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## Should Trees Have Standing?— Toward Legal Rights for Natural Objects (1972)

### 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 fellowmen"; 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. . . ."

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. 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—especially of the deformed and female. (Senicide, as among the North American Indians, was the corresponding rightlessness of the aged). 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

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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.

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*, guaranteeing basic constitutional protections to juvenile defendants, and the Voting Rights Act of 1970. 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, aliens, women (especially of the married variety), the insane, Blacks, foetuses, and Indians.

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, 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. 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. . . .

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. 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. . . . Such is the way the slave South looked upon the Black. 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.

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. 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. Cor-

porations have rights, but they cannot plead the fifth amendment; *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 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. . . .

### 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.

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*. . . .

#### *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 . . . 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. 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. . . .

This 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>1</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." 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. 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," 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-a-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 Pennsyl-

<sup>1</sup>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).

vania 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 inconvenience . . . must yield to the necessities of a great public industry, which although in the hands of a private corporation, subserves a great public interest." The stream itself is lost sight of in "a quantitative compromise between *two* conflicting interests."

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 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. The costs of making a forest whole, for example, would include the costs of reseeding, 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. 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, 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 "make its peace with the plaintiff as best it can." What is meant is a peace between them, and not amongst them and the river.

. . . 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. As the name implies, they want to conserve and guarantee *our* consumption and *our* enjoyment to these other living things. In their own right, natural objects have counted for little, in law as in popular movements.

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 (or "conservator" or "committee"—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. Perhaps we already 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." 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. . . .

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.

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. 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. 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. I would not ask more trust of national forests, vis-a-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.