



Transcript of CleanLaw Episode 16: Caitlin McCoy speaks with Sarah Light on Regulatory Horcruxes, March 28, 2019

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Robin Just: Welcome to this podcast from the Environmental & Energy Law Program at Harvard Law School. Today, Caitlin McCoy interviews Sarah Light, assistant professor of legal studies and business ethics at Wharton about how regulatory program can be split among federal agencies, state agencies, and even private actors and how that fragmentation can insulate programs from future deregulatory actions. We hope you enjoy the podcast.

Caitlin McCoy: Hello. This is Caitlin McCoy, the Climate, Clean Air, & Energy fellow at the Environmental & Energy Law Program. Today I am joined by Professor Sarah Light, who is an assistant professor of legal studies and business ethics at the Wharton School at the University of Pennsylvania. Thank you so much for joining us by phone today, Professor Light.

Sarah Light: Thank you so much for having me.

Caitlin: I'm really excited to talk to you by your article, Regulatory Horcruxes, which has been published in the Duke Law Journal. As our listeners may have already realized, you use a reference to the Harry Potter book series to describe the administrative law concept that you present in your article. We wanted to talk to you about this article because you use environmental regulatory programs to discuss your concept of the regulatory horcrux. This is all extremely relevant to our work following the Trump administration's deregulatory agenda and our Regulatory Rollback Tracker, as well as our other publications.

Caitlin: Let's begin. I will ask you to please explain the concept of a regulatory horcrux.

Sarah: Great. I'm so delighted to be here. Before explaining what a regulatory horcrux is, I would like to explain what a horcrux is to the extent that any of the listeners have not read the Harry Potter books. The idea of a horcrux is a concept in the Harry Potter books where the chief villain, Lord Voldemort, wished to achieve immortality. In order to achieve immortality, he essentially split portions of his soul and placed the portions of his soul into multiple external objects, everything from a diary to a necklace to a diadem to a ring.

Sarah: The goal was to essentially protect himself from attack. The theory goes that if one's body is attacked or destroyed, one still can't die because part of the soul



remains undamaged. This is consistent, honestly, with the idea that decentralization or fragmentation can be protective against attack.

Sarah: The concept of a regulatory horcrux essentially asks whether it's ever possible to harden or insulate a regulatory program from deregulatory actions or deregulatory attacks, if that's how you'd like to frame it. If so, how is it possible? Second, would it ever be a good thing? A regulatory horcrux can be created when a regulator, or the coalition that creates the regulation, intentionally fragments regulatory authority into multiple regulators beyond the primary federal agency that might be responsible for regulating in an area.

Caitlin: Great. Well, thank you for providing that background. It slipped my mind as a diehard Harry Potter fan to give people some background. Thank you for laying that out. I think before we go any further, I want to pause here to discuss the importance of these regulatory structures.

Caitlin: When we're talking about hardening a program for the sake of making a successor exit, perhaps more challenging or protecting a program, I think later in the article, you pointed out that the importance should be on ending the program at the right time, not necessarily providing a protective purpose solely to maintain the status quo for the sake of just maintaining the status quo.

Caitlin: You lay out the importance of these regulatory structures in the sense that the focus should be on, is the goal of the regulatory program being achieved, right, and in structuring it in such a way that the program is protected enough to run its course, but also that there's enough flexibility so that it can be disbanded in the future when the time is right. I wanted to make sure we highlighted that early on in our discussion and I also want to make sure I got that right.

Sarah: Yes. I think maybe it would be useful to take a step back for a moment to explain what motivated me to write this article in the first place.

Caitlin: Oh, that would be great.

Sarah: Yes. This article, in many ways, was a response to an article by JB Ruhl and Jim Salzman called Regulatory Exit in which they argue that regulators often think about how to create a program, what the program should look like, who should be governed by the program, but they don't spend enough time thinking at the outset about how and when a regulatory program ought to end.

Sarah: That is somewhat atypical, right? One thinks about if you're a military leader, you wouldn't enter into an armed conflict without some sense of what your goals are and what your exit strategy might be. Their admonition was that regulators need to think more consciously about regulatory exit and they propose a series of ways



that regulators ought to take the thought about exit into account more fully when a regulatory program is designed.

Sarah: When I read this piece, I thought to myself, "Great point. That's very interesting, yet there's one problem." The one problem is that there are background rules and laws that exist that allow a successor administration to exit a program regardless of how carefully the initiating regulator designed the program or wanted to think about exit.

Sarah: For example, Congress can repeal or amend a statute under Article 1, Section 7 of the Constitution or an agency can repeal or amend deregulation pursuant to the notice and comment procedures of the Administrative Procedure Act. There are certain types of regulations timing-wise that can be revoked under the Congressional Review Act. There are these background rules that say a successor administration can exit, so the concern, of course...

Sarah: I mean, in one sense, that's a good thing, right? We live in a democracy and our elected leaders should be able to amend the law as long as they do so consistent with appropriate procedures that we have put into place in our governing laws.

Sarah: On the other hand, there is a concern that exit will take place prematurely, and this is the point that you are getting at in your question, before the goals of a regulatory program have been achieved or accomplished. That was what prompted my question of: Is it ever a good thing to try to harden a regulatory program against success or exit or some kind of deregulation, acknowledging that in some cases it is a good thing and in other cases, it might not be a good thing? This yielded the concept of decentralized authority over a regulatory program and the concept of regulatory horcruxes. That was the motivation.

Sarah: The idea of the regulatory horcrux is that there are really three sets of institutions into which regulatory authority can be fragmented. Assuming that when we're thinking about this, we're talking about environmental regulation, which is certainly an area in which there has been deregulatory press in the current administration as well as it is my area of expertise, so that is why I wrote about it.

Sarah: The primary regulator at the federal level is generally the EPA. Let's think about what other institutions could house portions of or all of regulatory programs. There are really three sets. There are other federal agencies that have a primary mission that is not about environmental protection, for example, the Securities and Exchange Commission or the Federal Trade Commission or the Department of Defense, or Housing and Urban Development. The second set of institutions are states and local governments, sub-federal governmental agencies. Then the third set of institutions would be private actors.



- Sarah: These three different sets of institutions yield different types of regulatory horcruxes: horizontal if it's another federal agency, vertical if it's the states or local governments, and private, if the institutions are private actors, each of which has advantages and disadvantages and may be better or worse at resisting deregulatory pressure from the center, but also better and worse at achieving the goals of the regulatory program.
- Caitlin: You beat me to my next question, which was going to be to ask you to explain the three types, but I also want to say that with the three types, the horizontal, vertical and private, you also discuss that these three types are on a continuum in terms of how the power is divided between the different entities involved. You refer to two additional layers. One side of the continuum is a shared horcrux meaning that the entities have overlapping authority and on the other side, we have external horcruxes, meaning the secondary entity holds all of the authority over the program.
- Caitlin: With those layers in mind over our three main types, horizontal, vertical and private, I wanted to discuss with you the relative strengths and weaknesses of the various types. If it makes sense, we can just take them one at a time and start, perhaps, with horizontal in terms of its relative strengths and weaknesses.
- Sarah: Sure. I think it might be helpful for folks to have a sense, a little bit of what are some examples of horizontal horcruxes. One example would be the permitting program under the Clean Water Act, which gives the EPA and the US Army Corps of Engineers joint regulatory authority to define what the waters of the United States are for federal permitting requirements.
- Sarah: Other programs that would constitute shared horizontal horcruxes would be the EPA and Department of Energy sharing responsibility to administer the Energy Star program or shared responsibility between the EPA and the Department of Housing and Urban Development in addressing problems with respect to lead paint in residential housing.
- Sarah: An external horizontal horcrux might be something like what I've called in other research "the military environmental complex," the idea that Congress has directed the DOD to take into account climate change in its planning infrastructure and other aspects of its decision-making. The EPA plays no role, arguably. The programs related to climate change are housed entirely within the Department of Defense.
- Sarah: I think that the advantages of the horizontal horcrux are that because they're at the federal level, because there's the potential for uniform national rules or standards is that the horizontal horcrux is most likely able to mirror a centralized program in terms of the power that it has to address interstate problems or



problems of national scope. If a horcrux is embedded in the states, it is possible that the states that take the lead may not be able to address national problems or inter-state spillovers effectively. There's arguably greater power in the horizontal horcrux to address certain kinds of problems.

Sarah: Of course, as is potentially obvious by now, these horizontal horcruxes also have a weakness and the weaknesses is that they lie within the control of the federal government, which is the entity that controls the EPA as well, so efforts to deregulate traditional canonical environmental laws and regulations that are addressed and enforced by the EPA is likely, whether a different agency is in charge, but if it's the FTC, we have a unified federal government and it is likely that the same deregulatory pressures are going to apply to the FTC as the EPA, so they may still be under some deregulatory pressure.

Sarah: The exception to this and the nuance is that in order to have programs be adopted that span beyond the core environmental agency with a mission to protect the environment, but rather to be housed in, say, the Department of Defense, whose core mission is to protect national security. In order to have that program be adopted, there has to have been greater democratic deliberation, whereby the goals of protecting the environment or reducing climate emissions or addressing climate resilience had been framed in terms of the agency's core mission of national security.

Sarah: What's very interesting is that even while there's a tremendous amount of deregulatory pressure on the EPA on the climate and environment side, Congress has in the National Defense Authorization Act reaffirmed its commitment to the idea that climate change is a national security issue. We'll see how much the Department of Defense programs on climate change are able to withstand deregulatory efforts that are being pressed upon the EPA and its programs.

Sarah: Shall I continue with respect to vertical horcruxes?

Caitlin: Yeah, that would be great.

Sarah: Okay, vertical horcruxes can also be shared or external. In the shared context, this might be something like a cooperative federalism approach where the federal government sets the standards and the states enforce it. It could be something like the Clean Water Act permit program where, as I mentioned, the EPA and the Army Corps of Engineers have shared responsibility for ensuring that no discharges of pollutants occur into waters of the United States without a federal permit. There is also a program under Section 401 that requires the entity seeking a permit also to get approval from the relevant state, which has the authority to set water quality standards, so the state operates as a kind of backstop.



Sarah: A second example would be the California exception under the Clean Air Act, which allows California to seek a waiver from the EPA to set vehicle emissions standards that are at least as protective of human health and the environment as the standards set by the federal government. The reason why these qualify is because they are similarly created by the federal government at the time that the law is created.

Sarah: As I mentioned before, it is likely to be the case that when you have deregulatory action at the federal government level, for example, the current efforts to roll back or the proposal to roll back emission standards for light trucks and passenger cars, California is standing firm that it wishes to continue to enforce the higher standards that were put into place several years ago. There is some resistance to deregulatory efforts by the central government. Of course, California's standard is not a national standard, so while a dozen other states have adopted it, it does not address the same scope as the original core program under the Clean Air Act.

Sarah: Finally, with respect to private horcruxes, it's very important to acknowledge that only shared horcruxes exist in the private context. There's no such thing as an external private horcrux. The reason for this is because in order for something to count as a horcrux, it needs to be created by the central regulator or created by the enacting coalition. The mere failure to regulate something by the federal government always allows for private action.

Sarah: Private action can always exceed regulatory standards, so purely private actions doesn't really fit within the horcrux framework, but there are examples of shared regulatory space where private actors have some authority to enforce the law. The clearest example of this would be the citizen-suit provisions that exist under a number of every major federal environmental statutes. If the federal government chooses not to enforce the Clean Water Act, private entity like the Natural Resources Defense Council or Friends of the Earth or some other organization can sue as a private attorney general. That is a way in which there has been some kind of decentralization of the enforcement mechanism of statutes.

Caitlin: Well, I think you've already gotten into some of the advantages of horcruxes. I'd like to continue down that road and highlight one that I found particularly interesting in reading the article. That is the potential for these horcruxes to foreground longterm public interest, as you put it. Because in the world of environmental policy, we often see the costs and benefits of our regulatory programs distributed in a longterm manner, so when we start to take short-term hits at these programs, we decrease their longterm efficacy and some of those longterm results, which are often achieved incrementally. I thought that that was a particularly interesting advantage that you mentioned in your article. Were there any others that you wanted to mention that we hadn't gotten to yet?



Sarah: No, I mean, I think that the idea is that by using a horcrux, by using a fragmentation or decentralization, what you're doing is you're making the program more sticky. You increase the cost of creating it at the outset, potentially, but you also increase the number of entities that potentially have an interest in the program continuing. In order to destroy the program or deregulate the program, more entities have to be involved.

Sarah: While the federal government could change how it, for example, as it is attempting currently to do change how it interprets the term waters of the United States. Under the Clean Water Act, it is much harder for the deregulatory pressure to get at the California waiver under the Clean Air Act for vehicle emissions. By virtue of the fact that California has now its own constituency of support for this program, a constituency of support that is supported by a dozen other states, the federal government cannot simply end or roll back emissions limits related to greenhouse gas emissions from vehicles.

Sarah: There is going to be a court that is going to get involved. It's not simply the snap of the fingers and a decision at the federal level to change those standards. More entities with varied interests are involved in this has the potential to make regulations more sticky.

Caitlin: Right. I like to think of the California waiver example. Perhaps there is a new term that needs to be invented for that one because it's so unique. It's kind of the expanded external vertical horcrux, if you will, because you do have all those other states that are involved. I think as you also highlighted, when you have these horcruxes at play, whether they're vertical or horizontal, I think particularly what you're doing is you're bringing more voices to the table, so you're getting more priorities and more viewpoints within a single program.

Caitlin: Often, as you said, that can lead to a different reason behind why perhaps some of these environmental objectives or outcomes need to be pursued. In the case of DOD, as you sort of alluded to, they are perhaps pursuing certain environmental outcomes from a national security perspective, which is interesting. It leads to this stickier program where as you diversify the reasons behind achieving these environmental objectives, the more they become embedded into our democracy and our regulatory framework here. I think it's really interesting to read about how you framed all of these things to start to see them at play.

Sarah: Well, thank you. I'm glad that you found it a useful analytical framework.

Caitlin: Yeah. We can't let you go without turning to some of the disadvantages briefly because there are some disadvantages. As I stated earlier, the focus should be not necessarily on stickiness for stickiness' sake, but to try to make sure that these programs are running their course in terms of achieving what they've set out to



achieve, so what might be some of the disadvantages of a horcrux being established?

Sarah: Well, I think that there are two. There are the upfront disadvantages and then there are the democratic accountability disadvantages. Upfront, it may be more costly and more challenging to create a program that contains a regulatory horcrux rather than simply to create a simple program that has one agency at the federal level that enforces and administers that program, right?

Sarah: Once you are negotiating with other agencies and trying to figure out how to deal with inter-agency coordination or coordination between the federal government and the states or bringing in private actors, that may make the regulatory program more complicated with many, many more moving parts. There may be greater upfront costs to creating a program that contains the regulatory horcruxes.

Sarah: The second thing is, and this is really embedded within your question, is that durability for its own sake isn't a good thing. We have democratic elections for a reason. When we have democratic elections, presumably they reflect the current will of the people, so the idea is that our policies ought to reflect some democratic accountability. It shouldn't be the case that we have enacting coalition from 30 years ago dictating policy necessarily for all time. There is a concern that if you make regulatory programs sticky or harder to dislodge, that this is interfering with democratic accountability.

Sarah: Now, on the flip side, I think it's actually really important to note that climate change is one of these problems that requires a longterm perspective and that requires not necessarily thinking purely in the short term. Actually, your colleague at Harvard, Richard Lazarus, has argued very compellingly that in the climate change context, pre-commitment strategies that protect regulation from short-term reversals actually don't undermine democratic accountability because what they're doing is enhancing democratic accountability.

Sarah: If we don't ensure the durability of climate change regulation or legislation, then future generations have potentially no voice and no ability to engage in the democratic process at all. I find that argument to be extremely compelling, so I think that it is important to acknowledge the democratic accountability concerns, but also to recognize that first of all, if there's overwhelming cross-issue agreement that the goals of a regulatory program have been met, then more power to the democratic electorate who can undo the program, but in the climate change context, it is important to take a long term view. I think that the regulatory stickiness may be more appropriate there.

Caitlin: Well, I'm glad you raised this issue about climate because it's one that continues to be a major problem here in the US with the lack of leadership on a federal level



on climate. We see now increasing action, how to state and local level to mitigate climate change and also adapt to the effects of climate change. That's part of my continuing portfolio of work here at the Environmental & Energy Law Program.

Caitlin: I know that you have a lot of other portfolios of work going at any given time, but I was wondering, since you wrote this piece about a year ago, whether this has been on your radar, whether you've had any additional insights into the things that you discussed about horcruxes or the different contexts that you used as examples over the last year since you wrote the piece?

Sarah: Well, I think what's been very interesting has been simply to watch how the environmental deregulatory efforts has been playing out at the federal level and to see how states have responded and to see where the stickiness lies in using this analytical framework as a guidepost, so I had been very curious to see efforts to de-emphasize climate resilience and how former military leaders recently published a report reiterating that climate change is a national security issue, how the state of California has vowed to fight efforts to revoke its waiver under the Clean Air Act with respect to vehicle emissions.

Sarah: I wouldn't say that I have new insights on this particular topic, but rather that I have found this to be a very useful analytical framework in which to watch the current deregulatory efforts unfold and to see which ones are easier, which programs might be easier to change than others.

Caitlin: Yeah, that's exactly what I've been doing ever since I read your article as well. I know I've been following closely the efforts to revoke or preempt or withdraw, however the agency ends up framing it in its final rule, California's waiver under the Clean Air Act for its vehicle tailpipe standards.

Caitlin: With your article in mind, I know that I will be watching the inevitable litigation closely because now I'm curious to see whether it will influence the court, this unique regulatory structure that exists around California, as you have framed it, an "external vertical horcrux," but really, this unique position that California occupies in being able to create its own standards, which stands in contrast to how other states operate, even under the same statute, the Clean Air Act, for example, with how they create their state implementation plans where they have more of a shared vertical horcrux and they're very much, they're subject to a little bit more oversight by EPA.

Caitlin: I wonder if that degree of independence that exists for California in the way that EPA has oversight is constrained in this area will end influencing the court in some way, even though the case will be about the EPA's interpretation of the preemption clause in the Energy Policy and Conservation Act or whatever avenue Act, we will see. I know that I am using your article as a framing and it's leading



me to think a lot about how some of these things are going to play out, both in terms of the rule making and the inevitable litigation.

Sarah: Well, thank you. I'm so delighted that you're finding the analytical framework useful.

Caitlin: Well, Professor Light, it has been a pleasure to talk to you. I want to make sure that I give you a chance to raise anything else about this piece before we wrap things up here.

Sarah: No, I think your questions have been so comprehensive and this has been a really wonderful conversation. Thank you so much.

Caitlin: Well, thank you so much for joining us. We really appreciate it and I encourage everyone to read your article. It's only about 35 pages, so I found it to be accessible, but I am an administrative law nerd and I guess I just think that everybody else will be just as enthused to dive right in, but it comes highly recommended.

Sarah: Thank you.

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