



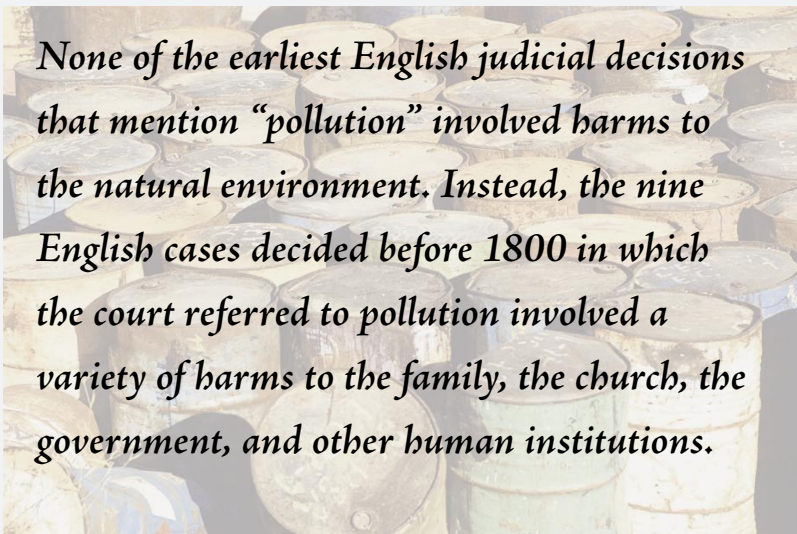
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The History

We have become accustomed to thinking of pollution exclusively in terms of environmental degradation. So accustomed, in fact, that references to cultural pollution, light pollution, spiritual pollution, and other kind of pollution besides environmental pollution are dismissed as merely rhetorical devices. The history of the word shows otherwise.

None of the earliest English judicial decisions that mention “pollution” involved harms to the natural environment. Instead, the nine English cases decided before 1800 in which the court referred to pollution involved a variety of harms to the family, the church, the government, and other human institutions. In 1688, Justice Croke warned an accused murderer that “Blood it is a crying sin, the which doth pollute the land.” In 1757, Lord Wilmot wrote of a contested gift that “[l]et the hand receiving it be ever so chaste, yet if it comes through a corrupt polluted channel, the obligation of restitution will follow it.” He added in another case that a bond could not be given for illegal consideration because “[a]ll writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice.” A 1775 estate dispute found that a fraudulent transaction had “tainted and polluted the whole of the preceding transaction.” The complaints against a minister included the charge that “he took the cups and other vessels of the church, consecrated to holy use, and employed them in his own house, and put barm in the cups, that they were so polluted, that the communicants of the parish were loath to drink out of them.” A 1792 adultery suit in which the husband was alleged to have encouraged his wife’s extramarital sexual activity rejected the notion that the husband “would consent to her pollution with a view of getting rid of her.” Another adultery case opined that a husband could not complain of his wife’s behavior when he had done the same: “It is not unfit if he, who is the guardian of the purity of his own house, has converted it into a brothel, that he should not be allowed to complain of the pollution which he himself has introduced.”

Nineteenth-century American judicial decisions referred to numerous types of pollution. There were, of course, a number of references to environmental pollution. As a federal court advised in 1886, “The right to pure air is incident to the land,—as much so as the right to the uninterrupted flow of a stream of pure water which runs through it,—and no one can be permitted to pollute either, to the injury and disadvantage of the owner.” But the first reference to water pollution in a reported American case did not occur until 1832, and the first reference to air pollution was in 1849. Meanwhile, the courts invoked the image of pollution to describe numerous other harms throughout the 19th century and before. In 1793, the Virginia Supreme Court noted that no West Indian citizens “can wish to see the tribunals of their own country polluted” by judges biased against Americans. The Indiana Supreme Court admonished in 1893 that “[f]ew greater crimes against society can be conceived than that of the moral pollution of our youth.” The courts were especially concerned about the moral pollution of women by adulterous husbands, rapists, and consignment to prostitution. The 19th-century courts also saw pollution in such disparate sources as wrongful business practices and inmates. At the beginning of the 20th century, the United States Supreme Court confirmed the congressional power to ensure that interstate commerce “shall not be polluted by the carrying of lottery tickets from one state to another.”



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of "Pollution"

The confluence of literary, political, religious, and legal references to pollution is best seen in the many 19th-century descriptions of slavery and its effects. Senator Charles Sumner's description of slavery as a mistress "polluted in the sight of the world" in the speech that precipitated his caning is just the most dramatic example of that imagery. Frederick Douglass described slavery as "glaring frightfully upon us, with the blood of millions in his polluted skirts," and a system "marked with blood and stained with pollution." He also wrote of "the scenes of pollution which the slaveholders continually provide for most of the poor, sinking, wretched young women, whom they call their property." John Greenleaf Whittier characterized supporters of slavery as "bowed to an Idol polluted with blood." A Cincinnati minister asked, "What Christian father could endure, that his daughters, whom he had educated in virtue, should be subdued for pollution by the whip, or by the customs of the system?" William Seward defended the Ordinance of 1787 as having "dedicated all of the national domain not yet polluted by slavery to free labor immediately, thenceforth and forever." John Quincy Adams objected that "so polluted are all streams of legislation in regions of slavery" that Congress approved the extension of slavery in the Missouri Compromise. The Pennsylvania Legislature resolved in 1820 that "the people of Pennsylvania . . . may boast that they were foremost in removing the pollution of slavery from amongst them." Harriet Beecher Stowe complained of "the pollution of the electoral franchise" in Kansas. A delegate to the 1857 Iowa constitutional convention praised the Kansans who "have saved the territory probably from being polluted with the curse of slavery." Justice Joseph Story told a grand jury that he wished he "could say that New England, and New England men, were free from this deep pollution" of the slave trade. Several English ministers approved a resolution upon the assassination of President Lincoln that characterized the Civil War "as a temporal judgment for the commencement, continuance, and defence of the polluted system of slavery." By 1878, even the Louisiana Supreme Court described the money earned by the sale of slaves in 1853 as "polluted gold."

Today's courts are much more likely to describe the air or water, instead of any human environments, as polluted. Yet there are still instances in which judges worry that the environments of our own creation have been polluted. The most frequent such reference occurs in over 100 civil rights cases in which courts describe hostile work environments as polluted by racism, sexism, or other kinds of discrimination. Courts also acknowledge worries about polluted business practices. The remedies for violations of trademark law must "provide a sufficient deterrent to ensure that the guilty party will not return to its former ways and once again pollute the marketplace." New York and other states charged Microsoft with "polluting" software industry standards. Campaign contributions are accused of polluting political campaigns and the legislative process. Judicial references to the pollution of the legal process include a court's caution that an accomplice's testimony "should be looked upon with disfavor because it comes from a corrupt and polluted source," and another court's conclusion that an unfounded suggestion of sexual abuse of a minor "had the potential of polluting the minds of the jury." The 21st-century counterpart to the 19th-century decisions voicing concerns about the moral pollution of youth appears in a New York court's reversal of a child custody order because the order failed to consider that a teenage girl "has lived in the polluted environment of domestic violence all of her life."

"Pollution," in short, means much more than the smoky air and oily water that environmental law regulates. We desire political institutions, workplaces, and cultural environments that are free from unwanted—*polluting*—influences. How an understanding of all sorts of pollution can achieve that desire for clean natural and human environments is what I begin to explore in my book.

Professor Nagle teaches courses in environmental law, property, and legislation. His book *The Many Faces of Pollution* will be published by the University of Chicago Press in the fall of 2004.