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LEGAL RIGHTS FOR NATURE — THE WRONG ANSWER TO THE RIGHT(S) QUESTION

BY P.S. ELDER*

Some years ago, Christopher Stone gave an affirmative answer to his own question, "Should Trees Have Standing?"¹ He was independently supported in this conclusion by Laurence Tribe.² I must, however, disagree with him. I reject his claim that non-animal and perhaps non-living objects ought to have legal standing. The only stone which could be of moral concern and hence deserving of legal rights, is one like Christopher. This may tell today's "deep ecologist" that "anthropocentric" thinkers such as myself, are "shallow"; but epithets do not replace analysis.

In this essay, I will highlight the differences between "shallow" and "deep" ecology, and briefly criticize Stone's position. I will then claim that Stone and the deep ecologists, even if not philosophically confused, do not take us anywhere in solving environmental disputes, that conventional ethics and law do not already go.

I. SHALLOW AND DEEP ECOLOGY

My disagreement with Stone reflects the current debate between the self-described deep ecologists and their shallow opponents.³ Each term represents a constellation of views about how humans should relate to the natural order. Different camps co-exist under each banner, but shallow ecologists tend to see moral value only in individual sentient creatures, if not solely in human beings. For this reason, they have been called "anthropocentric"⁴ as opposed to the "ecocentric" views of

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¹ (1972), 45 S. Cal. L. Rev. 450.

² Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law* (1974), 83 Yale L. J. 1315.

³ Naess, *The Shallow and the Deep, Long-Range Ecology Movement. A Summary* (1973), 16 Inquiry 95.

⁴ "Anthropocentrism" is a somewhat misleading term. First, all environmental ethics are anthropocentric in that, as far as we know, they can only be prescribed and consciously followed by humans. Second, few people believe that only humans are the object of any moral concern whatever. Almost everybody accords some limited moral significance to those animals who we think are capable at least of having experience of pain and pleasure.

deep ecologists. Different proponents in the latter group argue that not only sentient creatures, but all living things, all species, all ecosystems, possibly all things in the entire universe have inherent value and have moral significance independent of their use by human beings, or even of human existence. They decry the "speciesism" in the claim that human beings have unique moral importance. They also reject the "sentientism" which claims that some level of consciousness or capacity for experience is a prerequisite for moral significance. Indeed, some ecologists have adopted a mystical, ineffable vision of the unity of all:

[It] [t]hen follows the realization that the distinction between 'life' and 'lifeless' is a human construct. Every atom in this body existed before organic life emerged. . . . Remember your own childhood as minerals, as lava, as rocks? . . . We are the rocks dancing. Why do we look down on them with such a condescending air?⁵

Although I have neither the space nor the background to assess the many arguments for each species of shallow or deep ecology, I note that Stone is clearly deep and that I am shallow. Also, animal rights advocates like Tom Regan,⁶ whose case rests on sentientism, are shallow ecologists.

II. STONE'S POSITION

In his article, Stone is "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."⁷ He specifically limits himself to "non-animal but natural objects."⁸ This extraordinary leap is based on the following implicit argument. Our environment is seriously degraded by human action which has been based upon a serious ethical mistake. We have failed to see that natural objects, both animate and inanimate, have moral worth in themselves. Our anthropocentric ethics value the natural world as a resource to be manipulated at will for human benefit, without regard for the rights of non-animate things. On such a view, even conservationists make anthropocentric utilitarian arguments. Creating rights for these things and allowing the appointment of guardians to invoke these rights will enable us to improve the environmental quality. Presumably for Stone, nothing short of this new "ethical" framework will enable us to do this.

⁵ Seed, "Anthropocentrism?", in Sessions and Devall, eds., 5 *Ecophilosophy* (1983) at 11-12.

⁶ See Regan, *The Case for Animal Rights* (1983).

⁷ *Supra* note 1, at 456.

⁸ *Id.* at 26n.

In discussing the legal implications of his thesis, Stone describes what it means to be a holder of legal rights: first, no entity has a 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’”; secondly, “the thing can institute legal actions at its *behest*”; thirdly, “the court must take *injury to it* into account” and fourthly, “relief must run to the *benefit of it*.”⁹ Naturally, the inanimate object could institute proceedings only through its guardian.

Stone does admit that even if trees had rights, they could still be cut down on certain conditions. Indeed, the environment might have a different body of rights than humans.¹⁰ He believes that an expansion of environmental impact assessment procedures would be a major step toward protecting rights of the environment.¹¹ Beyond procedural protection, however, Stone suggests that “some [relatively] absolute rights be defined for the environment by setting up a constitutional list of ‘preferred objects.’”¹² Proposals threatening injury to them would “be reviewed with the highest level of scrutiny at all levels of government.”¹³ Also, Stone argues that plants can communicate their “needs”,¹⁴ but does not explain how rocks can do so. He also believes that economic analysis can quantify loss either on a replacement cost basis or, in a case that is question-begging, on a normative basis of how much something should be valued. Payment into a trust fund for the environment would presumably follow development approval.¹⁵

Stone believes that this shift in conceptual framework would work into the language of judges and steer their thoughts in the right direction.¹⁶ Perhaps, for example, the burden of proof would be interpreted “far more liberally from the point of view of the environment.”¹⁷ Stone even suggests that at the legislative level the natural environment should perhaps be given some sort of proportional representation.¹⁸

⁹ *Id.* at 458 (emphasis in original).

¹⁰ *Id.*

¹¹ *Id.* at 483-86.

¹² *Id.* at 486.

¹³ *Id.*

¹⁴ *Id.* at 471.

¹⁵ *Id.* at 480.

¹⁶ *Id.* at 488.

¹⁷ *Id.*

¹⁸ *Id.* at 487.

III. CRITICISM OF STONE

Unfortunately, Stone never reveals why the natural environment has a moral claim. He argues that, since we have progressed morally by extending rights to blacks, women and children and even to some animals that can suffer, we can (and should) progress further by giving plants and inanimate objects rights.¹⁹ But this is obviously a *non sequitur*: people and plants are not in the same category, which would be necessary to justify such a conclusion. Even if the grass and plants "need" water, in the sense that they will die without it, why does it follow that we have a duty to water them? Do they have any moral importance?

Stone clearly believes they do, and that is the heart of the matter. But they lack any of the relevant characteristics which make persons of moral importance — awareness, self-consciousness, the ability to formulate goals, act to attain them and to appreciate their attainment. It is, therefore, a distortion of our concepts to claim that plants or non-living natural objects can "want" to survive or remain undisturbed. There is "nobody home" who could care, or who could suffer. And if they do not care, why should we? In short, to paraphrase Gertrude Stein, "When you get there, there's no *their* there."

Deep ecologists admit that trees and canyons lack the human characteristics which we all agree make people of moral importance. They deny, however, that these are the only criteria for an object to have value in and of itself. Yet, following Kant, does not the notion of value presuppose a rational conception of self as subject rather than object? This second order self-awareness or,

[R]eflective capacity of persons . . . makes them the *source of value*, the objects of moral concern. The reason that persons are the source of value is that the choice of an alternative must *matter* to the chooser; the choice must make the difference, it must be valued. The idea of a choice being valued is intelligible only if the choice is consistent with a concept of one's self.²⁰

Stone uses another *non sequitur* when he argues that, since we can give rights to fictional entities such as corporations, and can create guardians for people who cannot speak for themselves, we can do so for the environment. Maybe we can; certainly these examples have met legal and individual needs in our complex society. The question, again, is

¹⁹ *Id.* at 450-57.

²⁰ Harper and Stein, "Persons as the Source of Value: An Alternative Basis for Rational Planning" (paper presented to the Association of Collegiate Schools of Planning, San Francisco Oct., 1983) at 3.

why is it morally appropriate to do so? Stone is, remarkably, silent on the matter.

If it cannot matter to canyon or trees if they are irreparably damaged, how are their guardians to know what to argue on their behalf, other than by using their own values? Even if trees “want” less smog in the air, why would they want it? One answer might be to reduce biological strain and to allow the tree to grow bigger or produce more seeds. But equally, the tree could ask that other trees competing with it be cut down for the same reason. Down with survival of the fittest (and perhaps, implicitly, with wilderness)! Civilized trees, bears or deer might reasonably ask that they, like people, be protected from the dangers of the natural environment and be fed and watered by people through the long rigorous winter. As Sagoff comments:

Are labour saving conveniences only good for people? Environmentalists always assume that the interests of those objects [rivers, mountains, lakes and other natural things] are *opposed to development*. How do they know this? Why wouldn't Mineral King want to host a ski resort, after doing nothing for a billion years? The seashore . . . indicates its willingness to entertain poor people . . . by becoming covered with great quantities of sand.²¹

At root, therefore, are the deep ecologists themselves not being “anthropocentric” in believing they know what is best for the natural environment? And, what if we disagree about what is best? In the case of an environment with rights, one can imagine government, industry and public interest groups litigating to see who will be named as guardian and thus give content to these “rights”.

Suppose we agree with Stone that humans are indeed part of the biosphere and should not be seen as separate and apart. We could draw a radically different conclusion from his: people are a part of nature, and in manipulating the environment to their own ends have simply proven to be better suited for survival. Over the eons of natural processes, ninety-nine percent of species have already become extinct. Why may we now not cause other species to become extinct, by being the stronger competitor? The deep ecologists' answer, one assumes, is that we owe these species moral duties. Why? *Because we're different and the deep ecologists' case rests on this difference*. We are not simply “part of nature.” We can understand morality. Indeed, it is the essence of being human which leads to respecting the rights of morally important beings.

²¹ Sagoff, *On Preserving the Natural Environment* (1974), 84 Yale L. J. 205 at 222 (words in brackets supplied).

IV. ORDINARY ETHICS GETS US THERE TOO

The fundamental question is why moral obligations exist and toward whom. Stone is quite right to point out that we already accept obligations to other than fully aware human persons — to babies, idiots and to some extent human vegetables. Who then has rights?

This article is meant only to show that Stone has not made his case; it is not intended to argue the case for ordinary morality. I would simply state my conclusion: first, that any self-conscious being who can have hopes and wishes about the future, weigh alternatives, freely choose among them and appreciate their attainment, is an object of moral concern. Second, a creature's capacity to feel pain (not merely show some physical reactions as plants and styrofoam cups do) clearly establishes its right not to have unnecessary suffering inflicted even if the creature is not in the first category. Third, there is no other category of morally relevant creatures or things. Thus, if whales, dolphins, apes or fruit flies can be shown to meet the first test, we cannot murder them for food or any other purpose nor can we enslave them. On the other hand, if they can feel pain, but cannot conceptualize (an impossibility to at least one serious thinker²²) we can kill them for food and even experiment on them as long as they are not caused to suffer unduly.

These conclusions may not seem emotionally satisfying. Deep ecologists may even think such views can be held only by vandals or philistines. This is not so. They need not lead to pillage or to Coney Island. Many shallow ecologists, including myself, feel peace, delight and awe when in the wilderness. We also feel great personal distress about the diminishing wilderness or impending extinction of beautiful animals or plants. But here are human reasons for us to let them or wilderness environments, survive — so that many people, shallow or deep, will not suffer anguish at their disappearance. Thus, rigorous environmental protection follows from shallow ecology as well as deep. Indeed, of Arne Naess's seven characteristics of deep ecology, I can support at least five.²³

²² Keeping, *Pain* (unpublished Master's Thesis, Department of Philosophy, University of Calgary, 1977).

²³ *Supra* note 3. I support the following five of Naess's seven normative principles of deep ecology (all emphasis in the original):

1. "Rejection of the Man-in-environment image in favour of the *relational, total-field image*." (*Id.* at 95.) Human should not be seen as isolated from, but intrinsic to, the environment.
2. "*Principles of diversity and symbiosis*." (*Id.* at 96.)
3. "Fight against *pollution and resource depletion*." (*Id.* at 97.)
4. "*Complexity, not complication*" (*id.*), because of the existence of unifying principles

V. CONVENTIONAL LAW CAN DO IT

Whether or not Stone's murky intuitive claims are philosophically sound, a great deal of philosophic and legal fuss can be avoided if our present, conventional legal notions can achieve the same result. Since all of law is a human construct, it follows that we can identify any matter of concern and legislate about it, if we want to. Whether or not non-humans have rights, only humans can be actors in the legal system and it must follow that only human concerns could ever be addressed by it. If society has the will to create rights for non-humans, we can *a fortiori* use sovereign legislating power to protect the environment by giving new rights to people.²⁴ A wide range of policy and legal techniques is available within existing legal and moral paradigms. For the moment, I will ignore the real problem, lack of political will; this exists whether or not a conceptual or merely technical shift is required.

Stone's main policy thrust seems to be an extension of environmental impact assessment and procedures to ensure a heavier weighting of environmental criteria.²⁵ Clearly, this can be done with our existing notions. Many suggestions have been made: legislate environmental criteria which must be considered by decision-makers and allow court challenges under broader rules of standing for failure to meet minimum standards of procedure or substance in decision-making;²⁶ guarantee the rights to public interest groups or concerned citizens to participate in open hearings with full information and financial aid to intervenors; extend environmental impact assessment to include the social and economic environments, and mandate a more searching

which help us to explain ecosystems.

5. *Local autonomy and decentralization.*" (*Id.* at 98.)

I disagree with:

1. "*Biospherical egalitarianism* — in principle." (*Id.* at 95.) Naess believes that the equal right to live inheres in all living creatures not just humans subject to some rights of self-defence.
2. "*Anti-class posture*" (*Id.* at 96), but only if Naess means to imply that being anti-class involves a refusal to divide living creatures into those having, and those not having, moral significance.

²⁴ The "supremacy of Parliament" may be subject to constitutionally protected rights, but if the constitution interferes with achieving social goals such as rigorous environmental protection, legal machinery exists which can amend the constitution.

²⁵ *Supra* note 1, at 482-85.

²⁶ See Elder, "A Survey of Developments in American Environmental Law," in Law Society of Upper Canada, *Pollution Environmental Law Reference Material* (rev. ed., 1972) 147 at 149-50. Stone, *supra* note 1, at 467 cites one of the same cases, *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F. 2nd 608 (1965) (sub. nom., *Consolidated Edison Co. of New York Inc. v. Scenic Hudson Preservation Conference et al.*, cert. denied, 384 U.S. 941, 86 S.Ct. 1462 (1966)) to show this is already happening. Curiously he takes developments in the law of standing as support for his position.

inquiry of broad alternatives to the proposed project. For instance, decision-makers (and thus public hearing bodies) could be required to consider evidence that insulation and other energy conservation policies would be a cheaper "source" of new energy than developing tar sands or frontier hydrocarbons and in addition, that conservation creates more employment.²⁷

Further, the ambit of impact assessment could be extended to both private and public projects, and even to those which are individually insignificant if a predicted series of them would, in the aggregate, cause a significant impact. Programmes or even legislative proposals would require assessment.²⁸ Funds for environmental mitigation or reclamation could be established. Decision makers in all levels of government involved in this assessment could be required to use legislated criteria, which presumably Stone would favour. For example, projects having significant environmental impacts might be authorized only "if no feasible and prudent alternative exists" and "if all possible planning to minimize harm" has been done.²⁹

It is widely agreed that our society has failed to protect its citizens adequately from harm caused by the production or use of many chemicals and from manufacturing processes. Technology assessment might prevent the production or use of new chemicals or processes until society is satisfied that no unreasonable long range human health problems or environmental damage will occur. Legislatively, a particular burden and standard of proof could be placed on the proponent of the technology; the weight of the burden could be statutorily defined. If scientific uncertainty and difficulty in the prediction of harm is inevitable,³⁰ development may have to be slowed down dramatically. Also, we must think more carefully about whether limited or pilot approvals should be considered.

In Canada, for instance, the law of standing has been a potential barrier in constitutional, public nuisance and administrative law dis-

²⁷ See Elder, *Heating Up Cold Lake — Public Participation and Esso Resources' Heavy Oil Project* (Faculty of Environmental Design, The University of Calgary, Occasional Paper Series, Oct., 1981).

²⁸ Section 102(c) of the *U.S. National Environmental Policy Act* of 1969 requires environmental impact statement on "proposals for legislation and other major federal actions. . . ."

²⁹ This was the legislation binding on the U.S. Secretary of Transportation in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814 (1971). See Elder, *supra* note 26, at 150.

³⁰ See Thompson, "Water Law — The Limits of the Management Concept," in Canadian Inst. of Resources Law, *Environmental Law in the 1980's: A New Beginning Proceedings* (1982) at 45 and Eddy, "Problems in Resolving Scientific Uncertainty Through Legal Process," *id.* at 131.

putes. Although the rules, at least in constitutional cases, have been relaxed,³¹ legislation can entirely abolish the standing problem, if this is thought desirable. Also, lax pollution standards could become more restrictive. However, sophisticated judgment will be necessary to decide if the criminal law model is satisfactory.³² Possibly effluent fees or regional pollution treatment authorities should be considered. Legislation, like the *Michigan Environmental Protection Act*,³³ can create a substantive right for any citizen to sue to prevent significant environmental harm and even to challenge the adequacy of agency standards. Numerous other techniques are available to the government to shape or even require or prevent behaviour: income tax deductions or credits; compulsory standards (zero pollutant discharge, if deemed feasible); subsidies; education, training and public information programmes; pilot or demonstration programmes; government procurement requirements; paid advertising; price setting; and constitutional amendments.

No doubt other more imaginative legal innovations and prescriptions for radical social transformation can and should be developed. But enough has been said to suggest that the limiting factor in environmental protection is not the paucity of available legal techniques based on anthropocentric theories of rights. I cannot think of one environmental protection reform which is beyond present institutional or legal scope. Of course, this is not to imply that there exists the will to restore the environment to pristine condition or even that it is necessary to try to do so. But the debate on this is intelligible and capable of resolution within our traditional ethics. We do, however, need rigorous public debate about the failure in many spheres of policy to apply traditional moral principles of justice (rights) and consequentialist goals, such as maximized happiness or minimized suffering. Stone, Tribe and the deep ecologists are right when they criticize society for favouring values which in the long run are wrong, both from a prudential and a moral point of view. Polluters who fail to internalize their externalities are really solving their disposal or economic problems at the expense of others — the paradigm of ignoring people's rights. And rights, properly understood, include more than protection of property and the physical person, although again taking these seriously would go far toward solv-

³¹ Swaigen, *Environmental Law 1975-1980* (1980), 12 *Ottawa L. Rev.* 439 at 459. See this useful article for a discussion of various ideas referred to herein.

³² Thompson, *supra* note 30.

³³ See Sax and Dimento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act* (1974), 4 *Ecology L. Q.* 1; Swaigen and Woods, "A Substantive Right to Environmental Quality," in Swaigen, ed., *Environmental Rights in Canada* (1981) at 195. This collection is fundamental to the area being discussed herein.

ing our problems. Persons have psychological needs, but ethical policy formulation can take these into account.

Environmental and social reform require decisions in the political process, and until the necessary shifts in public attitudes or values occur, the fundamental direction of our society will continue as it is. Participatory decision processes may allow us to argue the case for the conserver society, social control over production, zero discharge of highly toxic chemicals, and alternative energy. But, precisely because the legal techniques await policy decisions, it seems a waste of time for either Stone or myself to discuss in detail how legal techniques could help us clean up the environment, if there were the will. There is not. However, the collective lack of will need not render reformers impotent. Careful analysis and tireless political action are both badly needed. Ultimately, decision-makers, in appropriate circumstances, must be persuaded to favour environmental over other interests. Careful ethical analysis will be needed to show the thoughtful ones why they should. Once sound theory is in place, sophisticated political action will be needed to show the others why they had better follow such a lead.

But to return to Stone. He is also right to criticize the casual treatment of the world as a resource, a factory and a dump. It is, first of all, our home and as it is effectively a closed ecological system (save for energy from the sun), decision-makers owe us all a moral duty to respect our rights to "life, liberty and the security of the person."

Our present economic and political systems have failed us. Most people sense this, even if they cannot articulate it. It is now up to political, economic and environmental thinkers to show whether capitalism, socialism or a third, environmentally based political theory can provide guidance for the future. Personally, I doubt that a shared perception of environmental problems and of general prescriptions like decentralized, small-scale institutions, appropriate technology or the conserver society can unite people of the left, right and center for very long. Ultimately, people will still have to choose who will own or control the means of production and how distribution will occur; "economistic"³⁴ analysis may not be sufficient, but it is necessary. This is why environmental political parties like the Green Party³⁵ may be doomed, even though

³⁴ Bookchin, *Toward An Ecological Society* (1980).

³⁵ The Green Party is a well known political faction in Europe, especially in France and Germany. As well as being environmentalist, its members are deeply democratic (favouring consensus over majority rule) and tend to believe more in direct action than in Parliamentary representation. As well as environmentalism, they support feminism and nuclear disarmament.

The existence of green parties (they are being organized in several provinces in Canada, including British Columbia, Alberta and Ontario) is a source of frustration to socialists who argue

they add other issues like feminism and nuclear disarmament to their programme.

The Canadian mixed economy has tried brilliantly to fuse capitalism and socialism. Social welfare programmes and Crown enterprises have been accepted by private capital as the price for the latter to remain fundamentally in control. We can opt for this mixed capitalist economy with social mobility for the most able, but in a future without continual growth, the present pattern of distribution will come under increased pressure. In light of these life and death decisions about toxic and carcinogenic pollutants, human starvation, oppression and the threat of nuclear holocaust, deep ecology's argument supporting rights for canyons, trees and mule deer is really a trivial pursuit. It is not the direction in which environmental political philosophy should go.

that they have the same programme. However, "Greens" point out that many socialists support nuclear power, centralized planning and increase material production, all of which are anathema to many environmentalists.

