

BOOK REVIEW

Greener pastures: decentralizing the regulation of agricultural pollution

By Elizabeth Brubaker

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Review by Glenn Fox

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This important book builds on earlier work by the same author, *Property Rights in the Defense of Nature* (1995), which made a strong case that customary common law in the United Kingdom, the United States and Canada has been an effective means of pollution control, where and when it has been allowed to work. As that earlier book showed, however, legislative law, often drawn up on the premise that it would promote economic progress or the public good, has often weakened these customary common law remedies to air and water pollution.

This new book applies the same analytical lens to the narrower issue of air and water pollution originating on farms. The focus of the analysis is primarily Canadian policy, although connections to similar policies in the United States are made. Brubaker's thesis is that centralization of authority at the provincial level has eroded rights of property owners in rural communities by undermining the effectiveness of customary common law remedies against trespass and nuisance and also has impaired the ability of local municipal governments to resolve environmental conflicts over farm businesses, especially large livestock farms. The main culprit in this provincial centralization is so called "Right to Farm" legislation. Now in place in all ten provinces, right to farm legislation, among other things, reduces farmers' risk of liability for actions that would likely be found to be trespasses, nuisances or violations of riparian rights under customary common law. Right to farm legislation also typically overrides municipal land use policy, reducing the power of local municipalities to block the construction or expansion of large scale livestock production facilities. Brubaker's approach is pragmatic. She sees local government and customary common law as potential allies in the cause of protection of local air and water

quality from agricultural pollution. Her main focus is on how increased regulatory power at the provincial level has increased the scope for legalized nuisance from livestock agriculture. She pays less attention to tensions between customary common law and government in general, whether at the local, provincial or national level, as alternative means of conflict resolution, compared to her earlier work.

One of the most important contributions of the book is the attention that it gives to odour and to drainage as farm-related environmental problems. Environmental policy development directed at primary agriculture has typically emphasized actions to reduce threats of contamination of ground and surface water by nutrients and bacteria. At a local level, however, most environmental conflicts between farmers and their neighbours originate as a result of odour. Manure stinks. But odour, for various reasons, does not seem to have the same policy traction that ground and surface water quality do. Even the contribution of methane emissions from livestock to global warming has received more research and policy attention than odour. Brubaker makes odour a central issue in this book, both as a property rights issue and as a human health concern. And her analysis of environmental problems, not to mention property rights violations, associated with agricultural drainage, is long overdue.

One of the more problematic elements of right to farm legislation in Canada is the use of standard industry practice as a benchmark for determining if a farm is liable for harms imposed on neighbours. Ms. Brubaker carefully documents how this standard has resulted in numerous cases of agricultural pollution being imposed on neighbours in excess of what would be allowed under a strict liability customary common law regime. Murray

Rothbard (1982) showed that this particular issue is an example of a more general problem related to the substitution of negligence as the basis for liability in pollution cases. Under a negligence rule, the actions of the defendant are deemed permissible – and no liability attaches – if a “reasonable man” would have acted the way that the defendant acted under the circumstances. Under right to farm legislation, the reasonable man is represented by standard industry practice. Rothbard and others have argued that strict liability should be applied to nuisance cases. *Greener Pastures* makes reference to Rothbard’s work, but only in a footnote, and does not develop the idea of strict liability.

In contrast to Rothbard, however, *Greener Pastures* rejects the defense of “coming to the nuisance”: the doctrine that if I have freely moved into the locale of the nuisance I cannot then seek compensation for enduring its impact. In general, right to farm legislation fails to distinguish between two cases: (1) those in which farmers might in principle have legitimately acquired the right to release waste into the local environment by virtue of having arrived there first; and (2) those in which farmers would cause a nuisance to neighbouring landowners as a result of such releases. Rothbard, a strong advocate of the principle of “first in time, first in right”, would clearly distinguish between such cases by permitting the defence of “coming to a nuisance” (that if P has voluntarily exposed themselves to a nuisance caused by D, by purchasing property in the vicinity of that nuisance, then P cannot seek compensation from D for any harm caused by the nuisance). By contrast, *Greener Pastures* rejects the defense of “coming to the nuisance”. This rejection is not complete, however, in that, from time to time, she does support the idea that the character of the neighbourhood is a legitimate guideline for resolving disputes and she even seems to prefer zoning over the first in time, first in right principle. In the present context, the defense of coming to the nuisance would only apply for established farm practices. A new or an expanded or otherwise modified farming operation would not be protected under the first in time rule.

Greener Pastures documents the tension between local municipalities, several of which initiated local measures as a reaction to the development of large scale livestock production facilities within their jurisdictions, on the one hand, and provincial legislatures and farm groups, on the other. The major provincial agricultural associations sought action from provincial legislatures to address what they perceived to be a heterogeneous and inconsistent set of local planning measures aimed at regulating agricultural operations. Larger farms spanning adjacent

townships or counties found themselves needing to comply with multiple sets of regulations and policies. The remedy sought from the provincial legislatures was a level playing field at the local level. Ironically, those farm groups later had cause to regret this request when provincial regulation of farm nutrient use and legislation aimed at protecting groundwater quality were introduced. Ms. Brubaker makes a case for the regulation of agricultural pollution at the municipal level, in effect reversing the national trend toward more centralization at the provincial level. Her argument is based on a claim that municipal government is more accountable to its citizens than are more senior levels of government. She acknowledges, however, the municipal governments are not perfect, and that even they need to operate within the constraints reflected in customary common law property rights. She does not make the case, and this case could certainly be made based on this history of right to farm policy in Canada, that municipalities should be allowed sufficient autonomy to innovate and experiment with alternative approaches to the mediation of conflicts between farmers and their neighbors, an autonomy that has been largely taken away by provincial legislatures. This suppression of experimentation and innovation may well limit the ability to identify new and more cost effective approaches to internalize this important class of externalities.

One objection that is raised to the type of argument that Ms Brubaker is making about property rights approaches to environmental protection is that a private property rights approach will create a bonanza for lawyers. Brubaker raises this issue, but not until p. 96, and then only briefly. This matter deserves more and earlier attention. Many readers will have this objection in mind early in the book and they may not get to p. 96 before they lose interest in the story. There are a number of related issues that can be taken on under this heading. The role of class action suits (which might reduce the cost of weak cases to plaintiffs with ulterior motives), joint and several liability, the role of corporations (especially the limited-liability aspects of this form of business organization) and the role of precedent in customary common-law are all related to this point. Many of these issues are analyzed by Bate and Morris, Yandle, Meiners and Rothbard. Environmental economists have generally rejected customary common law remedies against pollution on the grounds that these remedies involve high transaction costs, and hence are less efficient than regulatory approaches, including emission taxes and tradable permit schemes. Although this argument is made frequently in leading textbooks and

journal articles, I have not been able to find analysis or empirical support for this claim. It seems to be made as an appeal to shared beliefs that does not require substantiation. *Greener Pastures*, and before that *Property Rights in Defense of Nature*, as well related work by Roger Bate, Julian Morris, Bruce Yandle, and Roger Meiners, among others, confront this conventional view with evidence from actual case law. The challenge to textbook writers in the field is substantial and the issue is important. It remains to be seen if this challenge will be acknowledged and addressed.

One insightful observation that is offered repeatedly throughout the book has to do with the apparent irrelevance of the name of the political party that forms the provincial government and the outcome of the legislative process, at least in terms of the treatment of the interests of farmers and also the environmental consequences. Liberals, Conservatives and New Democrats have all facilitated the institutionalization of legalized nuisances in rural communities.

Throughout this review, I have used the phrase “customary common law”, for two reasons. First, Elizabeth Brubaker uses this term in *Greener Pastures* to denote the historical body of theory and practice to which she has appealed in this book and in *Property Rights in Defense of Nature*. In addition, Hayek (1973) and Benson (1990) have explained that contemporary common law is a hybrid in which some principles of customary common law persist, but those principles are mixed with legislative law. It is no longer justifiable to conflate contemporary civil law with customary common law. *Property Rights in the Defense of Nature*, in some respects, was a plea to re-establish customary common law to its rightful place in as a bulwark against the fouling of air and water. But the plea is in support of the pure type of that law, not the current adulterated version.

At the beginning of this review, I described *Greener Pastures* as an important work. This claim might seem exaggerated to urban readers who only rarely find themselves downwind from a major livestock operation. But this book is of general importance beyond the specific context of agricultural pollution. *Greener Pastures* and *Property Rights in the Defense of Nature* ably document the extent of something that Ronald Coase (1960) called “legalized nuisance.” Legalized nuisance arises when actions that would otherwise be considered a tort, either on the grounds of trespass or nuisance, were absolved of liability by a legislature. Coase was offering a broad criticism of economists’ diagnoses of externality problems, which, in his view, often misdiagnosed pollution externalities universally as market failures. Coase identified

a few examples of legalized nuisance in his 1960 essay. Unfortunately, the overwhelming majority of economic commentary on that essay has been distracted by controversies over the so-called “Coase Theorem” and his insight about legalized nuisance and the correct diagnosis of externality problems has gone largely unnoticed in environmental economics and, for that matter, in environmental policy. It is precisely this oversight that makes *Greener Pastures*, and before it *Property Rights in Defense of Nature*, and sympathetic work by Meiners and Yandle (1991), so important. If Brubaker, and for that matter Coase and Meiners and Yandle, are correct, then a great many of economists’ diagnostic and prescriptive analyses of externality problems have missed the mark. Coase’s 1960 observation that it is ironic for economists to call for government intervention to address externality problems when it has often been government intervention that caused the externality problem in the first place has gone unheeded.

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