

1-1-2003

Environmental Ethics and Environmental Law: Harmony, Dissonance, Cacophony, or Irrelevance

Holly Doremus
Berkeley Law

Follow this and additional works at: <http://scholarship.law.berkeley.edu/facpubs>



Part of the [Law Commons](#)

Recommended Citation

Holly Doremus, *Environmental Ethics and Environmental Law: Harmony, Dissonance, Cacophony, or Irrelevance*, 37 U.C. Davis L. Rev. 1 (2003)

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.



Symposium Introduction

Environmental Ethics and Environmental Law: Harmony, Dissonance, Cacophony, or Irrelevance?

*Holly Doremus**

It was 1972, in the midst of the era of ferment and change which gave rise to what we now recognize as environmental law, when Christopher Stone published an article that would quickly become a classic.¹ By that time, a number of writers had suggested that nature might have a claim to ethical consideration. Aldo Leopold, for one, had made that case a generation earlier in his essay *The Land Ethic*.² Stone's article articulated a number of important insights about that moral position including, for example, that care for nature must be "felt as well as intellectualized."³

* Professor of Law and Chancellor's Fellow, University of California, Davis.

¹ Christopher D. Stone, *Should Trees Have Standing? — Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). Shortly thereafter, the article was republished in book form. CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? — TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS* (1974).

² ALDO LEOPOLD, *The Land Ethic*, in A SAND COUNTY ALMANAC 201 (1949).

³ CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? — TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS* 51 (1974).

But his pathbreaking contribution lay elsewhere, in his emphasis on the role of law.

Stone sought to provide a framework for translating the ethical rights of nature into legal ones. Leopold had emphasized the ethical responsibilities of landowners, to be enforced apparently by community norms, social pressures, and the internal workings of conscience.⁴ Stone did not view those enforcement mechanisms as sufficient. He argued that the law could, and should, recognize natural objects as having worth and dignity in their own right. He identified three essential elements that would qualify a natural entity as the holder (rather than the object) of legal rights.⁵ First, the entity must have the ability to institute legal proceedings, that is it must have standing in court in its own right. Second, in determining legal relief on the claim, the court must consider injury to the entity itself. Third, the relief granted must run to the benefit of the entity rather than providing a substitute for the uninjured entity's benefits to a person.

Recognition of intrinsic legal rights of natural objects, Stone noted, would be useful in many circumstances even if one adopted a wholly anthropocentric ethic toward nature. It could serve as a legal fiction to facilitate the aggregation of highly fragmented human interests, including those of future generations.⁶ But beyond that, making natural entities themselves the bearers of rights would facilitate an honest exchange that the existing law was suppressing. Instead of utilitarian arguments that, in Stone's words, "lack even their proponent's convictions," we could turn more forthrightly to discussion of whether, and under what circumstances, human interests should be subordinated to the rights of nature.⁷ Furthermore, prefiguring later scholarship on the expressive, cultural, and constitutive qualities of law,⁸ Stone asserted that changing the focus of legal rhetoric from the rights of people to the rights of nature would steer judges, and society itself, toward choices

⁴ See LEOPOLD, *supra* note 2, at 209 ("The farmer who clears the woods off a 75 per cent slope, turns his cows into the clearing, and dumps its rainfall, rocks, and soil into the community creek, is still (if otherwise decent) a respected member of society. . . . Obligations have no meaning without conscience, and the problem we face is the extension of the social conscience from people to land.").

⁵ STONE, *supra* note 3, at 11.

⁶ *Id.* at 27-28.

⁷ See *id.* at 43-44.

⁸ See generally, e.g., Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENVTL. L.J. 295 (2003); Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936 (1991); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (2000).

more protective of the environment.⁹

Stone was by no means engaged in an ivory-tower academic exercise. He wrote against a backdrop of important real-world events. The Forest Service had recently granted Walt Disney Enterprises a permit to develop a ski resort in Mineral King Valley, an undeveloped wilderness area. The Ninth Circuit had rejected the Sierra Club's challenge to that permit, on the grounds that the Sierra Club lacked standing.¹⁰ When the Supreme Court agreed to review the case, Stone hurried to complete the article in the hope that it might influence the Court's consideration of the case.¹¹ The Mineral King case provided a well-timed opportunity for the Court to endorse the rights of nature itself, represented by its guardians the Sierra Club, rather than insisting that the Sierra Club must demonstrate injury to the interests of its human members in order to gain access to the courts.

The Court as a whole did not adopt Stone's theory,¹² which after all had not been argued by the parties. But there was the hint of a revolution just over the horizon. Justice Douglas explicitly embraced Stone's analysis in his dissent.¹³ *Should Trees Have Standing?* was hailed on the floor of the Senate, and reprinted in the Congressional Record.¹⁴ America seemed to be poised on the edge of a world in which moral and legal reasoning would combine harmoniously to assure robust protection of the environment.

Much has changed in the generation since *Should Trees Have Standing?* was written. We have come to recognize that natural entities count for

⁹ STONE, *supra* note 3, at 41-42.

¹⁰ *Sierra Club v. Hickel*, 433 F.2d 24, 33 (9th Cir. 1970).

¹¹ The background to publication of the article is recounted in Garrett Hardin's Foreword to STONE, *supra* note 3.

¹² The Court held that the Sierra Club lacked standing because it had not alleged that the interests of its members would be affected by the development. The Court articulated a broad view of the type of injury that could support standing, making it clear that injury to recreational or esthetic interests could serve just as well as economic injury. Nonetheless, it left in place the requirement that the relevant injury must be to some interest of a person. *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972).

¹³ See *Morton*, 405 U.S. at 741-42 (Douglas, J., dissenting) ("The critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. See Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972).") (footnote omitted).

¹⁴ Hardin, *supra* note 11, at xvi.

more than the narrow economic benefits they might provide. The environmental fervor of that era produced a slew of federal and state statutes and regulations protecting many parts of the environment, including the air, the water, marine mammals, endangered species, wetlands, and wild rivers. Those statutes have greatly broadened the range of interests that merit consideration in court. They do not always require that the interests of nature be given preference over human interests but, as Stone had pointed out in 1972, rights need not be absolute to be real.¹⁵

Stone's other two criteria for giving legal existence to nature have been less fully achieved. In some cases, legal remedies do focus specifically on natural entities. The Oil Pollution Act and CERCLA, for example, permit awards of natural resource damages which may only be used to restore or remedy harm to natural systems.¹⁶ But in most cases, penalties for violations of environmental laws go to the general treasury, and although citizen suits can result in injunctions halting harmful actions, they cannot produce money damages that might be used to reverse those effects.

Little progress has been made toward the most rhetorically powerful of Stone's three criteria — allowing natural objects themselves to have standing in court. The practical problems of enabling people with diffuse or non-economic interests in protecting nature to vindicate those interests in court have been substantially ameliorated. The Supreme Court's decision in *Sierra Club v. Morton* made it clear that non-economic human interests could support standing. Citizen suit provisions in environmental statutes have expanded the range of legally protected interests and, by allowing recovery of attorney fees, reduced the economic barriers to suit. But the law has yet to acknowledge that natural objects, in their own right, have protectable legal interests.¹⁷

The questions asked of policymakers have changed significantly since 1972. At that point, the key question under discussion was the most

¹⁵ STONE, *supra* note 3, at 10.

¹⁶ 33 U.S.C. § 2706 (2000); 42 U.S.C. § 9607(f)(1) (2000).

¹⁷ The people who see themselves as guardians of nature understand the powerful symbolism of naming putting the entity they seek to protect forward as a plaintiff. Courts sometimes permit that practice, but only as window dressing. See, e.g., *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003); *Hawksbill Sea Turtle v. FEMA*, 126 F.3d 461 (3d Cir. 1997); *Mt. Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991); *Palilla v. Hawaii Dept. of Land and Natural Res.*, 639 F.2d 495 (9th Cir. 1981). When the matter is raised, courts still demand that the non-human plaintiff be accompanied by a human one with a demonstrably injured concrete interest. For a discussion of the issue of standing for non-human species, see *Hawksbill Sea Turtle*, 126 F.3d at 466 n.2.

basic one: should aspects of nature lacking demonstrable economic value receive any consideration at all. Today, that question is likely to strike us as quaintly outdated. That nature matters is a commonplace. It is hard to imagine a modern American politician explicitly campaigning on the theme that we should simply ignore the impacts of our actions on the natural world. The questions we face today are more subtle — what aspects of nature should count, and how much? When precisely should human material interests be subordinated to the well being of nature? Who should make those decisions? And how can we structure a society that properly calibrates the protection of nature?

Answering those questions requires both moral and legal reasoning. Poised at the boundary between first- and second-generation environmental law, we are at an appropriate point to ask a number of questions about the relationship between environmental ethics and environmental policy. Has our understanding of environmental ethics advanced to the point that it can concretely inform difficult policy choices? What role should we assign to ethics, as opposed to economics or natural science, in environmental decisions? Do we have pathways for incorporating ethics appropriately into our policy choices? Where we lack consensus on the ethical questions, can we nonetheless find common policy ground? Should we search for such pragmatic compromises, or is it important to identify more specifically the ethical intuitions that underlie our choices? Is there only a one way path from ethics to law, or should we look for a feedback loop in which our policy choices also play a role in ethical development?

In April 2003, the School of Law at the University of California, Davis, gathered together a number of distinguished commentators from diverse perspectives to offer their views on these and related questions. The conference, entitled “Environmental Ethics and Policy: Bringing Philosophy Down to Earth,” was a cooperative effort of the U.C. Davis Law Review, *Environs*, the U.C. Davis journal of environmental law and policy, and the U.C. Davis Environmental Law Society. The California State Bar Environmental Law Section provided generous financial support, as did the U.C. Davis School of Law. These papers, the tangible result of the conference, are being jointly published in the two journals.

The very first step in organizing the conference was to attract keynote speakers whose presentations would set the tone for the discussions to follow. We were thrilled when Professor Stone, whose 1972 article represents a milestone in the incorporation of environmental ethics into law, accepted our invitation. Here, he asks a provocative question: do

morals matter?¹⁸ He poses that as an empirical question, using computer databases to determine the extent to which courts and legislatures refer openly to principles or theorists of environmental ethics. Stone concludes that environmental ethics, particularly the non-anthropogenic strain of environmental ethics, has played an even less important role in public policy decisions than other branches of philosophy. He suggests that may be because environmental ethicists have so far failed to produce a body of work that defines non-utilitarian bases for assigning value to nature sufficiently to inform the difficult real-world choices policymakers must confront.

Our other keynote speaker was Professor Alyson Flournoy, who has recently argued powerfully that environmental ethics must play a stronger role in environmental policy, and that the ethics behind our policies must be clarified.¹⁹ In her contribution, Professor Flournoy essentially agrees with Professor Stone that environmental ethics have played little direct role in the development of our elaborate structure of environmental law.²⁰ She suggests that the absence of value talk is a serious problem for environmental policy, because if we do not understand the values we seek to protect we are unlikely to effectively protect them. In order to increase the salience of environmental ethics, Flournoy believes we should focus on "stepping stones," marginal changes from human-centered utilitarianism, rather than demanding a unified, coherent environmental ethic replace utilitarianism in a single step. Small changes can highlight key ethical issues, thus sparking productive societal debate. They may also help people who are vaguely dissatisfied with or beginning to question conventional utilitarianism to take halting steps in other directions.

We were fortunate to attract a diverse group of highly distinguished speakers for our panel presentations. We engaged not only legal academics and philosophers, but also people with experience on the ground in policy development and implementation. We hoped they would bring their varying perspectives to the table and learn from one another. The papers gathered in this volume demonstrate that our hopes

¹⁸ Christopher D. Stone, *Do Morals Matter? The Influence of Ethics on Courts and Congress in Shaping U.S. Environmental Policies*, 37 U.C. DAVIS L. REV. 13 (2003), *simultaneously published in* 27 ENVIRONS ENVTL. L. & POL'Y J. 13 (2003).

¹⁹ Alyson C. Flournoy, *In Search of an Environmental Ethic*, 28 COLUM. J. ENVTL. L. 63 (2003).

²⁰ Alyson C. Flournoy, *Building an Environmental Ethic from the Ground Up*, 37 U.C. DAVIS L. REV. 53 (2003), *simultaneously published in* 27 ENVIRONS ENVTL. L. & POL'Y J. 53 (2003).

were fulfilled.

Philosopher Bryan Norton picks up on the themes sounded by Christopher Stone.²¹ Norton endorses Stone's view that environmental ethics has not played an important role in policy, and appears to share Flournoy's view that the policy landscape would benefit from the right kind of public discussion of values. He ascribes the apparent irrelevance of environmental philosophy to the fact that both sides in environmental conflicts have been too deeply entrenched in their ideological commitments to notice that they may actually have common goals and values that might provide the basis for pragmatic compromises. In particular, Norton argues that the "morals vs. mammon" obsession of environmental ethicists with establishing the intrinsic value of nature in sharp contradistinction to human-centered utilitarianism has proven counterproductive in the policy arena. He favors a more pragmatic, pluralistic approach in which ethicists and economists who are both prepared to acknowledge the legitimacy of competing values can deliberate productively together.

Like Norton, Buzz Thompson focuses on the sharp conflicts between stereotypical "economic" and "moralist" views of environmental conflicts.²² In the stereotype, economists consider only the maximization of wealth, narrowly construed, and moralists consider only intrinsic rights which must not be sullied by intrusions of the marketplace. Where Norton urges moralists to broaden their view of legitimate values, Thompson suggests that they should also broaden their view of legitimate, useful tools. He explains that even if one rejects the *normative* use of economics to identify societal goals, economics can be an effective tool for identifying the causes of environmental problems, structuring measures that will ameliorate environmental harm, and overcoming political resistance to policy change. Furthermore, he suggests that in at least some circumstances the use of economic-based environmental policy instruments may actually encourage environmental altruism, thereby advancing the ethical goals of the environmental moralists.

Daniel Farber explores how scientific understanding of environmental problems can play into the ethics of decisionmaking.²³ It is widely

²¹ Bryan Norton, *Which Morals Matter? Freeing Moral Reasoning from Ideology*, 37 U.C. DAVIS L. REV. 81 (2003), *simultaneously published in* 27 ENVIRONS ENVTL. L. & POL'Y J. 81 (2003).

²² Barton H. Thompson, Jr., *What Good Is Economics?*, 37 U.C. DAVIS L. REV. 175 (2003), *simultaneously published in* 27 ENVIRONS ENVTL. L. & POL'Y J. 175 (2003).

²³ Daniel A. Farber, *Probabilities Behaving Badly: Complexity Theory and Environmental Uncertainty*, 37 U.C. DAVIS L. REV. 145 (2003), *simultaneously published in* 27 ENVIRONS

recognized that large scientific uncertainties are a defining feature of environmental problems.²⁴ But Farber explains that even when uncertainties are large, understanding the pattern of uncertainty can be essential to making good policy choices. He notes that some environmental problems may be subject to a “power law” distribution, under which the variance is extraordinarily high and extreme events are far more likely than under a normal (bell curve) distribution. If we can reasonably predict which environmental impacts are likely to follow a power law, that behavior would justify the often criticized use of conservative assumptions in risk assessment and application of a strong version of the precautionary principle.

In their paper, David Schmitz and Elizabeth Willott provide a case study of a voluntary transition from a private property to a communal property regime, the Sabi Sand Game Preserve in South Africa.²⁵ They note that, contrary to the image popularized by Garrett Hardin,²⁶ communal property holdings can sometimes be more effective in promoting sound environmental management than privatization. Limited communalization can provide management economies of scale, and some resources may not be able to persist in regions small enough for single ownership to be practical. Schmitz and Willott find that at Sabi Sands landowners have successfully communalized large-scale management, while maintaining essentially private small-scale management. They point out that communal management in this case serves both local economic and environmental interests. They suggest that institutional mechanisms for governing the environment must always, in order to persist, meet the economic needs of those subject to them.

Laura Westra’s contribution defends the intrinsic value approach to environmental ethics criticized by Norton.²⁷ Westra contrasts that position to the economic-based use of contingent valuation and preference-summing as the basis of decisions, thereby providing support for Norton’s contention that environmental ethicists tend to define

ENVTL. L. & POL’Y J. 145 (2003).

²⁴ See, e.g., Richard J. Lazarus, *Restoring What’s Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 745-46 (2000); Doremus, *supra* note 8, at 319-21.

²⁵ David Schmitz & Elizabeth Willott, *Reinventing the Commons: An African Case Study*, 37 U.C. DAVIS L. REV. 203 (2003), *simultaneously published in* 27 ENVIRONS ENVTL. L. & POL’Y J. 203 (2003).

²⁶ Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

²⁷ Laura Westra, *The Ethics of Integrity and the Law in Global Governance*, 37 U.C. DAVIS L. REV. 127 (2003), *simultaneously published in* 27 ENVIRONS ENVTL. L. & POL’Y J. 127 (2003).

themselves by opposition to the realm of economic analysis. But although she calls for environmental rights that are not contingent on human preferences, she does not define those rights in opposition to human rights. Instead, she argues that the right to ecological integrity is both a natural and a human right, since well functioning ecosystems are essential to human existence.

Cliff Rechtschaffen responds to the theme of the conference, and the criticisms Stone and Norton levy against ethicists, by undertaking to offer concrete recommendations for incorporating the ethical insights of environmental justice theorists into policy decisions.²⁸ He argues that environmental justice cannot be achieved unless distributional concerns are explicitly factored into environmental decisions. That can be done through: developing regulatory standards that take into account the behavior of real persons and protect sensitive groups, applying the precautionary principle and carefully reviewing alternatives in order to reduce the level of activities that disproportionately impact the poor and minorities, requiring fair distribution of environmental impacts in land use decisions and regional planning, and incorporating procedures in the environmental review process that will facilitate truly representative public participation as well as distributionally-sensitive environmental analysis.

Lee Talbot's paper brings us back to the question of whether, as a matter of fact, environmental ethics has any role in real-world policy decisions, and if so how that role is effectuated.²⁹ Talbot draws on his considerable policy experience in the Nixon administration during the formative era of federal environmental policy. His paper provides one response to Professor Stone's observation that ethical principles are not openly invoked in the legislative arena when environmental policy is being formulated. Talbot draws our attention to the importance of factors outside the public arena of legislative debate to which Stone's study was necessarily limited. He identifies the ethical commitments of key players as essential to several important developments in environmental law in that era, although they may not be apparent in the cold historic record of those developments.

My own contribution returns to a theme first sounded by Stone in his 1972 article: that environmental policies have important effects that go

²⁸ Clifford Rechtschaffen, *Advancing Environmental Justice Norms*, 37 U.C. DAVIS L. REV. 95 (2003), *simultaneously published in* 27 ENVIRONS ENVTL. L. & POL'Y J. 95 (2003).

²⁹ Lee M. Talbot, *Does Public Policy Reflect Environmental Ethics? If So, How Does It Happen?*, 37 U.C. DAVIS L. REV. 269 (2003), *simultaneously published in* 27 ENVIRONS ENVTL. L. & POL'Y J. 269 (2003).

far beyond their direct regulation of current activities. I contend that the environmental policies of today will necessarily influence the environmental values of tomorrow, and that those effects should play a role in our policy choices.³⁰ In order to ensure that our successors have the opportunity to understand and share our environmental values, we should: structure their physical environment to allow routine access to nature, encourage robust societal discussion of environmental values, highlight individual choices that contribute to environmental harm and offer alternatives to those choices, and pay attention to the potential impacts on values when we employ market-based policies.

Ann Carlson focuses on a different kind of dialectic, that between state and federal regulation.³¹ Using California's recent move to regulate greenhouse gas emissions as an example, she argues that even when multiple competing standards cannot be tolerated, allowing one selected state to develop more stringent regulations might encourage that state to experiment with aggressive regulation, which can be adopted nationwide if it succeeds.

Taken as a whole, the conference contributions suggest reason for both hope and concern. There was wide agreement among the speakers that moral considerations should play a role in public policy choices, but skepticism that they were currently doing so effectively. Many of our speakers saw as problematic the fact that ethical discussions have not played an important role in the public debate over environmental policies. Communication is, of course, not everything. A robust discussion of values will not guarantee agreement, and we will need decision rules (such as counting votes, counting monetary costs and benefits, or deferring to key trumping rights) to select policies in the face of disagreement.

Nevertheless, there seemed to be a consensus among the speakers that communication is a basic foundation for ethically sound policy decisions. Communication that reaches beyond one's comfort zone is especially needed. Genuine attempts to communicate with others who do not share your basic assumptions or values can help to counter the tendency toward ideological isolation and demonization of the opposition. Communication is only possible if people are willing to engage at a concrete level, grappling with how their views might be applied in

³⁰ Holly Doremus, *Shaping the Future: The Dialectic of Law and Environmental Values*, 37 U.C. DAVIS L. REV. 233 (2003), *simultaneously published in* 27 ENVIRONS ENVTL. L. & POL'Y J. 233 (2003).

³¹ Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281 (2003), *simultaneously published in* 27 ENVIRONS ENVTL. L. & POL'Y J. 281 (2003).

specific situations, rather than to spout abstract slogans. This conference illustrated that such genuine communication is possible, at least at the local level among people of good faith. Hopefully, it can serve as an inspiration for more open, multidisciplinary, cross-ideology discussion, and spark efforts to develop institutions to support such discussion in the policy arena.
