

# SHOULD TREES HAVE STANDING?— TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS

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## INTRODUCTION: THE UNTHINKABLE

In *Descent of Man*, Darwin observes that the history of man's moral development has been a continual extension in the objects of his "social instincts and sympathies." Originally each man had regard only for himself and those of a very narrow circle about him; later, he came to regard more and more "not only the welfare, but the happiness of all his fellow-men"; then "his sympathies became more tender and widely diffused, extending to men of all races, to the imbecile, maimed, and other useless members of society, and finally to the lower animals. . . ."<sup>1</sup>

The history of the law suggests a parallel development. Perhaps there never was a pure Hobbesian state of nature, in which no "rights" existed except in the vacant sense of each man's "right to self-defense." But it is not unlikely that so far as the earliest "families" (including extended kinship groups and clans) were concerned, everyone outside the family was suspect, alien, rightless.<sup>2</sup> And even within the family, persons we presently regard as the natural holders of at least some rights had none. Take, for example, children. We know something of the early rights-status of children from the widespread practice of infanticide—

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1. C. DARWIN, *DESCENT OF MAN* 119, 120-21 (2d ed. 1874). See also R. WAELDER, *PROGRESS AND REVOLUTION* 39 *et seq.* (1967).

2. See DARWIN, *supra* note 1, at 113-14:

. . . No tribe could hold together if murder, robbery, treachery, etc., were common; consequently such crimes within the limits of the same tribe "are branded with everlasting infamy"; but excite no such sentiment beyond these limits. A North-American Indian is well pleased with himself, and is honored by others, when he scalps a man of another tribe; and a Dyak cuts off the head of an unoffending person, and dries it as a trophy . . . It has been recorded that an Indian Thug conscientiously regretted that he had not robbed and strangled as many travelers as did his father before him. In a rude state of civilization the robbery of strangers is, indeed, generally considered as honorable.

See also Service, *Forms of Kinship* in *MAN IN ADAPTATION* 112 (Y. Cohen ed. 1968).

especially of the deformed and female.<sup>3</sup> (Senicide,<sup>4</sup> as among the North American Indians, was the corresponding rightlessness of the aged).<sup>5</sup> Maine tells us that as late as the *Patria Potestas* of the Romans, the father had *jus vitae necisque*—the power of life and death—over his children. A fortiori, Maine writes, he had power of “uncontrolled corporal chastisement; he can modify their personal condition at pleasure; he can give a wife to his son; he can give his daughter in marriage; he can divorce his children of either sex; he can transfer them to another family by adoption; and he can sell them.” The child was less than a person: an object, a thing.<sup>6</sup>

The legal rights of children have long since been recognized in principle, and are still expanding in practice. Witness, just within recent time, *In re Gault*,<sup>7</sup> guaranteeing basic constitutional protections to juvenile defendants, and the Voting Rights Act of 1970.<sup>8</sup> We have been making persons of children although they were not, in law, always so. And we have done the same, albeit imperfectly some would say, with prisoners,<sup>9</sup> aliens, women (especially of the married variety), the insane,<sup>10</sup> Blacks, fetuses,<sup>11</sup> and Indians.

3. See DARWIN, *supra* note 1, at 113. See also E. WESTERMARCK, 1 *THE ORIGIN AND DEVELOPMENT OF THE MORAL IDEAS* 406-12 (1912).

The practice of allowing sickly children to die has not been entirely abandoned, apparently, even at our most distinguished hospitals. See *Hospital Let Retarded Baby Die*, *Film Shows*, L. A. Times, Oct. 17, 1971, § A, at 9, col. 1.

4. There does not appear to be a word “gericide” or “geronticide” to designate the killing of the aged. “Senicide” is as close as the Oxford English Dictionary comes, although, as it indicates, the word is rare. 9 OXFORD ENGLISH DICTIONARY 454 (1933).

5. See DARWIN, *supra* note 1, at 386-93. WESTERMARCK, *supra* note 3, at 387-89, observes that where the killing of the aged and infirm is practiced, it is often supported by humanitarian justification; this, however, is a far cry from saying that the killing is requested by the victim as his right.

6. H. MAINE, *ANCIENT LAW* 153 (Pollock ed. 1930). Maine claimed that these powers of the father extended to all regions of private law, although not to the *Jus Publicum*, under which a son, notwithstanding his subjection in private life, might vote alongside his father. *Id.* at 152. WESTERMARCK, *supra* note 3, at 393-94, was skeptical that the arbitrary power of the father over the children extended as late as into early Roman law.

7. 387 U.S. 1 (1967).

8. 42 U.S.C. §§ 1973 *et seq.* (1970).

9. See *Landman v. Royster*, 40 U.S.L.W. 2256 (E.D. Va., Oct. 30, 1971) (eighth amendment and due process clause of the fourteenth amendment require federal injunctive relief, including compelling the drafting of new prison rules, for Virginia prisoners against prison conduct prohibited by vague rules or no rules, without disciplinary proceedings embodying rudiments of procedural due process, and by various penalties that constitute cruel and unusual punishment). See Note, *Courts, Corrections and the Eighth Amendment: Encouraging Prison Reform by Releasing Inmates*, 44 S. CAL. L. REV. 1060 (1971).

Nor is it only matter in human form that has come to be recognized as the possessor of rights. The world of the lawyer is peopled with inanimate right-holders: trusts, corporations, joint ventures, municipalities, Subchapter R partnerships,<sup>12</sup> and nation-states, to mention just a few. Ships, still referred to by courts in the feminine gender, have long had an independent jural life, often with striking consequences.<sup>13</sup> We have become so accustomed to the idea of a corporation having “its” own rights, and being a “person” and “citizen” for so many statutory and constitutional purposes, that we forget how jarring the notion was to early jurists. “That invisible, intangible and artificial being, that mere legal entity” Chief Justice Marshall wrote of the corporation in *Bank of*

10. But see T. SZASZ, *LAW, LIBERTY AND PSYCHIATRY* (1963).

11. See notes 22, 52 and accompanying text *infra*. The trend toward liberalized abortion can be seen either as a legislative tendency back in the direction of rightlessness for the foetus—or toward increasing rights of women. This inconsistency is not unique in the law of course; it is simply support for Hohfeld’s scheme that the “jural opposite” of someone’s right is someone else’s “no-right.” W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923).

Consider in this regard a New York case in which a settlor S established a trust on behalf of a number of named beneficiaries and “lives in being.” Desiring to amend the deed of trust, the grantor took steps pursuant to statute to obtain “the written consent of all persons beneficially interested in [the] trust.” At the time the grantor was pregnant and the trustee Chase Bank advised it would not recognize the proposed amendment because the child *en ventre sa mere* might be deemed a person beneficially interested in the trust. The court allowed the amendment to stand, holding that birth rather than conception is the controlling factor in ascertaining whether a person is beneficially interested in the trust which the grantor seeks to amend. *In re Peabody*, 5 N.Y.2d 541, 158 N.E.2d 841 (1959).

The California Supreme Court has recently refused to allow the deliberate killing of a foetus (in a non-abortion situation) to support a murder prosecution. The court ruled fetuses not to be denoted by the words “human being” within the statute defining murder. *Keeler v. Superior Court*, 2 Cal. 3d 619, 87 Cal. Rptr. 481, 470 P.2d 617 (1970). But see note 52 and accompanying text *infra*.

Some jurisdictions have statutes defining a crime of “feticide”—deliberately causing the death of an unborn child. The absence of such a specific feticide provision in the California case was one basis for the ruling in *Keeler*. See 2 Cal. 3d at 633 n.16, 87 Cal. Rptr. at 489 n.16, 470 P.2d at 625 n.16.

12. INT. REV. CODE of 1954, § 1361 (repealed by Pub. L. No. 89-389, effective Jan. 1, 1969).

13. For example, see *United States v. Cargo of the Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844). There, a ship had been seized and used by pirates. All this was done without the knowledge or consent of the owners of the ship. After the ship had been captured, the United States condemned and sold the “offending vessel.” The owners objected. In denying release to the owners, Justice Story cited Chief Justice Marshall from an earlier case: “This is not a proceeding against the owner; it is a proceeding against the vessel for an offense committed by the vessel; which is not the less an offense . . . because it was committed without the authority and against the will of the owner.” 43 U.S. at 234, quoting from *United States v. Schooner Little Charles*, 26 F. Cas. 979 (No. 15,612) (C.C.D. Va. 1818).

the *United States v. Deveau*<sup>14</sup>—could a suit be brought in its name? Ten years later, in the *Dartmouth College* case,<sup>15</sup> he was still refusing to let pass unnoticed the wonder of an entity “existing only in contemplation of law.”<sup>16</sup> Yet, long before Marshall worried over the personifying of the modern corporation, the best medieval legal scholars had spent hundreds of years struggling with the notion of the legal nature of those great public “corporate bodies,” the Church and the State. How could they exist in law, as entities transcending the living Pope and King? It was clear how a king could bind *himself*—on his honor—by a treaty. But when the king died, what was it that was burdened with the obligations of, and claimed the rights under, the treaty *his* tangible hand had signed? The medieval mind saw (what we have lost our capacity to see)<sup>17</sup> how *unthinkable* it was, and worked out the most elaborate conceits and fallacies to serve as anthropomorphic flesh for the Universal Church and the Universal Empire.<sup>18</sup>

It is this note of the *unthinkable* that I want to dwell upon for a moment. Throughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable. We are inclined to suppose the rightlessness of rightless “things” to be a decree of Nature, not a legal convention acting in support of some status quo. It is thus that we defer considering the choices involved in all their moral, social, and economic dimensions. And so the United States Supreme Court could straight-facedly tell us in *Dred Scott* that Blacks had been denied the rights of citizenship “as a subordinate and inferior class of beings, who had been subjugated by the dominant race. . . .”<sup>19</sup>

14. 9 U.S. (5 Cranch) 61, 86 (1809).

15. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

16. *Id.* at 636.

17. Consider, for example, that the claim of the United States to the naval station at Guantanamo Bay, at \$2000-a-year rental, is based upon a treaty signed in 1903 by José Montes for the President of Cuba and a minister representing Theodore Roosevelt; it was subsequently ratified by two-thirds of a Senate no member of which is living today. *Lease [from Cuba] of Certain Areas for Naval or Coaling Stations*, July 2, 1903, T.S. No. 426; C. BEVANS, 6 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES 1776-1949, at 1120 (U.S. Dep't of State Pub. 8549, 1971).

18. O. GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* (Maitland transl. 1927), especially at 22-30. The reader may be tempted to suggest that the “corporate” examples in the text are distinguishable from environmental objects in that the former are comprised by and serve humans. On the contrary, I think that the more we learn about the sociology of the firm—and the realpolitik of our society—the more we discover the ultimate reality of these institutions, and the increasingly legal fictiveness of the individual human being. See note 125 and accompanying text *infra*.

19. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 396, 404-05 (1856). In *Bailey v. Poinexter's Ex'r*, 56 Va. (14 Gratt.) 132, 142-43 (1858) a provision in a will that testator's

In the nineteenth century, the highest court in California explained that Chinese had not the right to testify against white men in criminal matters because they were “a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point . . . between whom and ourselves nature has placed an impassable difference.”<sup>20</sup> The popular conception of the Jew in the 13th Century contributed to a law which treated them as “*men ferae naturae*, protected by a quasi-forest law. Like the roe and the deer, they form an order apart.”<sup>21</sup> Recall, too, that it was not so long ago that the foetus was “like the roe and the deer.” In an early suit attempting to establish a wrongful death action on behalf of a negligently killed foetus (now widely accepted practice), Holmes, then on the Massachusetts Supreme Court, seems to have thought it simply inconceivable “that a man might owe a civil duty and incur a conditional prospective liability in tort to one not yet in being.”<sup>22</sup> The first woman in Wisconsin who thought she might have a right to practice law was told that she did not, in the following terms:

The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world . . . [A]ll life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it . . . The

slaves could choose between emancipation and public sale was held void on the ground that slaves have no legal capacity to choose:

These decisions are legal conclusions flowing naturally and necessarily from the one clear, simple, fundamental idea of chattel slavery. That fundamental idea is, that, in the eye of the law, so far certainly as civil rights and relations are concerned, the slave is not a person, but a thing. The investiture of a chattel with civil rights or legal capacity is indeed a legal solecism and absurdity. The attribution of legal personality to a chattel slave,—legal conscience, legal intellect, legal freedom, or liberty and power of free choice and action, and corresponding legal obligations growing out of such qualities, faculties and action—implies a palpable contradiction in terms.

20. *People v. Hall*, 4 Cal. 399, 405 (1854). The statute there under interpretation provided that “no Black or Mulatto person, or Indian shall be allowed to give evidence in favor of, or against a white man,” but was silent as to Chinese. The “policy” analysis by which the court brings Chinese under “Black . . . or Indian” is a fascinating illustration of the relationship between a “policy” decision and a “just” decision, especially in light of the exchange between Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) and Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, *id.* at 630.

21. Schechter, *The Rightlessness of Mediaeval English Jewry*, 45 JEWISH Q. REV. 121, 135 (1954) quoting from M. BATESON, *MEDIAEVAL ENGLAND* 139 (1904). Schechter also quotes Henry de Bracton to the effect that “a Jew cannot have anything of his own, because whatever he acquires he acquires not for himself but for the king. . . .” *Id.* at 128.

22. *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 16 (1884).

peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field . . .<sup>23</sup>

The fact is, that each time there is a movement to confer rights onto some new "entity," the proposal is bound to sound odd or frightening or laughable.<sup>23a</sup> This is partly because until the rightless thing receives its rights, we cannot see it as anything but a *thing* for the use of "us"—those who are holding rights at the time.<sup>24</sup> In this vein, what is striking about the Wisconsin case above is that the court, for all its talk about women, so clearly was never able to see women as they are

23. *In re Goddell*, 39 Wisc. 232, 245 (1875). The court continued with the following "clincher":

And when counsel was arguing for this lady that the word, person, in sec. 32, ch. 119 [respecting those qualified to practice law], necessarily includes females, her presence made it impossible to suggest to him as *reductio ad absurdum* of his position, that the same construction of the same word . . . would subject woman to prosecution for the paternity of a bastard, and . . . prosecution for rape.

*Id.* at 246.

The relationship between our attitudes toward woman, on the one hand, and, on the other, the more central concern of this article—land—is captured in an unguarded aside of our colleague, Curt Berger: ". . . after all, land, like woman, was meant to be possessed. . . ." LAND OWNERSHIP AND USE 139 (1968).

23a. Recently, a group of prison inmates in Suffolk County tamed a mouse that they discovered, giving him the name Morris. Discovering Morris, a jailer flushed him down the toilet. The prisoners brought a proceeding against the Warden complaining, *inter alia*, that Morris was subjected to discriminatory discharge and was otherwise unequally treated. The action was unsuccessful, on grounds that the inmates themselves were "guilty of imprisoning Morris without a charge, without a trial, and without bail," and that other mice at the prison were not treated more favorably. "As to the true victim the Court can only offer again the sympathy first proffered to his ancestors by Robert Burns. . . ." The Judge proceeded to quote from Burns' "To a Mouse." *Morabito v. Cyrta*, 9 CRIM. L. REP. 2472 (N.Y. Sup. Ct. Suffolk Co. Aug. 26, 1971).

The whole matter seems humorous, of course. But what we need to know more of is the function of humor in the unfolding of a culture, and the ways in which it is involved with the social growing pains to which it is testimony. Why do people make jokes about the Women's Liberation Movement? Is it not on account of—rather than in spite of—the underlying validity of the protests, and the uneasy awareness that a recognition of them is inevitable? A. Koestler rightly begins his study of the human mind, *ACT OF CREATION* (1964), with an analysis of humor, entitled "The Logic of Laughter." And cf. Freud, *Jokes and the Unconscious*, 8 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (J. Strachey transl. 1905). (Query too: what is the relationship between the conferring of proper names, e.g., Morris, and the conferring of social and legal rights?)

24. Thus it was that the Founding Fathers could speak of the inalienable rights of all men, and yet maintain a society that was, by modern standards, without the most basic rights for Blacks, Indians, children and women. There was no hypocrisy; emotionally, no one felt that these other things were men.

(and might become). All it could see was the popular "idealized" version of *an object it needed*. Such is the way the slave South looked upon the Black.<sup>25</sup> There is something of a seamless web involved: there will be resistance to giving the thing "rights" until it can be seen and valued for itself; yet, it is hard to see it and value it for itself until we can bring ourselves to give it "rights"—which is almost inevitably going to sound inconceivable to a large group of people.

The reason for this little discourse on the unthinkable, the reader must know by now, if only from the title of the paper. I am quite seriously proposing that we give legal rights to forests, oceans, rivers and other so-called "natural objects" in the environment—indeed, to the natural environment as a whole.<sup>26</sup>

25. The second thought streaming from . . . the older South [is] the sincere and passionate belief that somewhere between men and cattle, God created a *tertium quid*, and called it a Negro—a clownish, simple creature, at times even lovable within its limitations, but straitly foreordained to walk within the Veil. W. E. B. DuBois, *THE SOULS OF BLACK FOLK* 89 (1924).

26. In this article I essentially limit myself to a discussion of non-animal but natural objects. I trust that the reader will be able to discern where the analysis is appropriate to advancing our understanding of what would be involved in giving "rights" to other objects not presently endowed with rights—for example, not only animals (some of which already have rights in some senses) but also humanoids, computers, and so forth. Cf. the National Register for Historic Places, 16 U.S.C. § 470 (1970), discussed in *Ely v. Velde*, 321 F. Supp. 1088 (E.D. Va. 1971).

As the reader will discover, there are large problems involved in defining the boundaries of the "natural object." For example, from time to time one will wish to speak of that portion of a river that runs through a recognized jurisdiction; at other times, one may be concerned with the entire river, or the hydrologic cycle—or the whole of nature. One's ontological choices will have a strong influence on the shape of the legal system, and the choices involved are not easy. See notes 49, 73 and accompanying text *infra*.

On the other hand, the problems of selecting an appropriate ontology are problems of all language—not merely of the language of legal concepts, but of ordinary language as well. Consider, for example, the concept of a "person" in legal or in everyday speech. Is each *person* a fixed bundle of relationships, persisting unaltered through time? Do our molecules and cells not change at every moment? Our hypostatizations always have a pragmatic quality to them. See D. HUME, *Of Personal Identity*, in *TREATISE OF HUMAN NATURE* bk. 1, pt. IV, § VI, in *THE PHILOSOPHICAL WORKS OF DAVID HUME* 310-18, 324 (1854); T. MURTI, *THE CENTRAL PHILOSOPHY OF BUDDHISM* 70-73 (1955). In *LOVES BODY* 146-47 (1966) Norman O. Brown observes:

The existence of the "let's pretend" boundary does not prevent the continuance of the real traffic across it. Projection and introjection, the process whereby the self as distinct from the other is constituted, is not past history, an event in childhood, but a present process of continuous creation. The dualism of self and external world is built up by a constant process of reciprocal exchange between the two. The self as a stable substance enduring through time, an identity, is maintained by constantly absorbing good parts (or people) from the outside world and expelling bad parts from the inner world. "There is a continual 'unconscious' wandering of other personalities into ourselves."

Every person, then, is many persons; a multitude made into one person; a corporate body; incorporated, a corporation. A "corporation sole"; every man

As strange as such a notion may sound, it is neither fanciful nor devoid of operational content. In fact, I do not think it would be a misdescription of recent developments in the law to say that we are already on the verge of assigning some such rights, although we have not faced up to what we are doing in those particular terms.<sup>27</sup> We should do so now, and begin to explore the implications such a notion would hold.

### TOWARD RIGHTS FOR THE ENVIRONMENT

Now, to say that the natural environment should have rights is not to say anything as silly as that no one should be allowed to cut down a tree. We say human beings have rights, but—at least as of the time of this writing—they can be executed.<sup>28</sup> Corporations have rights, but they cannot plead the fifth amendment;<sup>29</sup> *In re Gault* gave 15-year-olds certain rights in juvenile proceedings, but it did not give them the right to vote. Thus, to say that the environment should have rights is not to say that it should have every right we can imagine, or even the same body of rights as human beings have. Nor is it to say that everything in the

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a parson-person. The unity of the person is as real, or unreal, as the unity of the corporation.

See generally, W. BISHIN & C. STONE, *LAW, LANGUAGE AND ETHICS* Ch. 5 (1972).

In different legal systems at different times, there have been many shifts in the entity deemed "responsible" for harmful acts: an entire clan was held responsible for a crime before the notion of individual responsibility emerged; in some societies the offending hand, rather than an entire body, may be "responsible." Even today, we treat father and son as separate jural entities for some purposes, but as a single jural entity for others. I do not see why, in principle, the task of working out a legal ontology of natural objects (and "qualities," e.g., climatic warmth) should be any more unmanageable. Perhaps someday all mankind shall be, for some purposes, one jurally recognized "natural object."

27. The statement in text is not quite true; cf. Murphy, *Has Nature Any Right to Life?*, 22 *HAST. L.J.* 467 (1971). An Irish court, passing upon the validity of a testamentary trust to the benefit of someone's dogs, observed in dictum that "'lives' means lives of human beings, not of animals or trees in California." *Kelly v. Dillon*, 1932 *Ir. R.* 255, 261. (The intended gift over on the death of the last surviving dog was held void for remoteness, the court refusing "to enter into the question of a dog's expectation of life," although prepared to observe that "in point of fact neighbor's [sic] dogs and cats are unpleasantly long-lived. . . ." *Id.* at 260-61).

28. Four cases dealing with the Constitutionality of the death penalty under the eighth and fourteenth amendments are pending before the United States Supreme Court. *Branch v. Texas*, 447 S.W.2d 932 (Tex. 1969), *cert. granted*, 91 S. Ct. 2287 (1970); *Aikens v. California*, 70 Cal. 2d 369, 74 Cal. Rptr. 882, 450 P.2d 258 (1969), *cert. granted*, 91 S. Ct. 2280 (1970); *Furman v. Georgia*, 225 Ga. 253, 167 S.E.2d 628 (1969), *cert. granted*, 91 S. Ct. 2282 (1970); *Jackson v. Georgia*, 225 Ga. 790, 171 S.E.2d 501 (1969), *cert. granted*, 91 S. Ct. 2287 (1970).

29. See *George Campbell Painting Corp. v. Reid*, 392 U.S. 286 (1968); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946); *Baltimore & O.R.R. v. ICC*, 221 U.S. 612 (1911); *Wilson v. United States*, 221 U.S. 361 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906).

environment should have the same rights as every other thing in the environment.

What the granting of rights does involve has two sides to it. The first involves what might be called the legal-operational aspects; the second, the psychic and socio-psychic aspects. I shall deal with these aspects in turn.

### THE LEGAL-OPERATIONAL ASPECTS

#### *What it Means to be a Holder of Legal Rights*

There is, so far as I know, no generally accepted standard for how one ought to use the term "legal rights." Let me indicate how I shall be using it in this piece.

First and most obviously, if the term is to have any content at all, an entity cannot be said to hold a legal right unless and until *some public authoritative body* is prepared to give *some amount of review* to actions that are colorably inconsistent with that "right." For example, if a student can be expelled from a university and cannot get any public official, even a judge or administrative agent at the lowest level, either (i) to require the university to justify its actions (if only to the extent of filling out an affidavit alleging that the expulsion "was not wholly arbitrary and capricious") or (ii) to compel the university to accord the student some procedural safeguards (a hearing, right to counsel, right to have notice of charges), then the minimum requirements for saying that the student has a legal right to his education do not exist.<sup>30</sup>

But for a thing to be a *holder of legal rights*, something more is needed than that some authoritative body will review the actions and processes of those who threaten it. As I shall use the term, "holder of legal rights," each of three additional criteria must be satisfied. All three, one will observe, go towards making a thing *count* jurally—to have a legally recognized worth and dignity in its own right, and not merely to serve as a means to benefit "us" (whoever the contemporary group of rights-holders may be). They are, first, that the thing can institute legal actions *at its behest*; second, that in determining the granting of legal relief, the court must take *injury to it* into account; and, third, that relief must run to the *benefit of it*.

To illustrate, even as between two societies that condone slavery

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30. See *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

there is a fundamental difference between  $S_1$ , in which a master can (if he chooses), go to court and collect reduced chattel value damages from someone who has beaten his slave, and  $S_2$ , in which the slave can institute the proceedings *himself*, for *his* own recovery, damages being measured by, say, *his* pain and suffering. Notice that neither society is so structured as to leave wholly unprotected the slave's interests in not being beaten. But in  $S_2$  as opposed to  $S_1$  there are three operationally significant advantages that the slave has, and these make the slave in  $S_2$ , albeit a slave, a holder of rights. Or, again, compare two societies,  $S_1$ , in which pre-natal injury to a live-born child gives a right of action against the tortfeasor at the mother's instance, for the mother's benefit, on the basis of the mother's mental anguish, and  $S_2$ , which gives the child a suit in its own name (through a guardian *ad litem*) for its own recovery, for damages to it.

When I say, then, that at common law "natural objects" are not holders of legal rights, I am not simply remarking what we would all accept as obvious. I mean to emphasize three specific legal-operational advantages that the environment lacks, leaving it in the position of the slave and the foetus in  $S_1$ , rather than the slave and foetus of  $S_2$ .

#### *The Rightlessness of Natural Objects at Common Law*

Consider, for example, the common law's posture toward the pollution of a stream. True, courts have always been able, in some circumstances, to issue orders that will stop the pollution—just as the legal system in  $S_1$  is so structured as incidentally to discourage beating slaves and being reckless around pregnant women. But the stream itself is fundamentally rightless, with implications that deserve careful reconsideration.

The first sense in which the stream is not a rights-holder has to do with standing. The stream itself has none. So far as the common law is concerned, there is in general no way to challenge the polluter's actions save at the behest of a lower riparian—another human being—able to show an invasion of *his* rights. This conception of the riparian as the holder of the right to bring suit has more than theoretical interest. The lower riparians may simply not care about the pollution. They themselves may be polluting, and not wish to stir up legal waters. They may be economically dependent on their polluting neighbor.<sup>31</sup> And, of

course, when they discount the value of winning by the costs of bringing suit and the chances of success, the action may not seem worth undertaking. Consider, for example, that while the polluter might be injuring 100 downstream riparians \$10,000 a year *in the aggregate*, each riparian separately might be suffering injury only to the extent of \$100—possibly not enough for any one of them to want to press suit by himself, or even to go to the trouble and cost of securing co-plaintiffs to make it worth everyone's while. This hesitance will be especially likely when the potential plaintiffs consider the burdens the law puts in their way:<sup>32</sup> proving, *e.g.*, specific damages, the "unreasonableness" of defendant's use of the water, the fact that practicable means of abatement exist, and overcoming difficulties raised by issues such as joint causality, right to pollute by prescription, and so forth. Even in states which, like California, sought to overcome these difficulties by empowering the attorney-general to sue for abatement of pollution in limited instances, the power has been sparingly invoked and, when invoked, narrowly construed by the courts.<sup>33</sup>

The second sense in which the common law denies "rights" to natural objects has to do with the way in which the merits are decided in those cases in which someone is competent and willing to establish standing. At its more primitive levels, the system protected the "rights" of the property owning human with minimal weighing of any values: "*Cujus est solum, ejus est usque ad coelum et ad infernos.*"<sup>34</sup> Today we have come more and more to make balances—but only such as will adjust the economic best interests of identifiable humans. For example, continuing with the case of streams, there are commentators who speak of a "general rule" that "a riparian owner is legally entitled to have the stream flow by his land with its quality unimpaired" and observe that "an upper owner has, *prima facie*, no right to pollute the water."<sup>35</sup>

32. The law in a suit for injunctive relief is commonly easier on the plaintiff than in a suit for damages. See J. GOULD, *LAW OF WATERS* § 206 (1883).

33. However, in 1970 California amended its Water Quality Act to make it easier for the Attorney General to obtain relief, *e.g.*, one must no longer allege irreparable injury in a suit for an injunction. CAL. WATER CODE § 13350(b) (West 1971).

34. To whomsoever the soil belongs, he owns also to the sky and to the depths. See W. BLACKSTONE, 2 COMMENTARIES \*18.

At early common law, the owner of land could use all that was found under his land "at his free will and pleasure" without regard to any "inconvenience to his neighbour." *Acton v. Blundell*, 12 Meeson & Welsburg 324, 354, 152 Eng. Rep. 1223, 1235 (1843). "He [the landowner] may waste or despoil the land as he pleases. . . ." R. MEGARRY & H. WADE, *THE LAW OF REAL PROPERTY* 70 (3d ed. 1966). See R. POWELL, 5 *THE LAW OF REAL PROPERTY* ¶725 (1971).

35. See Note, *Statutory Treatment of Industrial Stream Pollution*, 24 GEO. WASH.

31. For example, see *People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co.*, 107 Cal. 221, 40 Pac. 531 (1895) (refusing to enjoin pollution by a upper riparian at the instance of the Attorney General on the grounds that the lower riparian owners, most of whom were dependent on the lumbering business of the polluting mill, did not complain).

Such a doctrine, if strictly invoked, would protect the stream absolutely whenever a suit was brought; but obviously, to look around us, the law does not work that way. Almost everywhere there are doctrinal qualifications on riparian "rights" to an unpolluted stream.<sup>36</sup> Although these rules vary from jurisdiction to jurisdiction, and upon whether one is suing for an equitable injunction or for damages, what they all have in common is some sort of balancing. Whether under language of "reasonable use," "reasonable methods of use," "balance of convenience" or "the public interest doctrine,"<sup>37</sup> what the courts are balancing, with varying degrees of directness, are the economic hardships on the upper riparian (or dependent community) of abating the pollution vis-à-vis the economic hardships of continued pollution on the lower riparians. What does not weigh in the balance is the damage to the stream, its fish and turtles and "lower" life. So long as the natural environment itself is rightless, these are not matters for judicial cognizance. Thus, we find the highest court of Pennsylvania refusing to stop a coal company from discharging polluted mine water into a tributary of the Lackawana River because a plaintiff's "grievance is for a mere personal inconvenience; and . . . mere private personal inconveniences . . . must yield to the necessities of a great public industry, which although in the hands of a private corporation, subserves a great public interest."<sup>38</sup> The stream itself is lost sight of in "a quantitative compromise between *two* conflicting interests."<sup>39</sup>

The third way in which the common law makes natural objects rightless has to do with who is regarded as the beneficiary of a favorable judgment. Here, too, it makes a considerable difference that it is not

L. REV. 302, 306 (1955); H. FARNHAM, 2 LAW OF WATERS AND WATER RIGHTS § 461 (1904); GOULD, *supra* note 32, at § 204.

36. For example, courts have upheld a right to pollute by prescription, *Mississippi Mills Co. v. Smith*, 69 Miss. 299, 11 So. 26 (1882), and by easement, *Luama v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 41 F.2d 358 (9th Cir. 1930).

37. See *Red River Roller Mills v. Wright*, 30 Minn. 249, 15 N.W. 167 (1883) (enjoyment of stream by riparian may be modified or abrogated by reasonable use of stream by others); *Townsend v. Bell*, 167 N.Y. 462, 60 N.E. 757 (1901) (riparian owner not entitled to maintain action for pollution of stream by factory where he could not show use of water was unreasonable); *Smith v. Staso Milling Co.*, 18 F.2d 736 (2d Cir. 1927) (in suit for injunction, right on which injured lower riparian stands is a quantitative compromise between two conflicting interests); *Clifton Iron Co. v. Dye*, 87 Ala. 468, 6 So. 192 (1889) (in determining whether to grant injunction to lower riparian, court must weigh interest of public as against injury to one or the other party). See also *Montgomery Limestone Co. v. Bearder*, 256 Ala. 269, 54 So. 2d 571 (1951).

38. *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 149, 6 A. 453, 459 (1886).

39. Hand, J. in *Smith v. Staso Milling Co.*, 18 F.2d 736, 738 (2d Cir. 1927) (emphasis added). See also *Harrisonville v. Dickey Clay Co.*, 289 U.S. 334 (1933) (Brandeis, J.).

the natural object that counts in its own right. To illustrate this point, let me begin by observing that it makes perfectly good sense to speak of, and ascertain, the legal damage to a natural object, if only in the sense of "making it whole" with respect to the most obvious factors.<sup>40</sup> The costs of making a forest whole, for example, would include the costs of reseedling, repairing watersheds, restocking wildlife—the sorts of costs the Forest Service undergoes after a fire. Making a polluted stream whole would include the costs of restocking with fish, water-fowl, and other animal and vegetable life, dredging, washing out impurities, establishing natural and/or artificial aerating agents, and so forth. Now, what is important to note is that, under our present system, even if a plaintiff riparian wins a water pollution suit for damages, no money goes to the benefit of the stream itself to repair *its* damages.<sup>41</sup> This omission has the further effect that, at most, the law confronts a polluter with what it takes to make the plaintiff riparians whole; this may be far less than the damages to the stream,<sup>42</sup> but not so much as to force the polluter to desist. For example, it is easy to imagine a polluter whose activities damage a stream to the extent of \$10,000 annually, although the aggregate damage to all the riparian plaintiffs who come into the suit is only \$3000. If \$3000 is less than the cost to the polluter of shutting down, or making the requisite technological changes, he might prefer to pay off the damages (*i.e.*, the legally cognizable damages) and continue to pollute the stream. Similarly, even if the jurisdiction issues an injunction at the plaintiffs' behest (rather than to order payment of damages), there is nothing to stop the plaintiffs from "selling out" the stream, *i.e.*, agreeing to dissolve or not enforce the injunction at some price (in the example above, somewhere between plaintiffs' damages—\$3000—and defendant's next best economic alternative). Indeed, I take it this is exactly what Learned Hand had in mind in an opinion in which, after issuing an anti-pollution injunction, he suggests that the defendant

40. Measuring plaintiff's damages by "making him whole" has several limitations; these and the matter of measuring damages in this area generally are discussed more fully at notes 83-93 and accompanying text *infra*.

41. Here, again, an analogy to corporation law might be profitable. Suppose that in the instance of negligent corporate management by the directors, there were no institution of the stockholder derivative suit to force the directors to make *the corporation* whole, and the only actions provided for were direct actions by stockholders to collect for damages *to themselves qua* stockholders. Theoretically and practically, the damages might come out differently in the two cases, and not merely because the creditors' losses are not aggregated in the stockholders' direct actions.

42. And even far less than the damages to all human economic interests derivatively through the stream; see text accompanying notes 83-84, 120 *infra*.



"make its peace with the plaintiff as best it can."<sup>43</sup> What is meant is a peace between *them*, and not amongst them and the river.

I ought to make clear at this point that the common law as it affects streams and rivers, which I have been using as an example so far, is not exactly the same as the law affecting other environmental objects. Indeed, one would be hard pressed to say that there was a "typical" environmental object, so far as its treatment at the hands of the law is concerned. There are some differences in the law applicable to all the various resources that are held in common: rivers, lakes, oceans, dunes, air, streams (surface and subterranean), beaches, and so forth.<sup>44</sup> And there is an even greater difference as between these traditional communal resources on the one hand, and natural objects on traditionally private land, *e.g.*, the pond on the farmer's field, or the stand of trees on the suburbanite's lawn.

On the other hand, although there be these differences which would make it fatuous to generalize about a law of the natural environment, most of these differences simply underscore the points made in the instance of rivers and streams. None of the natural objects, whether held in common or situated on private land, has any of the three criteria of a rights-holder. They have no standing in their own right; their unique damages do not count in determining outcome; and they are not the beneficiaries of awards. In such fashion, these objects have traditionally been regarded by the common law, and even by all but the most recent legislation, as objects for man to conquer and master and use—in such a way as the law once looked upon "man's" relationships to African Negroes. Even where special measures have been taken to conserve them, as by seasons on game and limits on timber cutting, the dominant motive has been to conserve them *for us*—for the greatest good of the greatest number of human beings. Conservationists, so far as I am aware, are generally reluctant to maintain otherwise.<sup>45</sup> As the name implies, they want to conserve and guarantee *our* consumption and *our* enjoyment of these other living things. In their own right, natural objects have counted for little, in law as in popular movements.

43. *Smith v. Staso*, 18 F.2d 736, 738 (2d Cir. 1927).

44. Some of these public properties are subject to the "public trust doctrine," which, while ill-defined, might be developed in such fashion as to achieve fairly broad-ranging environmental protection. See *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 215 N.E.2d 114 (1966), discussed in Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 492-509 (1970).

45. By contrast, for example, with humane societies.

As I mentioned at the outset, however, the rightlessness of the natural environment can and should change; it already shows some signs of doing so.

### *Toward Having Standing in its Own Right*

It is not inevitable, nor is it wise, that natural objects should have no rights to seek redress in their own behalf. It is no answer to say that streams and forests cannot have standing because streams and forests cannot speak. Corporations cannot speak either; nor can states, estates, infants, incompetents, municipalities or universities. Lawyers speak for them, as they customarily do for the ordinary citizen with legal problems. One ought, I think, to handle the legal problems of natural objects as one does the problems of legal incompetents—human beings who have become vegetable. If a human being shows signs of becoming senile and has affairs that he is *de jure* incompetent to manage, those concerned with his well being make such a showing to the court, and someone is designated by the court with the authority to manage the incompetent's affairs. The guardian<sup>46</sup> (or "conservator"<sup>47</sup> or "committee"<sup>48</sup>—the terminology varies) then represents the incompetent in his legal affairs. Courts make similar appointments when a corporation has become "incompetent"—they appoint a trustee in bankruptcy or reorganization to oversee its affairs and speak for it in court when that becomes necessary.

On a parity of reasoning, we should have a system in which, when a friend of a natural object perceives it to be endangered, he can apply to a court for the creation of a guardianship.<sup>49</sup> Perhaps we already

46. See, *e.g.*, CAL. PROB. CODE §§ 1460-62 (West Supp. 1971).

47. CAL. PROB. CODE § 1751 (West Supp. 1971) provides for the appointment of a "conservator."

48. In New York the Supreme Court and county courts outside New York City have jurisdiction to appoint a committee of the person and/or a committee of the property for a person "incompetent to manage himself or his affairs." N.Y. MENTAL HYGIENE LAW § 100 (McKinney 1971).

49. This is a situation in which the ontological problems discussed in note 26 *supra* become acute. One can conceive a situation in which a guardian would be appointed by a county court with respect to a stream, bring a suit against alleged polluters, and lose. Suppose now that a federal court were to appoint a guardian with respect to the larger river system of which the stream were a part, and that the federally appointed guardian subsequently were to bring suit against the same defendants in state court, now on behalf of the river, rather than the stream. (Is it possible to bring a still subsequent suit, if the one above fails, on behalf of the entire hydrologic cycle, by a guardian appointed by an international court?)

While such problems are difficult, they are not impossible to solve. For one thing, pre-trial hearings and rights of intervention can go far toward their amelioration. Further, courts have been dealing with the matter of potentially inconsistent judgments



have the machinery to do so. California law, for example, defines an incompetent as "any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons."<sup>50</sup> Of course, to urge a court that an endangered river is "a person" under this provision will call for lawyers as bold and imaginative as those who convinced the Supreme Court that a railroad corporation was a "person" under the fourteenth amendment, a constitutional provision theretofore generally thought of as designed to secure the rights of freedmen.<sup>51</sup> (As this article was going to press, Professor Byrn of Fordham petitioned the New York Supreme Court to appoint him legal guardian for an unrelated foetus scheduled for abortion so as to enable him to bring a class action on behalf of all fetuses similarly situated in New York City's 18 municipal hospitals. Judge Holtzman granted the petition of guardianship.<sup>52</sup>) If such an argument based on present statutes should fail, special environmental legislation could be enacted along traditional guardianship lines. Such provisions could provide for guardianship both in the instance of public natural objects and also, perhaps with slightly different standards, in the instance of natural objects on "private" land.<sup>53</sup>

for years, as when one state appears on the verge of handing down a divorce decree inconsistent with the judgment of another state's courts. *Kempson v. Kempson*, 58 N.J. Eq. 94, 43 A. 97 (Ch. Ct. 1899). Courts could, and of course would, retain some natural objects in the *res nullius* classification to help stave off the problem. Then, too, where (as is always the case) several "objects" are interrelated, several guardians could all be involved, with procedures for removal to the appropriate court—probably that of the guardian of the most encompassing "ward" to be acutely threatened. And in some cases subsequent suit by the guardian of more encompassing ward, not guilty of laches, might be appropriate. The problems are at least no more complex than the corresponding problems that the law has dealt with for years in the class action area.

50. CAL. PROB. CODE § 1460 (West Supp. 1971). The N.Y. MENTAL HYGIENE LAW (McKinney 1971) provides for jurisdiction "over the custody of a person and his property if he is incompetent to manage himself or his affairs by reason of age, drunkenness, mental illness or other cause. . . ."

51. *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886). Justice Black would have denied corporations the rights of "persons" under the fourteenth amendment. See *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1938) (Black, J. dissenting): "Corporations have neither race nor color."

52. *In re Byrn*, L. A. Times, Dec. 5, 1971, § 1, at 16, col. 1. A preliminary injunction was subsequently granted, and defendant's cross-motion to vacate the guardianship was denied. Civ. 13113/71 (Sup. Ct. Queens Co., Jan. 4, 1972) (Smith, J.). Appeals are pending. Granting a guardianship in these circumstances would seem to be a more radical advance in the law than granting a guardianship over communal natural objects like lakes. In the former case there is a traditionally recognized guardian for the object—the mother—and her decision has been in favor of aborting the foetus.

53. The laws regarding the various communal resources had to develop along their own lines, not only because so many different persons' "rights" to consumption and

The potential "friends" that such a statutory scheme would require will hardly be lacking. The Sierra Club, Environmental Defense Fund, Friends of the Earth, Natural Resources Defense Counsel, and the Izaak Walton League are just some of the many groups which have manifested unflagging dedication to the environment and which are becoming increasingly capable of marshalling the requisite technical experts and lawyers. If, for example, the Environmental Defense Fund should have reason to believe that some company's strip mining operations might be irreparably destroying the ecological balance of large tracts of land, it could, under this procedure, apply to the court in which the lands were situated to be appointed guardian.<sup>54</sup> As guardian, it might be given rights of inspection (or visitation) to determine and bring to the court's attention a fuller finding on the land's condition. If there were indications that under the substantive law some redress might be available on the land's behalf, then the guardian would be entitled to raise the land's rights in the land's name, *i.e.*, without having to make the roundabout and often unavailing demonstration, discussed below, that the "rights" of the club's members were being invaded. Guardians would also be looked to for a host of other protective tasks, *e.g.*, monitoring effluents (and/or monitoring the monitors), and representing their "wards" at legislative and administrative hearings on such matters as the setting of state water quality standards. Procedures exist, and can be strengthened, to move a court for the removal and substi-

usage were continually and contemporaneously involved, but also because no one had to bear the costs of his consumption of public resources in the way in which the owner of resources on private land has to bear the costs of what he does. For example, if the landowner strips his land of trees, and puts nothing in their stead, he confronts the costs of what he has done in the form of reduced value of his land; but the river polluter's actions are costless, so far as he is concerned—except insofar as the legal system can somehow force him to internalize them. The result has been that the private landowner's power over natural objects on his land is far less restrained by law (as opposed to economics) than his power over the public resources that he can get his hands on. If this state of affairs is to be changed, the standard for interceding in the interests of natural objects on traditionally recognized "private" land might well parallel the rules that guide courts in the matter of people's children whose upbringing (or lack thereof) poses social threat. The courts can, for example, make a child "a dependent of the court" where the child's "home is an unfit place for him by reason of neglect, cruelty, or depravity of either of his parents. . . ." CAL. WELF. & INST. CODE § 600(b) (West 1966). See also *id.* at § 601: any child "who from any cause is in danger of leading an idle, dissolute, lewd, or immoral life [may be adjudged] a ward of the court."

54. See note 53 *supra*. The present way of handling such problems on "private" property is to try to enact legislation of general application under the police power, see *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), rather than to institute civil litigation which, though a piecemeal process, can be tailored to individual situations.

tution of guardians, for conflicts of interest or for other reasons,<sup>55</sup> as well as for the termination of the guardianship.<sup>56</sup>

In point of fact, there is a movement in the law toward giving the environment the benefits of standing, although not in a manner as satisfactory as the guardianship approach. What I am referring to is the marked liberalization of traditional standing requirements in recent cases in which environmental action groups have challenged federal government action. *Scenic Hudson Preservation Conference v. FPC*<sup>57</sup> is a good example of this development. There, the Federal Power Commission had granted New York's Consolidated Edison a license to construct a hydroelectric project on the Hudson River at Storm King Mountain. The grant of license had been opposed by conservation interests on the grounds that the transmission lines would be unsightly, fish would be destroyed, and nature trails would be inundated. Two of these conservation groups, united under the name Scenic Hudson Preservation Conference, petitioned the Second Circuit to set aside the grant. Despite the claim that Scenic Hudson had no standing because it had not made the traditional claim "of any personal economic injury resulting from the Commission's actions,"<sup>58</sup> the petitions were heard, and the case sent back to the Commission. On the standing point, the court noted that Section 313(b) of the Federal Power Act gave a right of instituting review to any party "aggrieved by an order issued by the Commission";<sup>59</sup> it thereupon read "aggrieved by" as not limited to those alleging the traditional personal economic injury, but as broad enough to include "those who by their activities and conduct have exhibited a special interest" in "the aesthetic, conservational, and recreational aspects of power development. . . ."<sup>60</sup> A similar reasoning has

55. CAL. PROB. CODE § 1580 (West Supp. 1971) lists specific causes for which a guardian may, after notice and a hearing, be removed.

Despite these protections, the problem of overseeing the guardian is particularly acute where, as here, there are no immediately identifiable human beneficiaries whose self-interests will encourage them to keep a close watch on the guardian. To ameliorate this problem, a page might well be borrowed from the law of ordinary charitable trusts, which are commonly placed under the supervision of the Attorney General. See CAL. CORP. CODE §§ 9505, 10207 (West 1955).

56. See CAL. PROB. CODE §§ 1472, 1590 (West 1956 and Supp. 1971).

57. 354 F.2d 608 (2d Cir. 1965), cert. denied, Consolidated Edison Co. v. Scenic Hudson Preservation Conf., 384 U.S. 941 (1966).

58. 354 F.2d 608, 615 (2d Cir. 1965).

59. Act of Aug. 26, 1935, ch. 687, Title II, § 213, 49 Stat. 860 (codified in 16 U.S.C. § 8251(b) (1970)).

60. 354 F.2d 608, 616 (2d Cir. 1965). The court might have felt that because the New York-New Jersey Trial Conference, one of the two conservation groups that

swayed other circuits to allow proposed actions by the Federal Power Commission, the Department of Interior, and the Department of Health, Education and Welfare to be challenged by environmental action groups on the basis of, e.g., recreational and esthetic interests of members, in lieu of direct economic injury.<sup>61</sup> Only the Ninth Circuit has balked, and one of these cases, involving the Sierra Club's attempt to challenge a Walt Disney development in the Sequoia National Forest, is at the time of this writing awaiting decision by the United States Supreme Court.<sup>62</sup>

organized Scenic Hudson, had some 17 miles of trailways in the area of Storm King Mountain, it therefore had sufficient economic interest to establish standing; Judge Hays' opinion does not seem to so rely, however.

61. *Road Review League v. Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967). Plaintiffs who included the Town of Bedford and the Road Review League, a non-profit association concerned with community problems, brought an action to review and set aside a determination of the Federal Highway Administrator concerning the alignment of an interstate highway. Plaintiffs claimed that the proposed road would have an adverse effect upon local wildlife sanctuaries, pollute a local lake, and be inconsistent with local needs and planning. Plaintiffs relied upon the section of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), which entitles persons "aggrieved by agency action within the meaning of a relevant statute" to obtain judicial review. The court held that plaintiffs had standing to obtain judicial review of proposed alignment of the road:

I see no reason why the word "aggrieved" should have different meaning in the Administrative Procedure Act from the meaning given it under the Federal Power Act. . . . The "relevant statute," i.e., the Federal Highways Act, contains language which seems even stronger than that of the Federal Power Act, as far as local and conservation interests are concerned.

*Id.* at 661.

In *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970), plaintiffs were held to have standing to challenge the construction of a dike and causeway adjacent to the Hudson Valley. The Sierra Club and the Village of Tarrytown based their challenge upon the provisions of the Rivers and Harbors Act of 1899. While the Rivers and Harbors Act does not provide for judicial review as does the Federal Power Act, the court stated that the plaintiffs were "aggrieved" under the Department of Transportation Act, the Hudson River Basin Compact Act, and a regulation under which the Corps of Engineers issued a permit, all of which contain broad provisions mentioning recreational and environmental resources and the need to preserve the same. Citing the *Road Review League* decision, the court held that as "aggrieved" parties under the Administrative Procedure Act, plaintiffs similarly had standing. Other decisions in which the court's grant of standing was based upon the Administrative Procedure Act include: *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 231 (4th Cir. 1971); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970); *Brooks v. Volpe*, 329 F. Supp. 118 (W.D. Wash. 1971); *Delaware v. Pennsylvania N.Y. Cent. Transp. Co.*, 323 F. Supp. 487 (D. Del. 1971); *Izaak Walton League of America v. St. Clair*, 313 F. Supp. 1312 (D. Minn. 1970); *Pennsylvania Environmental Council, Inc. v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970).

62. *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970), cert. granted sub nom. *Sierra Club v. Morton*, 401 U.S. 907 (1971) (No. 70-34). The Sierra Club, a non-profit California corporation concerned with environmental protection, claimed that its interest in the conservation and sound management of natural parks would be adversely affected by an Interior permit allowing Walt Disney to construct the Mineral King Resort in Sequoia

Even if the Supreme Court should reverse the Ninth Circuit in the Walt Disney-Sequoia National Forest matter, thereby encouraging the circuits to continue their trend toward liberalized standing in this area, there are significant reasons to press for the guardianship approach notwithstanding. For one thing, the cases of this sort have extended standing on the basis of interpretations of specific federal statutes—the Federal Power Commission Act,<sup>63</sup> the Administrative Procedure Act,<sup>64</sup> the Federal Insecticide, Fungicide and Rodenticide Act,<sup>65</sup> and others. Such a basis supports environmental suits only where acts of federal agencies are involved; and even there, perhaps, only when there is some special statutory language, such as “aggrieved by” in the Federal Power Act, on which the action groups can rely. Witness, for example, *Bass Angler Sportsman Society v. United States Steel Corp.*<sup>66</sup> There, plaintiffs sued 175 corporate defendants located throughout Alabama, relying on 33 U.S.C. § 407 (1970), which provides:

It shall not be lawful to throw, discharge, or deposit . . . any refuse matter . . . into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water. . . .<sup>67</sup>

Another section of the Act provides that one-half the fines shall be paid to the person or persons giving information which shall lead to a conviction.<sup>68</sup> Relying on this latter provision, the plaintiff designated his action a *qui tam* action<sup>69</sup> and sought to enforce the Act by injunction

National Forest. The court held that because of the Sierra Club's failure to assert a direct legal interest, that organization lacked standing to sue. The court stated that the Sierra Club had claimed an interest only in the sense that the proposed course of action was displeasing to its members. The court purported to distinguish *Scenic Hudson* on the grounds that the plaintiff's claim of standing there was aided by the “aggrieved party” language of the Federal Power Act.

63. 16 U.S.C. §§ 791(a) *et seq.* (1970). See note 59 and accompanying text *supra*.

64. 5 U.S.C. §§ 551 *et seq.* (1970). Decisions relying upon 5 U.S.C. § 702 are listed in note 56 *supra*.

65. 7 U.S.C. §§ 135 *et seq.* (1970). Section 135b(d) affords a right of judicial review to anyone “adversely affected” by an order under the Act. See *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1096 (D.C. Cir. 1970).

66. 324 F. Supp. 412 (N.D., M.D. & S.D. Ala. 1970), *aff'd mem., sub nom.* Bass Anglers Sportsman Soc'y of America, Inc. v. Koppers Co., 447 F.2d 1304 (5th Cir. 1971).

67. Section 13 of Rivers and Harbors Appropriation Act of 1899.

68. 33 U.S.C. § 411 (1970) reads:

Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of the title shall . . . be punished by a fine . . . or by imprisonment . . . in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

69. This is from the latin, “who brings the action as well for the King as for himself,” referring to an action brought by a citizen for the state as well as for himself.

and fine. The District Court ruled that, in the absence of express language to the contrary, no one outside the Department of Justice had standing to sue under a criminal act and refused to reach the question of whether violations were occurring.<sup>70</sup>

Unlike the liberalized standing approach, the guardianship approach would secure an effective voice for the environment even where federal administrative action and public-lands and waters were not involved. It would also allay one of the fears courts—such as the Ninth Circuit—have about the extended standing concept: if any ad hoc group can spring up overnight, invoke some “right” as universally claimable as the esthetic and recreational interests of its members and thereby get into court, how can a flood of litigation be prevented?<sup>71</sup> If an ad hoc committee loses a suit brought *sub nom.* Committee to Preserve our Trees, what happens when its very same members reorganize two years later and sue *sub nom.* the Massapequa Sylvan Protection League? Is the new group bound by *res judicata*? Class action law may be capable of ameliorating some of the more obvious problems. But even so, court economy might be better served by simply designating the guardian *de jure* representative of the natural object, with rights of

70. These sections create a criminal liability. No civil action lies to enforce it; criminal statutes can only be enforced by the government. A *qui tam* action lies only when expressly or impliedly authorized by statute to enforce a penalty by civil action, not a criminal fine.

324 F. Supp. 412, 415-16 (N.D., M.D. & S.D. Ala. 1970). Other *qui tam* actions brought by the Bass Angler Sportsman Society have been similarly unsuccessful. See *Bass Anglers Sportsman Soc'y of America v. Scholze Tannery*, 329 F. Supp. 339 (E.D. Tenn. 1971); *Bass Anglers Sportsman's Soc'y of America v. United States Plywood-Champion Papers, Inc.*, 324 F. Supp. 302 (S.D. Tex. 1971).

71. Concern over an anticipated flood of litigation initiated by environmental organizations is evident in Judge Trask's opinion in *Alameda Conservation Ass'n v. California*, 437 F.2d 1087 (9th Cir.), *cert. denied*, *Leslie Salt Co. v. Alameda Conservation Ass'n*, 402 U.S. 908 (1971), where a non-profit corporation having as a primary purpose protection of the public's interest in San Francisco Bay was denied standing to seek an injunction prohibiting a land exchange that would allegedly destroy wildlife, fisheries and the Bay's unique flushing characteristics:

Standing is not established by suit initiated by this association simply because it has as one of its purposes the protection of the “public interest” in the waters of the San Francisco Bay. However well intentioned the members may be, they may not by uniting create for themselves a super-administrative agency or a *parens patriae* official status with the capability of over-seeing and of challenging the action of the appointed and elected officials of the state government. Although recent decisions have considerably broadened the concept of standing, we do not find that they go this far. [Citation.]

Were it otherwise the various clubs, political, economic and social now or yet to be organized, could wreak havoc with the administration of government, both federal and state. There are other forums where their voices and their views may be effectively presented, but to have standing to submit a “case or controversy” to a federal court, something more must be shown.

437 F.2d at 1090.

discretionary intervention by others, but with the understanding that the natural object is "bound" by an adverse judgment.<sup>72</sup> The guardian concept, too, would provide the endangered natural object with what the trustee in bankruptcy provides the endangered corporation: a continuous supervision over a period of time, with a consequent deeper understanding of a broad range of the ward's problems, not just the problems present in one particular piece of litigation. It would thus assure the courts that the plaintiff has the expertise and genuine adversity in pressing a claim which are the prerequisites of a true "case or controversy."

The guardianship approach, however, is apt to raise two objections, neither of which seems to me to have much force. The first is that a committee or guardian could not judge the needs of the river or forest in its charge; indeed, the very concept of "needs," it might be said, could be used here only in the most metaphorical way. The second objection is that such a system would not be much different from what we now have: is not the Department of Interior already such a guardian for public lands, and do not most states have legislation empowering their attorneys general to seek relief—in a sort of *parens patriae* way—for such injuries as a guardian might concern himself with?

As for the first objection, natural objects *can* communicate their wants (needs) to us, and in ways that are not terribly ambiguous. I am sure I can judge with more certainty and meaningfulness whether and when my lawn wants (needs) water, than the Attorney General can judge whether and when the United States wants (needs) to take an appeal from an adverse judgment by a lower court. The lawn tells me that it wants water by a certain dryness of the blades and soil—immediately obvious to the touch—the appearance of bald spots, yellowing, and a lack of springiness after being walked on; how does "the United States" communicate to the Attorney General? For similar reasons, the guardian-attorney for a smog-endangered stand of pines could venture with more confidence that his client wants the smog stopped, than the directors of a corporation can assert that "the corporation" wants dividends declared. We make decisions on behalf of, and in the purported interests of, others every day; these "others" are often creatures whose wants are far less verifiable, and even far more metaphysical in conception, than the wants of rivers, trees, and land.<sup>73</sup>

72. See note 49 *supra*.

73. Here, too, we are dogged by the ontological problem discussed in note 26 *supra*. It is easier to say that the smog-endangered stand of pines "wants" the smog stopped

As for the second objection, one can indeed find evidence that the Department of Interior was conceived as a sort of guardian of the public lands.<sup>74</sup> But there are two points to keep in mind. First, insofar as the Department already is an adequate guardian it is only with respect to the federal public lands as per Article IV, section 3 of the Constitution.<sup>75</sup> Its guardianship includes neither local public lands nor private lands. Second, to judge from the environmentalist literature and from the cases environmental action groups have been bringing, the Department is itself one of the bogeys of the environmental movement. (One thinks of the uneasy peace between the Indians and the Bureau of Indian Affairs.) Whether the various charges be right or wrong, one cannot help but observe that the Department has been charged with several institutional goals (never an easy burden), and is currently looked to for action by quite a variety of interest groups, only one of which is the environmentalists. In this context, a guardian outside the institution becomes especially valuable. Besides, what a person wants, fully to secure his rights, is the ability to retain independent counsel even when, and perhaps especially when, the government is acting "for him" in a beneficent way. I have no reason to doubt, for example, that the Social Security System is being managed "for me"; but I would not want to abdicate my right to challenge its actions as they affect me, should the need arise.<sup>76</sup> I would not ask more trust of national forests, vis-à-vis the Department of Interior. The same considerations apply in the instance of local agencies, such as regional water pollution boards, whose members' expertise in pollution matters is often all too credible.<sup>77</sup>

The objection regarding the availability of attorneys-general as

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(assuming that to be a jurally significant entity) then it is to venture that the mountain, or the planet earth, or the cosmos, is concerned about whether the pines stand or fall. The more encompassing the entity of concern, the less certain we can be in venturing judgments as to the "wants" of any particular substance, quality, or species within the universe. Does the cosmos care if we humans persist or not? "Heaven and earth . . . regard all things as insignificant, as though they were playthings made of straw." LAO-TZU, TAO TEH KING 13 (D. Goddard transl. 1919).

74. See *Knight v. United States Land Ass'n*, 142 U.S. 161, 181 (1891).

75. Clause 2 gives Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

76. See *Flemming v. Nestor*, 363 U.S. 603 (1960).

77. See the L. A. Times editorial *Water: Public vs. Polluters* criticizing: . . . the ridiculous built-in conflict of interests on Regional Water Quality Control Board. By law, five of the seven seats are given to spokesmen for industrial, governmental, agricultural or utility users. Only one representative of the public at large is authorized, along with a delegate from fish and game interests. Feb. 12, 1969, Part II, at 8, cols. 1-2.

protectors of the environment within the existing structure is somewhat the same. Their statutory powers are limited and sometimes unclear. As political creatures, they must exercise the discretion they have with an eye toward advancing and reconciling a broad variety of important social goals, from preserving morality to increasing their jurisdiction's tax base. The present state of our environment, and the history of cautious application and development of environmental protection laws long on the books,<sup>78</sup> testifies that the burdens of an attorney-general's broad responsibility have apparently not left much manpower for the protection of nature. (Cf. *Bass Anglers*, above.) No doubt, strengthening interest in the environment will increase the zest of public attorneys even where, as will often be the case, well-represented corporate polluters are the quarry. Indeed, the United States Attorney General has stepped up anti-pollution activity, and ought to be further encouraged in this direction.<sup>79</sup> The statutory powers of the attorneys-general should be enlarged, and they should be armed with criminal penalties made at least commensurate with the likely economic benefits of violating the law.<sup>80</sup> On the other hand, one cannot ignore the fact that there is increased pressure on public law-enforcement offices to give more attention to a host of other problems, from crime "on the streets" (why don't we say "in the rivers"?) to consumerism and school bussing. If the environment is not to get lost in the shuffle, we would do well, I think, to adopt the guardianship approach as an additional safeguard, conceptualizing major natural objects as holders of their own rights, raisable by the court-appointed guardian.

### *Toward Recognition of its Own Injuries*

As far as adjudicating the merits of a controversy is concerned, there is also a good case to be made for taking into account harm to the environment—in its own right. As indicated above, the traditional way of deciding whether to issue injunctions in law suits affecting the environment, at least where communal property is involved, has been to strike some sort of balance regarding the economic hardships *on human*

78. The Federal Refuse Act is over 70 years old. Refuse Act of 1899, 33 U.S.C. § 407 (1970).

79. See Hall, *Refuse Act of 1899 and the Permit Program*, 1 NAT'L RES. DEFENSE COUNCIL NEWSLETTER i (1971).

80. To be effective as a deterrent, the sanction ought to be high enough to bring about an internal reorganization of the corporate structure which minimizes the chances of future violations. Because the corporation is not necessarily a profit-maximizing "rationally economic man," there is no reason to believe that setting the fine as high as—but no higher than—anticipated profits from the violation of the law, will bring the illegal behavior to an end.

*beings*. Even recently, Mr. Justice Douglas, our jurist most closely associated with conservation sympathies in his private life, was deciding the propriety of a new dam on the basis of, among other things, anticipated lost profits from fish catches, some \$12,000,000 annually.<sup>81</sup> Although he decided to delay the project pending further findings, the reasoning seems unnecessarily incomplete and compromising. Why should the environment be of importance only indirectly, as lost profits to someone else? Why not throw into the balance the cost *to the environment*?

The argument for "personifying" the environment, from the point of damage calculations, can best be demonstrated from the welfare economics position. Every well-working legal-economic system should be so structured as to confront each of us with the full costs that our activities are imposing on society.<sup>82</sup> Ideally, a paper-mill, in deciding what to produce—and where, and by what methods—ought to be forced to take into account not only the lumber, acid and labor that its production "takes" from other uses in the society, but also what costs alternative production plans will impose on society through pollution. The legal system, through the law of contracts and the criminal law, for example, makes the mill confront the costs of the first group of demands. When, for example, the company's purchasing agent orders 1000 drums of acid from the Z Company, the Z Company can bind the mill to pay for them, and thereby reimburse the society for what the mill is removing from alternative uses.

Unfortunately, so far as the pollution costs are concerned, the allocative ideal begins to break down, because the traditional legal institutions have a more difficult time "catching" and confronting us with the full social costs of our activities. In the lakeside mill example, major riparian interests might bring an action, forcing a court to weigh *their* aggregate losses against the costs to the mill of installing the

81. *Udall v. FPC*, 387 U.S. 428, 437 n.6 (1967). See also Holmes, J. in *New Jersey v. New York*, 283 U.S. 336, 342 (1931): "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."

82. To simplify the description, I am using here an ordinary language sense of causality, *i.e.*, assuming that the pollution causes harm to the river. As Professor Coase has pointed out in *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960), harm-causing can be viewed as a reciprocal problem, *i.e.*, in the terms of the text, the mill wants to harm the river, and the river—if we assume it "wants" to maintain its present environmental quality—"wants" to harm the mill. Coase rightly points out that at least in theory (if we had the data) we ought to be comparing the alternative social product of different social arrangements, and not simply imposing full costs on the party who would popularly be identified as the harm-causer.

anti-pollution device. But many other interests—and I am speaking for the moment of recognized homocentric interests—are too fragmented and perhaps “too remote” causally to warrant securing representation and pressing for recovery: the people who own summer homes and motels, the man who sells fishing tackle and bait, the man who rents rowboats. There is no reason not to allow the lake to prove damages to them as the *prima facie* measure of damages to it. *By doing so, we in effect make the natural object, through its guardian, a jural entity competent to gather up these fragmented and otherwise unrepresented damage claims, and press them before the court even where, for legal or practical reasons, they are not going to be pressed by traditional class action plaintiffs.*<sup>83</sup> Indeed, one way—the homocentric way—to view what I am proposing so far, is to view the guardian of the natural object as the guardian of unborn generations, as well as of the otherwise unrepresented, but distantly injured, contemporary humans.<sup>84</sup> By making the lake itself the focus of these damages, and “incorporating” it so to speak, the legal system can effectively take proof upon, and confront the mill with, a larger and more representative measure of the damages its pollution causes.

So far, I do not suppose that my economist friends (unremittent human chauvanists, every one of them!) will have any large quarrel in principle with the concept. Many will view it as a *trompe l'oeil* that comes down, at best, to effectuate the goals of the paragon class action, or the paragon water pollution control district. Where we are apt to part company is here—I propose going beyond gathering up the loose ends of what most people would presently recognize as economically valid damages. The guardian would urge before the court injuries not presently cognizable—the death of eagles and inedible crabs, the suffering of sea lions, the loss from the face of the earth of species of commercially valueless birds, the disappearance of a wilderness area. One might, of course, speak of the damages involved as “damages” to us

83. I am assuming that one of the considerations that goes into a judgment of “remoteness” is a desire to discourage burdensome amounts of petty litigation. This is one of the reasons why a court would be inclined to say—to use the example in the text—that the man who sells fishing tackle and bait has not been “proximately” injured by the polluter. Using proximate cause in this manner, the courts can protect themselves from a flood of litigation. But once the guardian were in court anyway, this consideration would not obtain as strongly, and courts might be more inclined to allow proof on the damages to remotely injured humans (although the proof itself is an added burden of sorts).

84. Cf. Golding, *Ethical Issues in Biological Engineering*, 15 U.C.L.A.L. REV. 443, 451-63 (1968).

humans, and indeed, the widespread growth of environmental groups shows that human beings do feel these losses. But they are not, at present, economically measurable losses: how can they have a monetary value for the guardian to prove in court?

The answer for me is simple. Wherever it carves out “property” rights, the legal system is engaged in the process of *creating* monetary worth. One’s literary works would have minimal monetary value if anyone could copy them at will. Their economic value to the author is a product of the law of copyright; the person who copies a copyrighted book has to bear a cost to the copyright-holder because the law says he must. Similarly, it is through the law of torts that we have made a “right” of—and guaranteed an economically meaningful value to—privacy. (The value we place on gold—a yellow inanimate dirt—is not simply a function of supply and demand—wilderness areas are scarce and pretty too—but results from the actions of the legal systems of the world, which have institutionalized that value; they have even done a remarkable job of stabilizing the price). I am proposing we do the same with eagles and wilderness areas as we do with copyrighted works, patented inventions, and privacy: *make* the violation of rights in them to be a cost by declaring the “pirating” of them to be the invasion of a property interest.<sup>85</sup> If we do so, the net social costs the polluter would be confronted with would include not only the extended homocentric costs of his pollution (explained above) but also costs to the environment *per se*.

How, though, would these costs be calculated? When we protect an invention, we can at least speak of a fair market value for it, by reference to which damages can be computed. But the lost environmental “values” of which we are now speaking are by definition over and above those that the market is prepared to bid for: they are priceless.

One possible measure of damages, suggested earlier, would be the cost of making the environment whole, just as, when a man is injured in an automobile accident, we impose upon the responsible party the injured man’s medical expenses. Comparable expenses to a polluted river would be the costs of dredging, restocking with fish, and so forth. It is on the basis of such costs as these, I assume, that we get the figure of \$1 billion as the cost of saving Lake Erie.<sup>86</sup> As an ideal, I think this

85. Of course, in the instance of copyright and patent protection, the creation of the “property right” can be more directly justified on homocentric grounds.

86. See Schrag, *Life on a Dying Lake*, in *THE POLITICS OF NEGLECT* 167, at 173 (R. Meek & J. Straayer eds. 1971).



is a good guide applicable in many environmental situations. It is by no means free from difficulties, however.

One problem with computing damages on the basis of making the environment whole is that, if understood most literally, it is tantamount to asking for a "freeze" on environmental quality, even at the costs (and there will be costs) of preserving "useless" objects.<sup>87</sup> Such a "freeze" is not inconceivable to me as a general goal, especially considering that, even by the most immediately discernible homocentric interests, in so many areas we ought to be cleaning up and not merely preserving the environmental status quo. In fact, there is presently strong sentiment in the Congress for a total elimination of all river pollutants by 1985,<sup>88</sup> notwithstanding that such a decision would impose quite large direct and indirect costs on us all. Here one is inclined to recall the instructions of Judge Hays, in remanding Consolidated Edison's Storm King application to the Federal Power Commission in *Scenic Hudson*:

The Commission's renewed proceedings must include as a basic concern the preservation of natural beauty and of natural historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered.<sup>89</sup>

Nevertheless, whatever the merits of such a goal in principle, there are many cases in which the social price tag of putting it into effect are going to seem too high to accept. Consider, for example, an oceanside nuclear generator that could produce low cost electricity for a million homes at a savings of \$1 a year per home, spare us the air pollution that comes of burning fossil fuels, but which through a slight heating effect threatened to kill off a rare species of temperature-sensitive sea urchins; suppose further that technological improvements adequate to reduce the temperature to present environmental quality would expend the entire one million dollars in anticipated fuel savings. Are we prepared to tax ourselves \$1,000,000 a year on behalf of the sea

87. One ought to observe, too, that in terms of real effect on marginal welfare, the poor quite possibly will bear the brunt of the compromises. They may lack the wherewithal to get out to the countryside—and probably want an increase in material goods more acutely than those who now have riches.

88. On November 2, 1971, the Senate, by a vote of 86-0, passed and sent to the House the proposed Federal Water Pollution Control Act Amendments of 1971, 117 CONG. REC. S17464 (daily ed. Nov. 2, 1971). Sections 101(a) and (a)(1) of the bill declare it to be "national policy that, consistent with the provisions of this Act—(1) the discharge of pollutants into the navigable waters be eliminated by 1985." S.2770, 92d Cong., 1st Sess., 117 CONG. REC. S17464 (daily ed. Nov. 2, 1971).

89. 354 F.2d 608, 624 (2d Cir. 1965).

urchins? In comparable problems under the present law of damages, we work out practicable compromises by abandoning restoration costs and calling upon fair market value. For example, if an automobile is so severely damaged that the cost of bringing the car to its original state by repair is greater than the fair market value, we would allow the responsible tortfeasor to pay the fair market value only. Or if a human being suffers the loss of an arm (as we might conceive of the ocean having irreparably lost the sea urchins), we can fall back on the capitalization of reduced earning power (and pain and suffering) to measure the damages. But what is the fair market value of sea urchins? How can we capitalize their loss to the ocean, independent of any commercial value they may have to someone else?

One answer is that the problem can sometimes be sidestepped quite satisfactorily. In the sea urchin example, one compromise solution would be to impose on the nuclear generator the costs of making the ocean whole somewhere else, in some other way, *e.g.*, reestablishing a sea urchin colony elsewhere, or making a somehow comparable contribution.<sup>90</sup> In the debate over the laying of the trans-Alaskan pipeline, the builders are apparently prepared to meet conservationists' objections half-way by re-establishing wildlife away from the pipeline, so far as is feasible.<sup>91</sup>

But even if damage calculations have to be made, one ought to recognize that the measurement of damages is rarely a simple report of economic facts about "the market," whether we are valuing the loss of a foot, a fetus, or a work of fine art. Decisions of this sort are always hard, but not impossible. We have increasingly taken (human) pain and suffering into account in reckoning damages, not because we think we can ascertain them as objective "facts" about the universe, but because, even in view of all the room for disagreement, we come up with a better society by making rude estimates of them than by ignoring them.<sup>92</sup> We can make such estimates in regard to environmental losses

90. Again, there is a problem involving what we conceive to be the injured entity. See notes 26, 73 *supra*.

91. N.Y. Times, Jan. 14, 1971, § 1, col. 2, and at 74, col. 7.

92. Courts have not been reluctant to award damages for the destruction of heirlooms, literary manuscripts or other property having no ascertainable market value. In *Willard v. Valley Gas Fuel Co.*, 171 Cal. 9, 151 Pac. 286 (1915), it was held that the measure of damages for the negligent destruction of a rare old book written by one of plaintiff's ancestors was the amount which would compensate the owner for all detriment including sentimental loss proximately caused by such destruction. The court, at 171 Cal. 15, 151 Pac. 289, quoted approvingly from *Southern Express Co. v. Owens*, 146 Ala. 412, 426, 41 S. 752, 755 (1906):



fully aware that what we are really doing is making implicit normative judgments (as with pain and suffering)—laying down rules as to what the society is going to “value” rather than reporting market evaluations. In making such normative estimates decision-makers would not go wrong if they estimated on the “high side,” putting the burden of trimming the figure down on the immediate human interests present. All burdens of proof should reflect common experience; our experience in environmental matters has been a continual discovery that our acts have caused more long-range damage than we were able to appreciate at the outset.

To what extent the decision-maker should factor in costs such as the pain and suffering of animals and other sentient natural objects, I cannot say; although I am prepared to do so in principle.<sup>93</sup> Given the conjectural nature of the “estimates” in all events, and the roughness of the “balance of conveniences” procedure where that is involved, the

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Ordinarily, where property has a market value that can be shown, such value is the criterion by which actual damages for its destruction or loss may be fixed. But it may be that property destroyed or lost has no market value. In such state of the case, while it may be that no rule which will be absolutely certain to do justice between the parties can be laid down, it does not follow from this, nor is it the law, that the plaintiff must be turned out of court with nominal damages merely. Where the article or thing is so unusual in its character that market value cannot be predicated of it, its value, or plaintiff's damages, must be ascertained in some other rational way and from such elements as are attainable.

Similarly, courts award damages in wrongful death actions despite the impossibility of precisely appraising the damages in such cases. In affirming a judgment in favor of the administrator of the estate of a child killed by defendant's automobile, the Oregon Supreme Court, in *Lane v. Hatfield*, 173 Or. 79, 88-89, 143 P.2d 230, 234 (1943), acknowledged the speculative nature of the measure of damages:

No one knows or can know when, if at all, a seven year old girl will attain her majority, for her marriage may take place before she has become twenty-one years of age. . . . Moreover, there is much uncertainty with respect to the length of time anyone may live. A similar uncertainty veils the future of a minor's earning capacity or habit of saving. Illness or a non-fatal accident may reduce an otherwise valuable and lucrative life to a burden and liability.

The rule, that the measure of recovery by a personal representative for the wrongful death of his decedent is the value of the life of such decedent, if he had not come to such an untimely end, has been termed vague, uncertain and speculative if not, conjectural. It is, however, the best that judicial wisdom has been able to formulate.

93. It is not easy to dismiss the idea of “lower” life having consciousness and feeling pain, especially since it is so difficult to know what these terms mean even as applied to humans. See Austin, *Other Minds*, in *Logic and Language* 342 (S. Flew ed. 1965); Schopenhauer, *On the Will in Nature*, in *TWO ESSAYS BY ARTHUR SCHOPENHAUER* 193, 281-304 (1889). Some experiments on plant sensitivity—of varying degrees of extravagance in their claims—include Lawrence, *Plants Have Feelings, Too . . .*, *ORGANIC GARDENING & FARMING* 64 (April 1971); Woodlief, Royster & Huang, *Effect of Random Noise on Plant Growth*, 46 *J. ACOUSTICAL SOC. AM.* 481 (1969); Backster, *Evidence of a Primary Perception in Plant Life*, 10 *INT'L J. PARAPSYCHOLOGY* 250 (1968).

practice would be of more interest from the socio-psychic point of view, discussed below, than from the legal-operational.

### *Toward Being a Beneficiary in its Own Right*

As suggested above, one reason for making the environment itself the beneficiary of a judgment is to prevent it from being “sold out” in a negotiation among private litigants who agree not to enforce rights that have been established among themselves.<sup>94</sup> Protection from this will be advanced by making the natural object a party to an injunctive settlement. Even more importantly, we should make it a beneficiary of money awards. If, in making the balance requisite to issuing an injunction, a court decides *not* to enjoin a lake polluter who is causing injury to the extent of \$50,000 annually, then the owners and the lake ought both to be awarded damages. The natural object's portion could be put into a trust fund to be administered by the object's guardian, as per the guardianship recommendation set forth above. So far as the damages are proved, as suggested in the previous section, by allowing the natural object to cumulate damages to others as *prima facie* evidence of damages to it, there will, of course, be problems of distribution. But even if the object is simply construed as representing a class of plaintiffs under the applicable civil rules,<sup>95</sup> there is often likely to be a sizeable amount of recovery attributable to members of the class who will not put in a claim for distribution (because their pro rata share would be so small, or because of their interest in the environment). Not only should damages go into these funds, but where criminal fines are applied (as against water polluters) it seems to me that the monies (less prosecutorial expenses, perhaps) ought sensibly to go to the fund rather than to the general treasuries. Guardians fees, including legal fees, would then come out of this fund. More importantly, the fund would be available to preserve the natural object as close as possible to its condition at the time the environment was made a rights-holder.<sup>96</sup>

The idea of assessing damages as best we can and placing them in a trust fund is far more realistic than a hope that a total “freeze” can be put on the environmental status quo. Nature is a continuous theatre in which things and species (eventually man) are destined to enter and

94. See note 39 *supra*, and Coase, note 82 *supra*.

95. See *FED. R. CIV. P.* 23 and note 49 *supra*.

96. This is an ideal, of course—like the ideal that no human being ought to interfere with any other human being. See Dyke, *Freedom, Consent and the Costs of Inter-action*, and Stone, *Comment*, in *IS LAW DEAD?* 134-67 (E. Rostow ed. 1971). Some damages would inevitably be *damnum absque injuria*. See note 93 *supra*.

exit.<sup>97</sup> In the meantime, co-existence of man and his environment means that *each* is going to have to compromise for the better of both. Some pollution of streams, for example, will probably be inevitable for some time. Instead of setting an unrealizable goal of enjoining absolutely the discharge of all such pollutants, the trust fund concept would (a) help assure that pollution would occur only in those instances where the social need for the pollutant's product (via his present method of production) was so high as to enable the polluter to cover *all* homo-centric costs, plus some estimated costs to the environment *per se*, and (b) would be a corpus for preserving monies, if necessary, while the technology developed to a point where repairing the damaged portion of the environment was feasible. Such a fund might even finance the requisite research and development.

(Incidentally, if "rights" are to be granted to the environment, then for many of the same reasons it might bear "liabilities" as well—as inanimate objects did anciently.<sup>98</sup> Rivers drown people, and flood over and destroy crops; forests burn, setting fire to contiguous communities. Where trust funds had been established, they could be available for the satisfaction of judgments *against* the environment, making it bear the costs of some of the harms it imposes on other right holders. In effect, we would be narrowing the claim of Acts of God. The ontological problem would be troublesome here, however; when the Nile overflows, is it the "responsibility" of the river? the mountains? the snow? the hydrologic cycle?<sup>99</sup>)

### *Toward Rights in Substance*

So far we have been looking at the characteristics of being a *holder of rights*, and exploring some of the implications that making the environment a holder of rights would entail. Natural objects would have

97. The inevitability of some form of evolution is not inconsistent with the establishment of a legal system that attempts to interfere with or ameliorate the process: is the same not true of the human law we now have, e.g., the laws against murder?

98. Holmes, *Early Forms of Liability*, in *THE COMMON LAW* (1881), discusses the liability of animals and inanimate objects in early Greek, early Roman and some later law. Alfred's Laws (A.D. 871-901) provided, for example, that a tree by which a man was killed should "be given to the kindred, and let them have it off the land within 30 nights." *Id.* at 19. In Edward I's time, if a man fell from a tree the tree was deodand. *Id.* at 24. Perhaps the liability of non-human matter is, in the history of things, part of a paranoid, defensive phase in man's development; as humans become more abundant, both from the point of material wealth and internally, they may be willing to allow an advance to the stage where non-human matter has rights.

99. See note 26 *supra*. In the event that a person built his house near the edge of a river that flooded, would "assumption of the risk" be available on the river's behalf?

standing in their own right, through a guardian; damage to and through them would be ascertained and considered as an independent factor; and they would be the beneficiaries of legal awards. But these considerations only give us the skeleton of what a meaningful rights-holding would involve. To flesh out the "rights" of the environment demands that we provide it with a significant body of rights for it to invoke when it gets to court.

In this regard, the lawyer is constantly aware that a right is not, as the layman may think, some strange substance that one either has or has not. One's life, one's right to vote, one's property, can all be taken away. But those who would infringe on them must go through certain procedures to do so; these procedures are a measure of what we value as a society. Some of the most important questions of "right" thus turn into questions of degree: how much review, and of which sort, will which agencies of state accord us when we claim our "right" is being infringed?

We do not have an absolute right either to our lives or to our driver's licenses. But we have a greater right to our lives because, if even the state wants to deprive us of that "right," there are authoritative bodies that will demand that the state make a very strong showing before it does so, and it will have to justify its actions before a grand jury, petit jury (convincing them "beyond a reasonable doubt"), sentencing jury, and, most likely, levels of appellate courts. The carving out of students "rights" to their education is being made up of this sort of procedural fabric. No one, I think, is maintaining that in no circumstances ought a student to be expelled from school. The battle for student "rights" involves shifting the answers to questions like: before a student is expelled, does he have to be given a hearing; does he have to have prior notice of the hearing, and notice of charges; may he bring counsel, (need the state provide counsel if he cannot?); need there be a transcript; need the school carry the burden of proving the charges; may he confront witnesses; if he is expelled, can he get review by a civil court; if he can get such review, need the school show its actions were "reasonable," or merely "not unreasonable," and so forth?<sup>100</sup>

In this vein, to bring the environment into the society as a rights-holder would not stand it on a better footing than the rest of us mere mortals, who every day suffer injuries that are *damnum absque injuria*.

100. See *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961); Comment, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362 (1963).

What the environment must look for is that its interests be taken into account in subtler, more procedural ways.

The National Environmental Policy Act is a splendid example of this sort of rights-making through the elaboration of procedural safeguards. Among its many provisions, it establishes that every federal agency must:

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives,

resolutions, and programs designed to maximize international co-operation in anticipating and preventing a decline in the quality of mankind's environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment . . . .<sup>101</sup>

These procedural protections have already begun paying off in the courts. For example, it was on the basis of the Federal Power Commission's failure to make adequate inquiry into "alternatives" (as per subsection (iii)) in *Scenic Hudson*, and the Atomic Energy Commission's failure to make adequate findings, apparently as per subsections (i) and (ii), in connection with the Amchitka Island underground test explosion<sup>102</sup> that Federal Courts delayed the implementation of environment-threatening schemes.

Although this sort of control (remanding a cause to an agency for further findings) may seem to the layman ineffectual, or only a stalling of the inevitable, the lawyer and the systems analyst know that these demands for further findings can make a difference. It may encourage the institution whose actions threaten the environment to really *think about* what it is doing, and that is neither an ineffectual nor a small feat. Indeed, I would extend the principle beyond federal agencies. Much of the environment is threatened not by them, but by private corporations. Surely the constitutional power would not be lacking to mandate that all private corporations whose actions may have significant adverse affect on the environment make findings of the sort now mandated for federal agencies. Further, there should be requirements that these findings and reports be channeled to the Board of Directors; if the directors are not charged with the knowledge of what their corporation is doing to the environment, it will be all too easy for lower level management to prevent such reports from getting to a policy-making level. We might make it grounds for a guardian to enjoin a private corporation's actions if such procedures had not been carried out.

The rights of the environment could be enlarged by borrowing yet another page from the Environmental Protection Act and mandating comparable provisions for "private governments." The Act sets up

101. National Environmental Policy Act, 92 U.S.C. § 4332 (1970).

102. See *Committee for Nuclear Responsibility Inc. v. Schlesinger*, 40 U.S.L.W. 3214 (Nov. 5, 1971) (Douglas, J. dissent to denial of application for injunction in aid of jurisdiction).

within the Executive Office of the President a Council on Environmental Quality "to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment."<sup>103</sup> The Council is to become a focal point, within our biggest "corporation"—the State—to gather and evaluate environmental information which it is to pass on to our chief executive officer, the President. Rather than being ineffectual, this may be a highly sophisticated way of steering organizational behavior. Corporations—especially recidivist polluters and land despoilers—should have to establish comparable internal reorganization, *e.g.*, to set up a Vice-President for Ecological Affairs. The author is not offering this suggestion as a cure-all, by any means, but I do not doubt that this sort of control over internal corporate organization would be an effective supplement to the traditional mechanisms of civil suits, licensing, administrative agencies, and fines.<sup>104</sup>

Similarly, courts, in making rulings that may affect the environment, should be compelled to make findings with respect to environmental harm—showing how they calculated it and how heavily it was weighed—even in matters outside the present Environmental Protection Act. This would have at least two important consequences. First, it would shift somewhat the focus of court-room testimony and concern; second, the appellate courts, through their review and reversals for "insufficient findings," would give content to, and build up a body of, environmental rights, much as content and body has been given, over the years, to terms like "Due Process of Law."

Beyond these procedural safeguards, would there be any rights of the environment that might be deemed "absolute," at least to the extent of, say, Free Speech? Here, the doctrine of irreparable injury comes to mind. There has long been equitable support for an attorney-general's enjoining injury to communal property if he can prove it to be "irreparable." In other words, while repairable damage to the environment

103. 42 U.S.C. § 4342 (1970).

104. As an indication of what lower-level management is apt to do, see Ehrenreich & Ehrenreich, *Conscience of a Steel Worker*, 213 THE NATION 268 (1971). One steel company's "major concession [toward obedience to the 1899 Refuse Act, note 78 *supra*] was to order the workers to confine oil dumping to the night shift. 'During the day the Coast Guard patrols. But at night, the water's black, the oil's black; no one can tell.'" An effective corporation law would assure that the internal information channels within a corporation were capable of forcing such matters to the attention of high-level officials. Even then, there is no guarantee that the law will be obeyed—but we may have improved the odds.

might be balanced and weighed, irreparable damage could be enjoined absolutely. There are several reasons why this doctrine has not been used effectively (witness Lake Erie).<sup>105</sup> Undoubtedly, political pressures (in the broadest sense) have had an influence. So, too, has the failure of all of us to understand just how delicate the environmental balance is; this failure has made us unaware of how early "irreparable" injury might be occurring, and, if aware, unable to prove it in court. But most important I think, is that the doctrine simply is not practical as a rule of universal application. For one thing, there are too many cases like the sea urchin example above, where the marginal costs of abating the damage seem too clearly to exceed the marginal benefits, even if the damage to the environment itself is liberally estimated. For another, there is a large problem in how one defines "irreparable." Certainly the great bulk of the environment in civilized parts of the world has been injured "irreparably" in the sense of "irreversibly"; we are not likely to return it to its medieval quality. Despite the scientific ring to the term, judgments concerning "irreparable injury" are going to have to subsume questions both of degree of damage and of value—to all of "us" including the environment, *i.e.*, to "spaceship earth"—of the damaged object. Thus, if we are going to revitalize the "irreparable damages" doctrine, and expect it to be taken seriously, we have to recognize that what will be said to constitute "irreparable damage" to the ionosphere, because of its importance to all life, or to the Grand Canyon, because of its uniqueness, is going to rest upon normative judgments that ought to be made explicit.

This suggests that some (relatively) absolute rights be defined for the environment by setting up a constitutional list of "preferred objects," just as some of our Justices feel there are "preferred rights" where humans are concerned.<sup>106</sup> Any threatened injury to these most jealously-to-be-protected objects should be reviewed with the highest level of scrutiny at all levels of government, including our "counter-majoritarian" branch, the court system. Their "Constitutional rights" should be implemented, legislatively and administratively, by, *e.g.*, the setting of environmental quality standards.

I do not doubt that other senses in which the environment might

105. In the case of Lake Erie, in addition to the considerations that follow in the text, there were possibly additional factors such as that no one polluter's acts could be characterized as inflicting irreparable injury.

106. See for example Justice Reed's opinion for the Court in *Kovacs v. Cooper*, 336 U.S. 77 (1949) (but see Mr. Justice Frankfurter's concurring opinion, 336 U.S. at 89-96), and *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

have rights will come to mind, and, as I explain more fully below, would be more apt to come to mind if only we should speak in terms of their having rights, albeit vaguely at first. "Rights" might well lie in unanticipated areas. It would seem, for example, that Chief Justice Warren was only stating the obvious when he observed in *Reynolds v. Sims* that "legislators represent people, not trees or acres." Yet, could not a case be made for a system of apportionment which *did* take into account the wildlife of an area?<sup>107</sup> It strikes me as a poor idea that Alaska should have no more congressmen than Rhode Island primarily *because there are in Alaska all those trees and acres, those waterfalls and forests*.<sup>108</sup> I am not saying anything as silly as that we ought to overrule *Baker v. Carr* and retreat from one man-one vote to a system of one man-or-tree one vote. Nor am I even taking the position that we ought to count each acre, as we once counted each slave, as three-fifths of a man. But I am suggesting that there is nothing unthinkable about, and there might on balance even be a prevailing case to be made for, an electoral apportionment that made some systematic effort to allow for the representative "rights" of non-human life. And if a case can be made for that, which I offer here mainly for purpose of illustration, I suspect that a society that grew concerned enough about the environment to make it a holder of rights would be able to find quite a number of "rights" to have waiting for it when it got to court.

### *Do We Really Have to Put it that Way?*

At this point, one might well ask whether much of what has been written could not have been expressed without introducing the notion of trees, rivers, and so forth "having rights." One could simply and straightforwardly say, for example, that (R<sub>1</sub>) "the class of persons competent to challenge the pollution of rivers ought to be extended beyond that of persons who can show an immediate adverse economic impact on themselves," and that (R<sub>2</sub>), "judges, in weighing competing claims to a wilderness area, ought to think beyond the economic and even esthetic impact on man, and put into the balance a concern for the threatened environment as such." And it is true, indeed, that to say trees and rivers have "rights" is not in itself a stroke of any operational significance—no more than to say "people have rights." To solve any concrete case,

107. Note that in the discussion that follows I am referring to legislative apportionment, not voting proper.

108. In point of fact, there is no reason to suppose that an increase of Congressmen for Alaska would be a benefit to the environment; the reality of the political situation might just as likely result in the election of additional Congressmen with closer ties to oil companies and other developers.

one is always forced to more precise and particularized statements, in which the word "right" might just as well be dropped from the elocution.

But this is not the same as to suggest that introducing the notion of the "rights" of trees and rivers would accomplish nothing beyond the introduction of a set of particular rules like (R<sub>1</sub>) and (R<sub>2</sub>), above. I think it is quite misleading to say that "*A* has a right to . . ." can be fully explicated in terms of a certain set of specific legal rules, and the manner in which conclusions are drawn from them in a legal system. That is only part of the truth. Introducing the notion of something having a "right" (simply *speaking* that way), brings into the legal system a flexibility and open-endedness that no series of specifically stated legal rules like R<sub>1</sub>, R<sub>2</sub>, R<sub>3</sub>, . . . R<sub>n</sub> can capture. Part of the reason is that "right" (and other so-called "legal terms" like "infant," "corporation," "reasonable time") have meaning—vague but forceful—in the ordinary language, and the force of these meanings, inevitably infused with our thought, becomes part of the context against which the "legal language" of our contemporary "legal rules" is interpreted.<sup>109</sup> Consider, for example, the "rules" that govern the question, on whom, and at what stages of litigation, is the burden of proof going to lie? Professor Krier has demonstrated how terribly significant these decisions are in the trial of environmental cases, and yet, also, how much discretion judges have under them.<sup>110</sup> In the case of such vague rules, it is *context*—senses of direction, of value and purpose—that determines how the rules will be understood, every bit as much as their supposed "plain meaning." In a system which spoke of the environment "having legal rights," judges would, I suspect, be inclined to interpret rules such as those of burden of proof far more liberally from the point of the environment. There is, too, the fact that the vocabulary and expressions that are available to us influence and even steer our thought. Consider the effect that was had by introducing into the law terms like "motive," "intent," and "due process." These terms work a subtle shift into the rhetoric of explanation available to judges; with them, new ways of thinking and

109. See Simpson, *The Analysis of Legal Concepts*, 80 LAW Q. REV. 535 (1964).

110. Krier, *Environmental Litigation and the Burden of Proof*, in LAW AND THE ENVIRONMENT 105 (M. Baldwin & J. Page eds. 1970). See *Texas East Trans. Corp. v. Wildlife Preserves*, 48 N.J. 261, 225 A.2d 130 (1966). There, where a corporation set up to maintain a wildlife preserve resisted condemnation for the construction of plaintiff's pipe line, the court ruled that ". . . the quantum of proof required of this defendant to show arbitrariness against it would not be as substantial as that to be assumed by the ordinary property owner who devotes his land to conventional uses." 225 A.2d at 137.

new insights come to be explored and developed.<sup>111</sup> In such fashion, judges who could unabashedly refer to the "legal rights of the environment" would be encouraged to develop a viable body of law—in part simply through the availability and force of the expression. Besides, such a manner of speaking by courts would contribute to popular notions, and a society that spoke of the "legal rights of the environment" would be inclined to legislate more environment-protecting rules by formal enactment.

If my sense of these influences is correct, then a society in which it is stated, however vaguely, that "rivers have legal rights" would evolve a different legal system than one which did not employ that expression, even if the two of them had, at the start, the very same "legal rules" in other respects.

#### THE PSYCHIC AND SOCIO-PSYCHIC ASPECTS

There are, as we have seen, a number of developments in the law that may reflect a shift from the view that nature exists *for men*. These range from increasingly favorable procedural rulings for environmental action groups—as regards standing and burden of proof requirements, for example—to the enactment of comprehensive legislation such as the National Environmental Policy Act and the thoughtful Michigan Environmental Protection Act of 1970. Of such developments one may say, however, that it is not the environment *per se* that we are prepared to take into account, but that man's increased awareness of possible long range effects on himself militate in the direction of stopping environmental harm in its incipiency. And this is part of the truth, of course. Even the far-reaching National Environmental Policy Act, in its preambulatory "Declaration of National Environmental Policy," comes out both for "restoring and maintaining environmental quality *to the overall welfare and development of man*" as well as for creating and maintaining "conditions under which *man and nature can exist in productive harmony*."<sup>112</sup> Because the health and well-being of mankind depend upon the health of the environment, these goals will often be so mutually supportive that one can avoid deciding whether our rationale is to advance "us" or a new "us" that includes the environment. For example, consider the Federal Insecticide, Fungicide, and Rodenticide

Act (FIFRA) which insists that, *e.g.*, pesticides, include a warning "adequate to prevent injury to living man and other vertebrate animals, vegetation, and useful invertebrate animals."<sup>113</sup> Such a provision undoubtedly reflects the sensible notion that the protection of humans is best accomplished by preventing dangerous accumulations in the food chain. Its enactment does not necessarily augur far-reaching changes in, nor even call into question, fundamental matters of consciousness.

But the time is already upon us when we may have to consider subordinating some human claims to those of the environment *per se*. Consider, for example, the disputes over protecting wilderness areas from development that would make them accessible to greater numbers of people. I myself feel disingenuous rationalizing the environmental protectionist's position in terms of a utilitarian calculus, even one that takes future generations into account, and plays fast and loose with its definition of "good." Those who favor development have the stronger argument—they at least hold the protectionist to a standstill—from the point of advancing the greatest good of the greatest number of people. And the same is true regarding arguments to preserve useless species of animals, as in the sea urchin hypothetical. One *can* say that we never know what is going to prove useful at some future time. In order to protect ourselves, therefore, we ought to be conservative now in our treatment of nature. I agree. But when conservationists argue this way to the exclusion of other arguments, or find themselves speaking in terms of "recreational interests" so continuously as to play up to, and reinforce, homocentrist perspectives, there is something sad about the spectacle. One feels that the arguments lack even their proponent's convictions. I expect they want to say something less egotistic and more emphatic but the prevailing and sanctioned modes of explanation in our society are not quite ready for it. In this vein, there must have been abolitionists who put their case in terms of getting more work out of the Blacks. Holdsworth says of the early English Jew that while he was "regarded as a species of *res nullius* . . . [H]e was valuable for his acquisitive capacity; and for that reason the crown took him under its protection."<sup>114</sup> (Even today, businessmen are put in the position of insisting that their decent but probably profitless acts will "help our company's reputation and be good for profits."<sup>115</sup>)

111. See Stone, *Existential Humanism and the Law*, in *EXISTENTIAL HUMANISTIC PSYCHOLOGY* 151 (T. Greening ed. 1971).

112. National Environmental Policy Act, 42 U.S.C. §§ 4321-47 (1970).

113. See note 65 *supra*.

114. W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 45 (5th ed. 1931).

115. Note that it is in no small way the law that imposes this manner of speech on businessmen. See *Dodge v. Ford Motor Co.*, 204 Mich. 459, 499-505, 170 N.W. 668, 682-83 (1919) (holding that Henry Ford, as dominant stockholder in Ford Motor Co., could



For my part, I would prefer a frank avowal that even making adjustments for esthetic improvements, what I am proposing is going to cost "us," *i.e.*, reduce our standard of living as measured in terms of our present values.

Yet, this frankness breeds a frank response—one which I hear from my colleagues and which must occur to many a reader. Insofar as the proposal is not just an elaborate legal fiction, but really comes down in the last analysis to a compromise of *our* interests for *theirs*, why should we adopt it? "What is in it for 'us'?"

This is a question I am prepared to answer, but only after permitting myself some observations about how *odd* the question is. It asks for me to justify my position in the very anthropocentric hedonist terms that I am proposing we modify. One is inclined to respond by a counter: "couldn't you (as a white) raise the same questions about compromising your preferred rights-status with Blacks?"; or "couldn't you (as a man) raise the same question about compromising your preferred rights-status with women?" Such counters, unfortunately, seem no more responsive than the question itself. (They have a nagging ring of "yours too" about them.) What the exchange actually points up is a fundamental problem regarding the nature of philosophical argument. Recall that Socrates, whom we remember as an opponent of hedonistic thought, confutes Thrasymachus by arguing that immorality makes one miserably unhappy! Kant, whose moral philosophy was based upon the categorical imperative ("Woe to him who creeps through the serpent windings of Utilitarianism"<sup>116</sup>) finds himself justifying, *e.g.*, promise keeping and truth telling, on the most prudential—one might almost say, commercial—grounds.<sup>117</sup> This "philosophic irony" (as Professor Engel calls it) may owe to there being something unique about ethical argument.<sup>118</sup> "Ethics cannot be put into words", Wittgenstein puts it; such matters "make themselves manifest."<sup>119</sup> On the other hand, perhaps the truth is that in any argument which aims at persuading a human being to action (on ethical or any other bases), "logic" is only an instru-

not withhold dividends in the interests of operating the company "as a semi-eleemosynary institution and not as a business institution".

116. I. KANT, *PHILOSOPHY OF LAW* 195 (Hastie Transl. 1887).

117. I. KANT, *The Metaphysics of Morality*, in *THE PHILOSOPHY OF KANT* § 1 at 230-31 (J. Watson transl. 1908).

118. Engel, *Reasons, Morals and Philosophic Irony*, in *LANGUAGE AND ILLUMINATION* 60 (1969).

119. L. WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* §§ 6.421, 6.522 (D. Pears & B. McGuinness transl. 1961).

ment for illuminating positions, at best, and in the last analysis it is psycho-logical appeals to the listener's self-interest that hold sway, however "principled" the rhetoric may be.

With this reservation as to the peculiar task of the argument that follows, let me stress that the strongest case can be made from the *perspective* of human advantage for conferring rights on the environment. Scientists have been warning of the crises the earth and all humans on it face if we do not change our ways—radically—and these crises make the lost "recreational use" of rivers seem absolutely trivial. The earth's very atmosphere is threatened with frightening possibilities: absorption of sunlight, upon which the entire life cycle depends, may be diminished; the oceans may warm (increasing the "greenhouse effect" of the atmosphere), melting the polar ice caps, and destroying our great coastal cities; the portion of the atmosphere that shields us from dangerous radiation may be destroyed. Testifying before Congress, sea explorer Jacques Cousteau predicted that the oceans (to which we dreamily look to feed our booming populations) are headed toward their own death: "The cycle of life is intricately tied up with the cycle of water . . . the water system has to remain alive if we are to remain alive on earth."<sup>120</sup> We are depleting our energy and our food sources at a rate that takes little account of the needs even of humans now living.

These problems will not be solved easily; they very likely can be solved, if at all, only through a willingness to suspend the rate of increase in the standard of living (by present values) of the earth's "advanced" nations, and by stabilizing the total human population. For some of us this will involve forfeiting material comforts; for others it will involve abandoning the hope someday to obtain comforts long envied. For all of us it will involve giving up the right to have as many offspring as we might wish. Such a program is not impossible of realization, however. Many of our so-called "material comforts" are not only in excess of, but are probably in opposition to, basic biological needs. Further, the "costs" to the advanced nations is not as large as would appear from Gross National Product figures. G.N.P. reflects social gain (of a sort) without discounting for the social *cost* of that gain, *e.g.*, the losses through depletion of resources, pollution, and so forth. As has well been shown, as societies become more and more "advanced," their real marginal gains become less and less for each additional dollar of

120. Cousteau, *The Oceans: No Time to Lose*, L.A. Times, Oct. 24, 1971, § (opinion), at 1, col. 4.



G.N.P.<sup>121</sup> Thus, to give up "human progress" would not be as costly as might appear on first blush.

Nonetheless, such far-reaching social changes are going to involve us in a serious reconsideration of our consciousness towards the environment. I say this knowing full well that there is something more than a trifle obscure in the claim: is popular consciousness a meaningful notion, to begin with? If so, what is our present consciousness regarding the environment? Has it been causally responsible for our material state of affairs? Ought we to shift our consciousness (and if so, to what exactly, and on what grounds)? How, if at all, would a shift in consciousness be translated into tangible institutional reform? Not one of these questions can be answered to everyone's satisfactions, certainly not to the author's.

It is commonly being said today, for example, that our present state of affairs—at least in the West—can be traced to the view that Nature is the dominion of Man, and that this attitude, in turn, derives from our religious traditions.

Whatever the origins, the text is quite clear in Judaism, was absorbed all but unchanged into Christianity, and was inflated in Humanism to become the implicit attitude of Western man to Nature and the environment. Man is exclusively divine, all other creatures and things occupy lower and generally inconsequential stature; man is given dominion over all creatures and things; he is enjoined to subdue the earth. . . . This environment was created by the man who believes that the cosmos is a pyramid erected to support man on its pinnacle, that reality exists only because man can perceive it, that God is made in the image of man, and that the world consists solely of a dialogue between men. Surely this is an infantilism which is unendurable. It is a residue from a past of inconsequence when a few puny men cried of their supremacy to an unhearing and uncaring world. One longs for a psychiatrist who can assure man that his deep seated cultural inferiority is no longer necessary or appropriate. . . . It is not really necessary to destroy nature in order to gain God's favor or even his undivided attention.<sup>122</sup>

Surely this is forcibly put, but it is not entirely convincing as an explanation for how we got to where we are. For one thing, so far as

121. See J. HARTE & R. SOCOLOW, *PATIENT EARTH* (1971).

122. McHarg, *Values, Process and Form*, in *THE FITNESS OF MAN'S ENVIRONMENT* 213-14 (1968).

intellectual influences are to be held responsible for our present state of affairs, one might as fairly turn on Darwin as the Bible. It was, after all, Darwin's views—in part through the prism of Spencer—that gave moral approbation to struggle, conquest, and domination; indeed, by emphasizing man's development as a product of chance happenings, Darwin also had the effect—intended or not—of reducing our awareness of the mutual interdependency of everything in Nature. And besides, as Professor Murphy points out, the spiritual beliefs of the Chinese and Indians "in the unity between man and nature had no greater effect than the contrary beliefs in Europe in producing a balance between man and his environment"; he claims that in China, *tao* notwithstanding, "ruthless deforestation has been continuous."<sup>123</sup> I am under the impression, too, that notwithstanding the vaunted "harmony" between the American Plains Indians and Nature, once they had equipped themselves with rifles their pursuit of the buffalo expanded to fill the technological potential.<sup>124</sup> The fact is, that "consciousness" explanations pass too quickly over the less negative but simpler view of the situation: there are an increasing number of humans, with increasing wants, and there has been an increasing technology to satisfy them at "cost" to the rest of nature. Thus, we ought not to place too much hope that a changed environmental consciousness will in and of itself reverse present trends. Furthermore, societies have long since passed the point where a change in human consciousness on any matter will rescue us from our problems. More than ever before we are in the hands of institutions. These institutions are not "mere legal fictions" moreover—they have wills, minds, purposes, and inertias that are in very important ways their own, i.e., that can transcend and survive changes in the consciousnesses of the individual humans who supposedly comprise them, and whom they supposedly serve. (It is more and more the individual human being, with his consciousness, that is the legal fiction.<sup>125</sup>)

123. Murphy, *supra* note 27, at 477.

124. On the other hand, the statement in text, and the previous one of Professor Murphy, may be a bit severe. One could as easily claim that Christianity has had no influence on overt human behavior in light of the killings that have been carried out by professed Christians, often in its name. *Feng shui* has, on all accounts I am familiar with, influenced the development of land in China. See Freedman, *Geomancy*, 1968 *PROCEEDINGS OF THE ROYAL ANTHROPOLOGICAL INSTITUTE OF GREAT BRITAIN AND IRELAND* 5; March, *An Appreciation of Chinese Geomancy*, 27 *J. ASIAN STUDIES* 253 (1968).

125. The legal system does the best it can to maintain the illusion of the reality of the individual human being. Consider, for example, how many constitutional cases, brought in the name of some handy individual, represent a power struggle between institutions—the NAACP and a school board, the Catholic Church and a school board, the ACLU and the Army, and so forth. Are the individual human plaintiffs the real moving causes of these cases—or an afterthought?

For these reasons, it is far too pat to suppose that a western "environmental consciousness" is solely or even primarily responsible for our environmental crisis. On the other hand, it is not so extravagant to claim that it has dulled our resentment and our determination to respond. For this reason, whether we will be able to bring about the requisite institutional and population growth changes depends in part upon effecting a radical shift in our feelings about "our" place in the rest of Nature.

A radical new conception of man's relationship to the rest of nature would not only be a step towards solving the material planetary problems; there are strong reasons for such a changed consciousness from the point of making us far better humans. If we only stop for a moment and look at the underlying human qualities that our present attitudes toward property and nature draw upon and reinforce, we have to be struck by how stultifying of our own personal growth and satisfaction they can become when they take rein of us. Hegel, in "justifying" private property, unwittingly reflects the tone and quality of some of the needs that are played upon:

A person has as his substantive end the right of putting his will into any and every thing and thereby making it his, because it has no such end in itself and derives its destiny and soul from his will. This is the absolute right of appropriation which man has over all "things."<sup>126</sup>

What is it within us that gives us this need not just to satisfy basic biological wants, but to extend our wills over things, to object-ify them, to make them ours, to manipulate them, to keep them at a psychic distance? Can it all be explained on "rational" bases? Should we not be suspect of such needs within us, cautious as to why we wish to gratify

When we recognize that our problems are increasingly institutional, we would see that the solution, if there is one, must involve coming to grips with how the "corporate" (in the broadest sense) entity is directed, and we must alter our views of "property" in the fashion that is needed to regulate organizations successfully. For example, instead of ineffectual, after-the-fact criminal fines we should have more preventive in-plant inspections, notwithstanding the protests of "invasion of [corporate] privacy."

In-plant inspection of production facilities and records is presently allowed only in a narrow range of areas, e.g., in federal law, under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 374 *et seq.* (1970), and provisions for meat inspection, 21 U.S.C. § 608 (1970). Similarly, under local building codes we do not wait for a building to collapse before authoritative sources inquire into the materials and procedures that are being used in the construction; inspectors typically come on site to check the progress at every critical stage. A sensible preventive legal system calls for extending the ambit of industries covered by comparable "privacy invading" systems of inspection.

126. G. HEGEL, *HEGEL'S PHILOSOPHY OF RIGHT* 41 (T. Knox transl. 1945).

them? When I first read that passage of Hegel, I immediately thought not only of the emotional contrast with Spinoza, but of the passage in Carson McCullers' *A Tree, A Rock, A Cloud*, in which an old derelict has collared a twelve year old boy in a streetcar cafe. The old man asks whether the boy knows "how love should be begun?"

The old man leaned closer and whispered:

"A tree. A rock. A cloud."

"The weather was like this in Portland," he said. "At the time my science was begun. I meditated and I started very cautious. I would pick up something from the street and take it home with me. I bought a goldfish and I concentrated on the goldfish and I loved it. I graduated from one thing to another. Day by day I was getting this technique. . . .

"For six years now I have gone around by myself and built up my science. And now I am a master. Son. I can love anything. No longer do I have to think about it even. I see a street full of people and a beautiful light comes in me. I watch a bird in the sky. Or I meet a traveler on the road. Everything, Son. And anybody. All stranger and all loved! Do you realize what a science like mine can mean?"<sup>127</sup>

To be able to get away from the view that Nature is a collection of useful senseless objects is, as McCullers' "madman" suggests, deeply involved in the development of our abilities to love—or, if that is putting it too strongly, to be able to reach a heightened awareness of our own, and others' capacities in their mutual interplay. To do so, we have to give up some psychic investment in our sense of separateness and specialness in the universe. And this, in turn, is hard giving indeed, because it involves us in a flight backwards, into earlier stages of civilization and childhood in which we had to trust (and perhaps fear) our environment, for we had not then the power to master it. Yet, in doing so, we—as persons—gradually free ourselves of needs for supportive illusions. Is not this one of the triumphs for "us" of our giving legal rights to (or acknowledging the legal rights of) the Blacks and women?<sup>128</sup>

127. C. McCULLERS, *THE BALLAD OF THE SAD CAFE AND OTHER STORIES* 150-51 (1958).

128. Consider what Schopenhauer was writing "Of Women," about the time the Wisconsin Supreme Court was explaining why women were unfit to practice law, note 23 *supra*:

You need only look at the way in which she is formed, to see that woman is not meant to undergo great labour, whether of the mind or of the body. She pays the debt of life not by what she does, but by what she suffers; by the pains of

Changes in this sort of consciousness are already developing, for the betterment of the planet and us. There is now federal legislation which "establishes by law"<sup>129</sup>

the humane ethic that animals should be accorded the basic creature comforts of adequate housing, ample food and water, reasonable handling, decent sanitation, sufficient ventilation, shelter from extremes of weather and temperature, and adequate veterinary care including the appropriate use of pain-killing drugs. . . .<sup>130</sup>

The Vietnam war has contributed to this movement, as it has to others. Five years ago a Los Angeles mother turned out a poster which read "War is not Healthy for children and other living things."<sup>131</sup> It caught

childbearing and care for the child, and by submission to her husband, to whom she should be a patient and cheering companion. The keenest sorrows and joys are not for her, nor is she called upon to display a great deal of strength. The current of her life should be more gentle, peaceful and trivial than man's, without being essentially happier or unhappier.

Women are directly fitted for acting as the nurses and teachers of our early childhood by the fact that they are themselves childish, frivolous and short-sighted; in a word, they are big children all their life long—a kind of intermediate stage between the child and the full-grown man, who is man in the strict sense of the word. . . .

However many disadvantages all this may involve, there is at least this to be said in its favour: that the woman lives more in the present than the man, and that, if the present is at all tolerable, she enjoys it more eagerly. This is the source of that cheerfulness which is peculiar to woman, fitting her to amuse man in his hours of recreation, and, in case of need, to console him when he is borne down by the weight of his cares.

. . . . [I]t will be found that the fundamental fault of the female character is that it has *no sense of justice*. This is mainly due to the fact, already mentioned, that women are defective in the powers of reasoning and deliberation; but it is also traceable to the position which Nature has assigned to them as the weaker sex. They are dependent, not upon strength, but upon craft; and hence their instinctive capacity for cunning, and their ineradicable tendency to say what is not true. \*\*\*For as lions are provided with claws and teeth, and elephants and boars with tusks, bulls with horns, and the cuttle fish with its cloud of inky fluid, so Nature has equipped woman, for her defense and protection, with the arts of dissimulation; and all the power which Nature has conferred upon man in the shape of physical strength and reason, has been bestowed upon women in this form. Hence, dissimulation is innate in woman, and almost as much a quality of the stupid as of the clever. . . .

A. SCHOPENHAUER, *On Women*, in *STUDIES IN PESSIMISM* 105-10 (T. B. Saunders transl. 1893).

If a man should write such insensitive drivel today, we would suspect him of being morally and emotionally blind. Will the future judge us otherwise, for venting rather than examining the needs that impel us to treat the environment as a senseless object—to blast to pieces some small atoll to find out whether an atomic weapon works?

129. Of course, the phase one looks toward is a time in which such sentiments need not be prescribed by law.

130. The "Purpose of the Legislation" in H.R. Rep. No. 91-1651, 91st Cong., 2d Sess., to the "[Animal] Welfare Act of 1970," 3 U.S. CODE CONG. & ADMIN. NEWS 5103, 5104 (1970). Some of the West Publishing Co. typesetters may not be quite ready for this yet; they printed out the title as "Annual Welfare Act of 1970."

131. See McCALL's, May, 1971, at 44.

on tremendously—at first, I suspect, because it sounded like another clever protest against the war, *i.e.*, another angle. But as people say such things, and think about them, the possibilities of what they have stumbled upon become manifest—in its suit against the Secretary of Agriculture to cancel the registration of D.D.T., Environmental Defense Fund alleged "biological injury to man and other living things."<sup>132</sup> A few years ago the pollution of streams was thought of only as a problem of smelly, unsightly, unpotable water *i.e.*, to us. Now we are beginning to discover that pollution is a process that destroys wondrously subtle balances of life within the water, and as between the water and its banks. This heightened awareness enlarges our sense of the dangers to us. But it also enlarges our empathy. We are not only developing the scientific capacity, but we are cultivating the personal capacities *within us* to recognize more and more the ways in which nature—like the woman, the Black, the Indian and the Alien—is like us (and we will also become more able realistically to define, confront, live with and admire the ways in which we are all different).<sup>133</sup>

The time may be on hand when these sentiments, and the early stirrings of the law, can be coalesced into a radical new theory or myth—felt as well as intellectualized—of man's relationships to the rest of nature. I do not mean "myth" in a demeaning sense of the term, but in the sense in which, at different times in history, our social "facts" and relationships have been comprehended and integrated by reference to the "myths" that we are co-signers of a social contract, that the Pope is God's agent, and that all men are created equal. Pantheism, Shinto and Tao all have myths to offer. But they are all, each in its own fashion, quaint, primitive and archaic. What is needed is a myth that can fit our growing body of knowledge of geophysics, biology and the cosmos. In

132. *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1096 (D.C. Cir. 1970). Plaintiffs would thus seem to have urged a broader than literal reading of the statute, 7 U.S.C. § 135(z) (2) (d) (1970), which refers to " . . . living man and other vertebrate animals, vegetation, and useful invertebrate animals."

E.D.F. was joined as petitioners by the National Audubon Society, the Sierra Club, and the West Michigan Environmental Action Council, 428 F.2d at 1094-95 n.5.

133. In the case of the bestowal of rights on other humans, the action also helps the recipient to discover new personal depths and possibilities—new dignity—within himself. I do not want to make much of the possibility that this effect would be relevant in the case of bestowing rights on the environment. But I would not dismiss it out of hand, either. How, after all, do we judge that a man is, say, "flourishing with a new sense of pride and dignity?" What we mean by such statements, and the nature of the evidence upon which we rely in support of them, is quite complex. See Austin, note 93 *supra*. A tree treated in a "rightful" manner would respond in a manner that, when described, would sound much like the response of a person accorded "new dignity." See also note 93 *supra*.

this vein, I do not think it too remote that we may come to regard the Earth, as some have suggested, as one organism, of which Mankind is a functional part—the mind, perhaps: different from the rest of nature, but different as a man's brain is from his lungs.

Ever since the first Geophysical Year, international scientific studies have shown irrefutably that the Earth as a whole is an organized system of most closely interrelated and indeed interdependent activities. It is, in the broadest sense of the term, an "organism." The so-called life-kingdoms and the many vegetable and animal species are dependent upon each other for survival in a balanced condition of planet-wide existence; and they depend on their environment, conditioned by oceanic and atmospheric currents, and even more by the protective action of the ionosphere and many other factors which have definite rhythms of operation. Mankind is part of this organic planetary whole; and there can be no truly new global society, and perhaps in the present state of affairs no society at all, as long as man will not recognize, accept and enjoy the fact that mankind has a definite function to perform within this planetary organism of which it is an active part.

In order to give a constructive meaning to the activities of human societies all over the globe, these activities—physical and mental—should be understood and given basic value with reference to the wholesome functioning of the entire Earth, and we may add of the entire solar system. This cannot be done (1) if man insists on considering himself an alien Soul compelled to incarnate on this sorrowful planet, and (2) if we can see in the planet, Earth, nothing but a mass of material substances moved by mechanical laws, and in "life" nothing but a chance combination of molecular aggregations.

. . . As I see it, the Earth is only one organized "field" of activities—and so is the *human person*—but these activities take place at various levels, in different "spheres" of being and realms of consciousness. The lithosphere is not the biosphere, and the latter not the . . . ionosphere. The Earth is not *only* a material mass. Consciousness is not only "human"; it exists at animal and vegetable levels, and most likely must be latent, or operating in some form, in the molecule and the atom; and all these diverse and in a sense hierarchical modes of activity and consciousness should be seen integrated in and perhaps transcended by an all-encompassing and "eonic" planetary Consciousness.

. . . .

Mankind's function within the Earth-organism is to extract

from the activities of all other operative systems within this organism the type of consciousness which we call "reflective" or "self"-consciousness—or, we may also say to *mentalize* and give meaning, value, and "name" to all that takes place anywhere within the Earth-field. . . .

This "mentalization" process operates through what we call culture. To each region of, and living condition in the total field of the Earth-organism a definite type of culture inherently corresponds. Each region is the "womb" out of which a specific type of human mentality and culture can and sooner or later will emerge. All these cultures—past, present and future—and their complex interrelationships and interactions are the collective builders of the Mind of humanity; and this means of the *conscious Mind of the Earth*.<sup>134</sup>

As radical as such a consciousness may sound today, all the dominant changes we see about us point in its direction. Consider just the impact of space travel, of world-wide mass media, of increasing scientific discoveries about the interrelatedness of all life processes. Is it any wonder that the term "spaceship earth" has so captured the popular imagination? The problems we have to confront are increasingly the world-wide crises of a global organism: not pollution of a stream, but pollution of the atmosphere and of the ocean. Increasingly, the death that occupies each human's imagination is not his own, but that of the entire life cycle of the planet earth, to which each of us is as but a cell to a body.

To shift from such a lofty fancy as the planetarization of consciousness to the operation of our municipal legal system is to come down to earth hard. Before the forces that are at work, our highest court is but a frail and feeble—a distinctly human—institution. Yet, the Court may be at its best not in its work of handing down decrees, but at the very task that is called for: of summoning up from the human spirit the kindest and most generous and worthy ideas that abound there, giving them shape and reality and legitimacy.<sup>135</sup> Witness the School Desegregation Cases which, more importantly than to integrate the schools (assuming they did), awakened us to moral needs which, when made visible, could not be denied. And so here, too, in the case of the environment, the Supreme Court may find itself in a position to award "rights" in a way that will contribute to a change in popular consciousness. It would

134. D. RUDHYAR, DIRECTIVES FOR NEW LIFE 21-23 (1971).

135. See Stone, note 111 *supra*.

be a modest move, to be sure, but one in furtherance of a large goal: the future of the planet as we know it.

How far we are from such a state of affairs, where the law treats “environmental objects” as holders of legal rights, I cannot say. But there is certainly intriguing language in one of Justice Black’s last dissents, regarding the Texas Highway Department’s plan to run a six-lane expressway through a San Antonio Park.<sup>136</sup> Complaining of the Court’s refusal to stay the plan, Black observed that “after today’s decision, the people of San Antonio and the birds and animals that make their home in the park will share their quiet retreat with an ugly, smelly stream of traffic. . . . Trees, shrubs, and flowers will be mown down.”<sup>137</sup> Elsewhere he speaks of the “burial of public parks,” of segments of a highway which “devour parkland,” and of the park’s heartland.<sup>138</sup> Was he, at the end of his great career, on the verge of saying—just saying—that “nature has ‘rights’ on its own account”? Would it be so hard to do?

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136. *San Antonio Conservation Soc’y v. Texas Highway Dep’t*, cert. denied, 400 U.S. 968 (1970) (Black, J. dissenting to denial of certiorari).

137. *Id.* at 969.

138. *Id.* at 971.

## PART II

### *Opinions of the U.S. Supreme Court*