at 984.

produced a stream of work we had not fully appreciated—his creative explorations of the “idea of pollution.” We chose the articles covered above to learn more about John and this body of his scholarship, albeit, sadly, we could only do so posthumously. We found the same attributes that characterized his work in the other domains with which we were familiar—breadth and depth of exploration, thoughtful and careful analysis, and a lively voice. This was no surprise to us, nor would it be to anyone who knew John.