

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.²⁷ 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.²⁸ Corporations have rights, but they cannot plead the fifth amendment;²⁹ *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

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.³⁰

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

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.³¹ And, of

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).

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:³² 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.³³

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.*"³⁴ 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."³⁵

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.

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.³⁶ 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,"³⁷ 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."³⁸ The stream itself is lost sight of in "a quantitative compromise between *two* conflicting interests."³⁹

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.⁴⁰ 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.⁴¹ 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,⁴² 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 derivately through the stream; *see* text accompanying notes 83-84, 120 *infra*.

"make its peace with the plaintiff as best it can."⁴³ 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.⁴⁴ 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.⁴⁵ 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 guardian⁴⁶ (or "conservator"⁴⁷ or "committee"⁴⁸—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.⁴⁹ 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."⁵⁰ 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.⁵¹ (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.⁵²) 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.⁵³

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. Eg. 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