

James P. Sterba, ed.,
*Social and Political Philosophy:
Contemporary Perspectives*
London: Routledge, 2001
Pages 349-369.

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ENFORCING ENVIRONMENTAL ETHICS

Civic law and natural value

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How much environmental ethics should we write into law? Care for our environment is something on which we must gain minimal consensus, but also something that will require considerable enforcement. Not all duties are matters of justice, but many are. If you doubt that, try stealing. Or killing. Or raping. Or dumping hazardous wastes (maybe a kind of killing, stealing, or raping). Our inquiry is how far such enforcement is and ought to be so, how far environmental ethics is, in this larger sense, environmental justice.

Politically, "command and control" solutions are out of vogue; what we need instead, many cry, are "incentives," Even incentives, such as pollution permits, operate against a background of required compliance. They sweeten the obedience to environmental law, and introduce some voluntary choices, but the insistent command is still there. We dangle carrots up front, but at the rear we hold a stick.

Ethically, law-like forms of ethics are also out of vogue; what we need instead, many cry, is "caring." Others emphasize "virtues." Caring, virtuous persons need no rules. That may be true in later stages of personal moral development; but in public life, caring in concert needs regulation. The virtuous ahead, up front, may need no laws; but those at the rear, and most of us along the way, need enforcement, reinforcement – which helps us move along. Rules channel caring and discipline virtuous intentions. To this issue we will return.

1 Legislating environmental care

You may be surprised how much is enforced, and at how many levels, from Acts of Congress to lighting campfires. Starting at the top, recall a dozen examples from over one hundred Acts of the US Congress.

- Clean Air Act (1955), Amendments (1963, 1965, 1969, 1977, renewed 1970, 1990)

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- Wild and Scenic Rivers Act (1968)
- Wilderness Act (1964)
- National Environmental Policy Act (1969)
- Marine Mammal Protection Act (1972)
- Endangered Species Act (1973, 1982), Amendments (1976, 1977, 1978, 1979, 1980)
- National Forest Management Act (1976)
- Federal Land Policy and Management Act (1976)
- International Environmental Protection Act (1983)
- Comprehensive Environmental Response, Compensation, and Liability Act (Superfund) (1980), Amendments (1986)
- Clean Water Act (1987)
- Emergency Wetlands Resources Act (1986)

With agency and court interpretation, these acts enforce much environmental behavior. If you doubt this, try shooting a bald eagle, or filling a wetland, or riding a motorbike in a designated wilderness. Following the last quarter century of environmental law and regulation, enforced by the Environmental Protection Agency, no-one in the United States today can do business legally in the manner in which our parents and grandparents routinely conducted business.

Internationally, there are over 150 international environmental agreements registered with the United Nations, and these are often enforced by the participating nations (United Nations Environment Programme, 1991; and see below). Two examples are the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) (1973) and the United Nations *Convention on Biological Diversity* (1992). If you are caught trying to bring a snow leopard skin into the United States, you will find yourself in prison with a fine of tens of thousands of dollars.

More locally, with state and local governments, court decisions, actions of regulatory agencies, such as the US Fish and Wildlife Service, or even decisions of the district rangers, this enforcement enlarges, ramifies, and becomes quite detailed. Go elk hunting a day early, and you may end up in jail with your weapon confiscated. Do you want to do a master's thesis in wildlife biology? Your project is to find out among antelopes what proportion of males and females survive the winter, with a view to changing the hunting season for better survival of the herd. Fail to fill in a permit form detailing whether you have used the most humane method of capture, and the Animal Welfare Committee for the Colorado Division of Wildlife, on which I sit, will cancel your project.

Anyone who backpacks in Colorado wilderness is prohibited from camping within 100 feet of lakes, streams, trails. That zone is often where nearly all the desirable campsites are. Two years back, in the Rawah Wilderness, after a hard day's climb, partly because there was more snow at

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the treeline lakes than expected, I took extra effort to find a legal site. I pitched a late camp, only to find the next day, alas, behind my tent, half buried yet in the snow, a trail that I had not seen.

Sure enough, the backcountry ranger came through, and asked me to move my tent. Fortunately he appeared late the second day; I was leaving the next morning, so he relented. But he had the legal power, and if I had insisted on staying on there despite his orders, I would have been taken to court. I spent the evening without the campfire I wished, since fires are prohibited in the subalpine zones. Add up these enforcements, great and small, and one could probably conclude that, far from environmental ethics being optional and voluntary, to the contrary, most of it is enforced.

Environmental ethics is a persona! ethic, or it is no ethic at all. But it is equally true that environmental ethics must go public or, likewise, it will be no ethic at all. Enforcement is more appropriate in communal space, and the environment is communal space.

2 Concern and concert; cheating and coercion

The environment, a public good, cannot be a private matter only; how we act must be collective, institutional, coordinated, corporate. In a community, there are things we cannot do unless we do them together. Let us analyse ways in which this requires civic law protecting natural value.

Many environmental problems result from the incremental aggregation of actions that are individually beneficial. A person may be doing what would be, taken individually, a perfectly good thing, a thing they have a right to do, were they alone, but which, taken in collection with thousands of others doing the same thing, becomes a harmful thing. These actions must be regulated when aggregated. This is Garret! Hardin's tragedy of the commons (1968). Pursuit of individual advantage destroys the commons.

Here, contrary to Adam Smith, there is no invisible hand. Hardin found that solutions will often require "mutual coercion, mutually agreed upon." A community nearing the carrying capacity of its resource base will have to curb short-term self-interest for the long-term good of all. Long-term sustainability requires suppressing short-term desires. Humans can and often do the wrong thing – "by nature*" we might say – and law needs to "civilize" these instincts.

Our evolutionary history shaped us for short-range tribal survival, seldom asking us to consider future generations beyond children and grandchildren, never figuring in the welfare of others thousands of miles away or the incremental build-up of heavy metals. Perhaps a commons ethics could work for tribes, but for nations and global commerce, we need regulation of the common good. Often we humans are not so much evil as thoughtless. Social powers external to the self, such as government or business, cause even well intended persons to act against their individual

wishes. Those powers can work against environmental ethics; but we wish to turn governmental powers toward the building of an environmental ethics.

The communal good is mutual and requires broad social agreement on environmental policy. But it also requires enforcement, for some will be tempted to exceed the limits set by policy. This is the problem of "cheaters," persons who will in self-interest take advantage of cooperating others. Nor is this always consciously intended; individuals may act as they have been accustomed to over many decades, without waking up to how these customary individual goods are aggregating to bring communal evils to which we are unaccustomed. Environmental law will be needed to curb prevailing practices. The social contract must be policed. Civic law protects natural value.

This ethic will be voluntary, an enlightened and democratically achieved consensus, with the willing support of millions of citizens (as we hope and outline in the next section). But this voluntary compliance depends on the expectation that even those who do not wish to obey will be required to do so. No laws can be enforced without the widespread voluntary compliance of citizens; there are never enough enforcement officers to compel everybody. But even if 99% of citizens are glad to behave in a certain way, provided that all others do, 1% of the citizens will be pressed to freeload, and this will trigger bad faith. Minority rights and the right to dissent have also to be considered – and enforced! But no-one has the right to harm others, without justified cause. Where some destroy public goods entwined with biotic community, enforcement can be justified.

One rotten apple spoils a barrel. The corruption is contagious. Unless a society polices out the polluters, the rot will spread. Maybe that is not the way it ought to be, had we human nature ideally; but, with human nature realistically, this is the way it is. This is especially true when: "New occasions teach new duties; Time makes ancient good uncouth" (Lowell, 1844, 1966, p. 191).

Environmental goods have long been assumed as nature's gift. Only in the last century did these goods come under jeopardy and threat. Now tacit goods have to be made explicit; assumed goods have to be guaranteed by legal enforcement. This is going to require nudging people along, where they do not wish to go – not yet at least, though they may, in retrospect, be quite glad when they get there. Vested interests, often with much inertia, have to be divested. Habits have to be de-habituated. Self-interest is easy enough to rationalize under the old rationale. This is the way we have been doing it for decades; can what was right yesterday be wrong tomorrow?

Such established self-interest, combining with established and tacit goods, will quickly be asserted as individual rights. "My water rights go back to 1890! What do you mean I can't irrigate with it like I used to because the selenium from the return flow is building up and is toxic downstream? That's not fair!" But we cannot leave old decisions in place when new information comes on line, without in effect making new and different decisions.

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Nudging people out of their old habits and privileges, shifting patterns of right and wrong at shifting levels of scale and scope, is going to require enforcement.

Consider changed attitudes toward smoking and the long effort to mix incentive and regulation. Our forefathers did not know what we now know about tobacco, any more than they knew about selenium. We require tobacco warnings on packages; we prohibit the sale of tobacco to minors. In public, you must smoke outside and in the cold. Every cigarette smoker has felt pushed around. But it would not have been possible to achieve a smoke-free environment without enforcement. *Mutatis mutandis*, apply this to clean air and environmental health. Or to clean water, despite 1890 rights.

"Liberty" is a virtue word; everybody wants it. "Enforce," the seeming contrast, is often pejorative; nobody wants to be forced. But this is superficial. In fact one cannot have the freedom one desires without law enforcement. Unless thieves are restrained and property laws enforced I am not free to own my home. One has more options in a decently ordered society. My right to free speech and action requires policing of those who would curtail it. Environmental ethics needs to learn to extrapolate and innovate these classical arguments into the domain of environmental goods.

Many of the liberties that we protect are quite precious. I am not even free to breathe unless toxic air emissions are enforced. The Clean Air Act of 1970 turns thirty years of age this year, one of the most successful environmental laws ever. According to the Environmental Protection Agency, air pollution has been cut by a third and acid rain by 25%. Cars are 95% cleaner. The ozone layer is projected to recover by mid-century. Emissions of the six worst air pollutants dropped 33% from 1970-97 despite a 31% increase in US population, a 114% rise in productivity and a 127% jump in the number of miles driven by Americans in their automobiles. All this would not have been possible without enforcing environmental ethics. As much could be said for clean water, or environmental health.

There are useful analogies with the US civil rights movement (I speak, let it be noted, as a Southerner, whose great grandparents were slaveowners). The US South (often also the North and West) did not desegregate voluntarily. Typically, compliance was forced by civil rights legislation. But neither was the enforcement unconstitutional, nor was it often violent. Many Southerners had a deep sense that it was right, although not something they particularly wanted to do. Today, no Southerners would return to the segregated South. They are proud of what they have done.

Environmental enforcement will often be similar. The fluorocarbons were removed from refrigerators, mandated by law. The forest industry moved to plantations and sustainable forestry, and decried government interference locking up too much wilderness. Wolves were returned to Yellowstone, with sheep ranchers muttering "Shoot, shovel, and shut up." But refrigerator

makers, foresters and ranchers (or at least their children) are going to be proud of their environmental success.

Enforcement covers a wide spectrum of occasions when an agent acts contrary to that agent's own wishes. owing to forces brought to bear from the outside. The main idea is of external restraints counter to internal desires. These may involve boycotts, tariffs, fines, prohibition of access, impounded equipment and funds, or jail. Enforcement need not be violent; indeed it will seldom be.

Unfortunately, enforcement can be in the interests of injustice as well as justice, and this is as true environmentally as socially. Enforcement is often used to maintain undesirable practices in the service of privilege and vested interests. Enforcement can settle issues the wrong way, and it often has. But few social issues have been settled the right way without enforcement – not slavery, not child labor, not women's suffrage, not workplace safety, not minimum wage, not civil rights.

I concede that an enforced ethic is incomplete. I do not murder, or pollute, for fear of punishment. If so, my ethics is not autonomous; it is nominal. Enforced ethics is necessary but not sufficient for environmental ethics. But with enforcement, we can perhaps change habits, and once habituated, the behavior may be internalized. There is enforcement initially, when the actors have as yet no will; but, having done it, afterward the actors come to make up the former deficiency of will. The automobile industry was forced to clean up, but there are no auto makers who now wish to return to the cars of the sixties. I agree that, where there is frequent use, one ought not camp near lakes, or build fires in alpine country; and I do not need a backcountry ranger to make me behave this way.

Enforcement will tend to be for the status quo, when what is as often needed is enforcement to produce change. Enforcement will be part of the establishment, and environmental ethics is often anti-establishment, that is, reformatory. Enforcement will have a certain prestige. "That's the law!" with the suppressed premise that it's a good law and ought to be obeyed. Then we must assert that enforcement does not carry its own credentials, but needs its own authorization and justification. Enforcement is no substitute for argument. We do not want coercion to substitute for intelligence, but we also recognize that intelligent action will need enforcement on those not so enlightened. Meanwhile, there always underlies such action the prior question of whether enforcement is just. Lawyers have to argue, even if policemen do not. Philosophers have no powers of enforcement; they can only argue. They question authority. That is why I am arguing for the legitimate and rational use of enforcement.

A general moral principle is that the excessive use of force is unwarranted, and that applies here. There will be debate about appropriate means and degrees of enforcement. Also, we will hope for arguments that while the enforced behavior may be contrary to the actor's desires, it is not contrary to

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that actor's welfare. My concern is whether enforcement is moral, compared with caring, and I conclude only halfway so. Here, as elsewhere in ethics, one wants enforcement in the service of desirable ends, appropriate caring, regulated by constitutional processes, preferably those of democracy.

3 Democratic environmental ethics

Hardin's "mutual coercion, mutually agreed upon" leads to the question of how far an environmental ethic can be democratic. The answer is complex. We recall, amused and chastened, Winston Churchill's quip that "Democracy is the worst form of government, except for all the others." Democracy, though the best alternative we have, is not entirely well suited for environmental protection. If environmental policy is to be just, and also enforced, such law ought be enacted and policed through democratic process. This requires some thinking through. A non-democratic government might enforce a just environmental policy, but it would be better to have a democratic environmental ethics.

Two places where humans pursue their values most zealously are in politics and economics. Other domains of value, such as school and church, are no less important, for these also critically help us to form a concept of natural value. Still, in the modern world humans intensely value democracy and capitalism. In business we are consumers; in politics we are citizens. These concerns are allies but they are also in tension. Capitalism can be indifferent to values outside the economic domain (political, religious, aesthetic, ecological). Capitalism has produced wealth, but it has distributed it rather inequitably, while often claiming that it allots wealth meritoriously to those who work hard, efficiently and intelligently. Here we typically think that government is needed to regulate business on matters such as worker safety, minimal wage, or minority hiring, or the rights of labor and dangers of unfair competition. Law is needed to preserve those domains of value that cannot safely be left to the open marketplace.

This ought to extend to environmental concerns – so the democrats (and republicans too!) now argue. For this superintending of commerce we turn to government (aided by school and church) to forge a community bound by ties of mutual service, rather than mere commercial exchange. Natural resource decisions have been long considered primarily economic decisions. Lands under private ownership were bought and sold in markets and cared for under economic incentives. Even public lands, in the commons, could best be managed with a cost/benefit approach; we were interested in what goods we could collectively harvest from them.

Shifting concepts of natural value, however, now mean that many, even most, of the values carried by natural systems cannot be safely left to unregulated capitalist markets. We no longer want a purely economic

conception of the natural good, any more than we want a purely economic conception of the social good. Hence we look to democracy to insure that these kinds of natural values are sufficiently protected by the regulation of economics, by removing some natural values from economic access, or, where we do consume resources, by creating incentives or prohibitions to obtain the balance of other natural and social goods that we value as citizens.

Regulation polices these interconnections to see that the economic ones stay in their legitimate domain. Environmental regulation has arisen to protect by national will environmental values whose protection cannot be left to economic interests alone. A democracy places the constraint of the general will on those who would degrade the commons. We sometimes legislate morality, at least in minimum essential or common denominator areas. In environmental policy, there must be a management ethic for the commons – about soil, air, water, pollution, environmental quality, the ozone layer, mutagens, wildlife, the eagle as a national symbol, endangered species, future generations

Not only is the environment a public good, but further, most remaining wildlands are public lands - national forests, parks, wilderness areas, seashores, grasslands, wildlife refuges, lands under the Bureau of Land Management, state or county parks and forests. These areas are largely managed for multiple use and only semiwild; still they constitute a major component of the natural environment. They also contain most of the relict pristine wildlands, as nearly as these anywhere remain. One cannot look to the market to produce or protect the multiple values that citizens enjoy in general on public lands, much less in wilderness areas, since many of the values sought here are not, or not simply, economic ones. A nation needs collective choices producing a public land ethic.

Democracy, though more admired than is capitalism, is no more perfect. The humans who gather to do business together are the same humans who gather to form government. They do not leave behind one human nature and take on another when they move from marketplace to courthouse – even though the values at stake differ. If human nature is sometimes flawed, these flaws will as soon turn up in government as in business. We have largely thought that democracy is the form of government best able to combine individual freedoms and mutual cooperation with checks on these flaws in human nature. With its more comprehensive sense of the public good, with all the citizens cross-checking each other, democracy can put checks on the flaws in human nature that will make the unregulated market inhumane.

But we have also to realize that democracy can itself be a flawed institution. A tough question is whether democracy can discipline itself enough to be environmentally rational. A test of a democracy is whether its citizens can learn to practice enlightened constraint, developing an ethic for the use of the environment, and more, developing ethical concern for the whole

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commonwealth of a human society set in its ecosystems. One thing that democracy can produce is debate, discussion about values (though, alas, it does not always do so); and we are more likely to uncover and conserve all of the natural values at stake when issues have been well debated.

In this debate, an initial problem is that ordinary people often lack the needed expertise. Popular desires are not always a useful guide to environmentally wise or just decision, especially about complicated matters that involve judging risks or balancing tradeoffs. Selenium is as necessary for human health as it is toxic. At how many parts per million of selenium in the drinking water, or in the ducks shot on the marsh, or the fish caught in the river, do we pass from the healthy to the tolerable and then to the toxic? One needs to trust experts.

Experts may concede that their knowledge is incomplete, and what then? Apply the precautionary principle. But then one needs experts to know where the precautionary thresholds lie, if such there are. One needs time to realize the results, although the actors are impatient for decisions. Just how much old-growth forest is required for those spotted owls? That is not the kind of question one puts to popular vote. Who is competent to decide? That is not the kind of question one puts to popular vote either. To the contrary, politically popular answers are as likely to be wrong as right.

The Endangered Species Act requires consultation when a project involving federal funds is likely to place an endangered species in jeopardy. Permitting depends on what is called a "biological opinion." There has been a fight to keep these opinions strictly "biological," meaning not "economic" or "political," certainly not "democratic." Such biological opinions, rendered by biologists and their supervisors, will be enforced. The laws that require and enforce such opinions are democratically achieved, perhaps also politically biased, and they could be changed, if there were sufficient social pressures. Meanwhile, those who cherish democracy must turn over some decisions to experts.

Environmental concern tests the popular will for long-term decisions. There are lag times for effects, as with aerosol sprays and carbon dioxide emissions. Future generations are not here to vote today. One is tempted to discount the future environmentally. Although environmentalism has increasingly become popular, it is also true that what environmentalists want is usually out of step with the immediately prevailing majority. Environmentalists are frequently nudging the majority where it does not yet quite want to go. Another way of putting this is that environmentalists make explicit what is as yet latent in the public mind. Environmentalists use law to do this, because otherwise people wake up too late. "You never miss the water until the well runs dry."

Most people are anthropocentric. Only people vote. But the most seminal environmental laws push further than concern for civic values. They recognize how civic values are entwined with natural values. People need to

vote with a concern for endangered species, for humane hunting, for marine mammals, for wilderness. The scale and scope of environmental affairs is typically decades, even centuries. The scale and scope of Congress can sometimes match that, but the scale is often two years, or even the election three months away. If citizens insist on short-sighted, immediate, humanistic values, then Congressional representatives, who have to be re-elected every two years, and Senators, who have to be elected every six, will not be in a much better position than corporate executives whose stockholders insist on maximum dividends every quarter, without regard for the long-range health of the business. We can be tempted to vote for the legislator who promises rewards now; those who do not will be out of office next election.

This can mean decisions that are not really sustainable over the generations of our children and grandchildren. The half-life of a politician is about four years; the half-life of a corporate director is twice that. The half-life of a forest is about a century. The half-life of a species is several million years. The half-life of a plutonium dump is almost forever. All this means that democracies need to seek longer-term views, and more appropriate supporting laws, than voting citizens are inclined naturally to supply.

One way we do this is with checks and balances. The judiciary is not that branch of government placed under immediate democratic control; to the contrary it is relatively free of it. Judges do not have any more environmental expertise than ordinary people, but they have the power and legal obligation to consult experts and to take longer-range views. They must apply laws that they do not make; our democratically elected representatives make them. Such laws must also be constitutional. But judges do not answer directly to democratic will. They listen to argument. They rather consider what is just, or right, what optimizes the greatest good for die greatest number – and that means, environmentally, what combines civic law with the greatest protection of environmental value.

4 Human rights, responsibilities, and caring for nature

Perhaps one will conclude that the only enforceable environmental ethics is the sort that protects humans from harms. Anthropocentric caring for what humans have at stake in nature will be the most persuasive part, politically correct, and readily enforceable, because it builds on a classical humanistic legacy, enforcing justice where persons threaten other persons. One ought not to harm other persons, and this can be readily extrapolated to environmental harms. We might call this a right to normal living, where "normal" becomes "normative" about the natural givens – air, soil, water, living space – when such traditional givens are jeopardized by encroaching human activities. One ought to have "sustainability"; this sustainability enters as an ingredient of environmental health.

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If one has a right to national security and hence the Department of Defense, one has a right to environmental security and hence the Environmental Protection Agency. If one has a right to civic security, and hence the sheriffs, one has a right to environmental security, and hence the police lock up the illegal dumpster or shut down the nonconforming industrial plant. Protection against undue harms has long been the province of judicial power. Rights, legally claimed and enforced, must be coordinated with responsibilities. Thus your right to clean water is my responsibility not to pollute the streams, and one cannot be enforced without the other. If social security can be mandated, so can environmental security,

In these environmental laws, however, humans do not always have themselves at the focus of every evaluation, as for example with laws about cockfighting, bullfighting or leghold traps. Over most of the nation, hunters are now required, many against their will, to use steel shot when hunting water fowl. Ducks feed on spent shot that falls into their ponds, needing grit for their gizzards, and afterward die slowly from lead poisoning. Two or three million ducks and geese were dying this way, until law required the steel shot – against a long struggle of resistance by hunters and munitions manufacturers.

In 1992, Coloradoans prohibited spring bear hunting, as well as bear hunting by dogs or over bait. Hunted in the spring, a sow is taken and her cubs starve. Hunted spring or fall, dogs chased a bear relentlessly, a cruel and unfair hunt. The prohibition was made by state referendum, a majority decision, with 70% of voters rejecting the hunt. This is a fully democratic decision. It is also enforced, unwillingly, on those who wish to hunt bears.

A sign in Rocky Mountain National Park urges visitors not to harass the bighorn sheep: "Respect their right to life." Park visitors are prohibited from stopping their cars, or walking, along a half mile of road, so as to give the sheep freedom to pass at will. The hiking trail up Specimen Mountain, a favorite one, is closed during lambing season, several months in the spring. The general park ethic is that if you are interfering with any animal's behavior, you are too close. Back off. One ought to give animals their freedom, no matter how much you wish to get up closer for that marvelous take-home photograph. All such regulations are enforced.

A Wyoming rancher built a wire mesh fence, twenty-eight miles long and five feet high, to protect his cattle-grazing land from antelope. He also hoped to scatter or destroy the herd, because there was a likelihood that wildlife authorities would declare the area critical habitat, and this would make difficult or impossible stripmining the area for coal. An early, severe winter (1983-4) followed; snows prevented the antelope from foraging elsewhere; and the fence blocked their migration to snow-free areas. About 1,500 antelope were threatened with starvation. The fence was put up and taken down over several winters, and finally, in a series of appeals which went all the way to the US Supreme Court, the courts ordered the fence removed or

rebuilt. The case was complex, turning on wildlife as a public good more than on animal cruelty, but concern for animal welfare was an important factor. Again, civic law protected natural value.

That we can at times be legally required to be "humane" is a revealing choice of words. We are treating humanely something that is not human. Such an ethic is often persuasive, because we obviously share with animals the capacity to suffer. Inflicting pain requires justification. If the infraction is serious enough, you will have to answer for it in court. Notice, however, that environmental regulation can enforce what some consider to be inhumane, as when Yellowstone Park regulations forbade the rescue of a drowning bison, insisting that "nature should take its course."

Some laws extend to species and ecosystems. The US Congress has lamented, in the Endangered Species Act (1973), the lack of "adequate concern (for) and conservation (of)" species, which have "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people" (Sec. 2), and mandated species protection. The Act was tougher than first realized. It has stood over a quarter century, protecting endangered species beyond any reasonable expectation of benefits, interpreted in the usual medical, industrial, agricultural, or even recreational senses, as for example with saving the snail darter or spotted owl. The National Forest Management Act (1976), the Federal Land Policy and Management Act (1976) and the Wilderness Act (1964) are interpreted in terms of "ecosystem management," and the US Forest Service can prefer to say that it manages for the "multiple values" on public lands, rather than for the traditional "multiple uses."

5 Humans versus nature

Can and ought we enforce environmental ethics if this benefits nature over against humans? We use "versus" provocatively, in the legal court-case sense: Humans v. Nature.

Some will immediately claim that this need not be "versus"; that is too adversarial. What one seeks is humans "with" nature, "in" nature, humans "and" nature, "caring for" nature; or some more complementary and inclusive conjoining of the two. The central problem is precisely this dualist "versus"; and so – critics will lament – I phrase the problem the wrong way. Look for harmony, not opposition; and write laws that way.

So let me hasten to state that one ought to legislate win-win solutions, where this is possible. Culture and nature have entwined destinies. People cannot be healthy in a sick environment. Faced with a dilemma, we try to find a way out by showing that no hard choices need to be made. Make the laws so that there is the greatest good for the greatest number, and include the fauna and flora in the cost/benefit analysis. Look for multiple values,

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natural and cultural, as does the Forest Service and the EPA. My critics will twist and turn to show that the "versus" can be eliminated.

Consider poverty in developing nations. The *Rio Declaration* insists, "All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement" (United Nations Environment Programme, *Rio Declaration*, Principle 5), presumably using legislation to do so. It also declares, rather piously: "Human beings are at the centre of concerns for sustainable development" and that these humans "are entitled to a healthy and productive life in harmony with nature" (Principle 1). Typically, it turns out that humans are not really winning, if they are sacrificing the nature that is their life-support system. Humans win by conserving nature – and these winners include the poor and the hungry. "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it" (Principle 4).

But I remain to claim, with equal insistence, that daily the decisions we face are "versus" in the win-lose sense. We face disjunctions as often as conjunctions. Just as typically, nature is sacrificed for human development; most development is of this kind. Conservation dilemmas are very much with us in developing countries. My analysis is not of some ideal but of the real world. As much as anyone else, I will convert such situations into win-win if I can. Only I face the reality that they do not so easily or so soon convert.

Not all development is justified, but that which gets people fed seems basic and urgent. Then nature should lose. Surely that is just. James P. Sterba formulates this as "a principle of human preservation."

Actions that are necessary for meeting one's basic needs or the basic needs of other human beings are permissible even when they require aggressing against the basic needs of individual animals and plants or even of whole species or ecosystems.

(Sterba 2000, p. 34; cf. Sterba 1998, p. 128)

On that principle, any laws protecting species, ecosystems, animals, or plants, when this thwarts meeting the basic needs of humans, will be unjust. Sterba desires, he claims, a "peacemaking model" for his ethic (1998, pp. 1-13); but he here becomes quite "aggressive."

Two words in this principle: "necessary" and "basic." will prove elastic enough that various debaters can shrink and stretch them to their liking. Perhaps they can thereby make the principle effectively cover a wide range of cases. But I am now arguing that environmental ethics and law ought, at times, to run counter to this principle. Let us move through a spectrum of cases building this argument.

Members of the Hopi tribe, native Americans in Arizona, wish to engage in a ceremony that requires killing golden eagles. The eagle is captured as a chick, kept well, even revered, for months, then ritually suffocated, sending the spirit of the eagle to fly to the world of their Hopi ancestors, informing the ancestors of what the Hopis need in today's world – no doubt including their basic needs, since many of the Hopis are poor. The ancestors engage powers that ensure that these needs are met. The eagle chicks are taken from Hopi sacred lands, but these are now often in national parks and monuments. Although the Hopis received permission from the US Fish and Wildlife to take up to forty eaglets, they were refused by National Park Service officials, on grounds of wildlife conservation. In particular, they were refused admission to Wupatki National Monument, outside Flagstaff, Arizona. The tribe has protested (Stevens and Velushi 1999; Shaffer 1999).

By Sterba's principle, if, in their culture, this is a necessary way of meeting their basic needs, this refusal is unjust and should not be enforced. So much the worse for the eagles. I argue to the contrary that the Hopis were justifiably refused admission; and, should they persist, should be forcibly prevented. In our Western view, of course, this ceremony is not "necessary" to meet their "basic" needs. To retain Sterba's principle we must become "Eurocentric," though he dislikes this (1998, pp. 116-21), and impose our view on theirs. Meanwhile those who engage in the ceremony believe that it is "necessary" to have this eagle contact their ancestors to supply their needs.

This view, I maintain, is false. There is no scientific, ethical, social, religious, or other evidence that the sacrificed eaglet improves their lives. Probably one could find psychosomatic evidence; that those who believe so are reinforced in their resolution, courage, thrift, ingenuity, and might indeed manage to meet their basic needs better in result. We ought to impose our view on theirs, and the imposition couples our Western world-view with a valuing of what eagles are in themselves.

Ethicists would certainly prohibit the Hopis if they were sacrificing their children. In that case, you would appeal to human rights, and to the obligation of the government to protect the rights of the would-be sacrificed child. My argument is by extension, I do not claim, however, that the eagle has rights, but that the eagle has intrinsic value, intensified in this case by concern for a threatened species, and that such value overrides protection of the false beliefs of the Hopis. One need not wait to persuade the Hopis of this; one ought enforce this ethic. Even if, in multicultural tolerance, you wish to remain agnostic about the Hopi belief, one ought not to "agress against" eagles to protect a doubtful human belief about ways to meet basic needs. Surely native Americans, though thwarted by the white man's law, have a venerable tradition of respect for animals, and they can find some way of revising their belief system so as to spare the eagles.

In the United Kingdom, as elsewhere, Orthodox Jews have long practiced kosher slaughter. This is "necessary" in their view for the proper service of

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God. Are not religious needs quite "basic"? The slaughterer, or *shohet*, slits the throat; butchering is designed to remove as much blood as possible. Jews have been commanded not to eat the blood, out of respect for life and in reminder that life belongs to God. Also, rabbis have long argued that this is humane slaughter.

Times change, and today there is a stun gun available that instantly paralyzes the animal with an electric shock, after which it is killed. The British government has considered legislation to require the use of such stun guns, on grounds that this is now the most humane method of slaughter. Some Orthodox rabbis have objected, since this prevents the maximal removal of blood, and the meat is not kosher (Linzey and Cohn-Sherbok 1997, pp. 54-6; Farm Animal Welfare Council, 1985, pp. 19-20, 24-5). Should this law be enacted and enforced?

I argue that such enforcement is justified. I can concede that Jews worship God with their observances (as I cannot concede that the eagle contacts Hopi ancestors). I concede that religious needs are basic. But I cannot bring myself to believe that the Jewish God commands continuing traditional kosher slaughter, if this causes the animal more suffering. I would plead the case on the strength of their own premises, as well as mine, out of reverence for life and of compassion for sentient animals. Nevertheless, should they insist on their orthodoxy, I am prepared to resist it by enforcing civic law.

In twenty years Africa's black rhinoceros population declined from 65,000 to 2,500, a loss of 97%; the species faces imminent extinction. There has been loss of habitat due to human population growth; but the primary direct cause is poaching for horns. People cannot eat horns; but they can buy food with the money from selling them. Zimbabwe has a hard-line shoot-to-kill policy for poachers, and over 150 poachers have been killed (Berger and Cunningham 1994).

Lest I seem callous, let me insert caveats to guard against inhumanity. One ought to take much care to see that poachers have other alternatives for overcoming their poverty. Such obligations equal any obligations we have to protect the rhinos. If we were zealous, we could make poaching unnecessary. Still, when I face facts in the pressing context in which these Zimbabwean poachers are today caught up, it is highly probable that some of these poachers have no feasible alternative available to them for meeting their basic needs.

I also maintain that such policy is right. Given the fact that rhinos have been so precipitously reduced, given that the Zimbabwean population is escalating – the average married woman there *desires* to have six children (Bongaarts 1994) – one ought to put the black rhino as a species first and make poaching illegal, even if basic human needs thereby go unmet. Anyone familiar with sub-Saharan Africa will realize that, otherwise, there will be no rhinos, or elephants, or lions, or gorillas. Sterba's principle is aggressive indeed. Always putting human basic needs first guarantees, sooner or later,

the extinction of every jeopardized species that cannot be preserved as a food animal. Nature co-opted to feed people is seldom wild nature saved.

Royal Chitwan National Park in Nepal is a primary sanctuary for Bengal tigers and the Asian rhinoceros, both extremely endangered species. Other species protected in the area are the sloth bear, the pygmy hog, the swamp deer, the black buck, the Asian rock python, and the gharial crocodile (the most endangered crocodile). The region, in lowland Nepal, was too malarious to live in year-round until the 1950s. In earlier years, what is now the park area was kept as a hunting preserve for the Rana rulers of Nepal in the dry season. Oddly, the tigers and rhinos survived because of the mosquitoes,

Following a mosquito eradication campaign in mid-century, Nepalis began to move into the region. The migrants cleared the forests and started cultivating crops, also poaching. In 1973, to increase protection, the hunting preserve was designated a national park. Nepalis were surrounding it. The population of the Terai (lowland) region was 36,000 in 1950; in less than a decade it was one million. With one of the highest birthrates in the world, and with the influx continuing, the population in 1991 was 8.6 million, 90% of them poor, 50% of them desperately poor (Nepal and Weber 1993; Shrestha 1997).

No-one is allowed to live in the park. People complain that they cannot cut grasses, graze cattle and buffalo, or timber the park at will. They are allowed to cut thatch grasses several days a year, and 30% of park income is given to Village Development Committees. The Royal Nepalese Army, with 800 soldiers, is responsible for preventing poaching, grazing, cutting grasses, pilfering timber, and permanent habitation of the land. Enforcement is quite rigorous. In 1985, 554 violations were fined and 1,306 cattle were impounded. In 1993 thirty-seven rhino poachers were apprehended. The soldiers also do what they can to improve the lot of the people. But being hungry is not a sufficient reason to sacrifice the park, and this is legally enforced, no matter that human needs go unmet.

Again, my caveats. One needs to fix this problem by attacking its root social causes. But, alas, in a recent visit to Nepal, I did not find any answers in sight. You can stretch the word "necessary" to make it unnecessary for the Nepalis to sacrifice the park – had they a different kind of society, had they more foreign aid than they do. (Even now about one half of the government's revenue depends on foreign aid and borrowing; one third of the hard currency entering the country is aid.) Yes, there are other options in principle, and the destruction is unnecessary – logically, ideally, eventually. But fact of the matter again is that, practically, no such options are viable for most of these nine million Nepalis. "Justice for here and now," Sterba's emphasis, requires decisions in law enforcement that save nature and leave basic human needs unmet.

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But by Sterba's principle, these millions will be justified in destroying Royal Chitwan National Park, the last refuge in Nepal of the tigers and rhino, also of a dozen other species. Unless civic law can protect natural value, long before their needs are met, most of the biodiversity in Nepal will be gone. Humans ought not always and everywhere dump their mistakes, mismanagements and misfortunes onto jeopardized wildlife; and basic needs unmet is no unchallengeable exception. We might not make this argument for every endangered beetle or nematode worm, but the lithe, supple cat, epitome of feline power, joined with the other charismatic species, displays richness in value that one ought not to sacrifice for a temporary and ultimately futile solution to these deep human problems.

6 Global enforcement: nature and the nations

Enforcement requires government; there is no world government. But environmental ethics has gone global in scale: climate change and global warming, fishing in the deep seas, population control, developed/developing nations, inequitable distribution of wealth driving environmental degradation, trade in ivory, tiger skins and rhino horns. Can and ought there be enforcement on this scale? Or will we stay adrift in a multicultural and pluralist morass? On national scales, enforcement is possible, but on international scales, there is anarchy. At least there is only incentive, never command and control. Internationally – at least short of war – there are only carrots, never sticks.

One possibility is that in the burgeoning nations, whether escalating in numbers or appetites, enforcement sufficient to provide quality environments may be impossible, because it is too demanding on human capacities. Quality environments would be desirable, ideally; but realistically, it is already too late. In 1970 in only one nation (Chad) was the average person, on balance, becoming poorer, with population growth overwhelming economic advance. By 1980, the number of such nations had risen to thirty-five; by 1990 the number was ninety! (Westing 1993, p. 100). One shudders when waiting for the 2000 figure. Under such pressures, civic law is unlikely to be able to protect natural values – certainly not tiger habitat, and hardly even soil and water quality.

Escalating populations and consumerism are likely to escalate the need for enforcement, at the same time that they escalate its difficulty. Indeed, given the human nature about which we earlier worried, even decent environments are likely to become uncommon. Perhaps the most we can hope for is environmental justice, more or less, in more fortunate regions of the globe.

When it comes to nature, the nations are often as much part of the problem as part of the answer. The divisive troubles that arise among the world states, with their competing national sovereignties, are not well

adapted for harmonious relations with the Earth commons. The "rights" of nations, and "rights" as claimed by citizens of these political states are not well aligned with the ecology and geography of the planet. The shapes of the continents are the result of natural forces, and natural resources lie where they lie by nature. On these continents, national boundaries were drawn for political reasons and often with minimal attention to natural resources – nearly all were drawn before many of the modern essential resources were resources at all: coal, electric power, uranium, copper or iron ore.

People assert their need for a productive and quality environment as citizens of nations that have economic policies, political agendas, and laws demanding loyalties in support. Their access to natural resources comes filtered through political units that are not formed, or continued, with these ecologies in mind. They want resources, but the political alignments can often mean suboptimal and unjust solutions to the problems of resource distribution. *Natural* resources have to become *national* resources, and "nationalizing" natural resources can be as much part of the problem as part of the answer, especially when the sovereign independence of nations is asserted without regard for the ecological and social interdependencies of these nations.

But it is a mistake to conclude that nothing is enforceable because, on this one Earth, there are 178 sovereign nations. Although there is no world government nations can and do enforce, on their own nationals and on other parties, the provisions of treaties into which they have entered. The number of international treaties that generate environmental law is considerable (Kiss 1983; Rummel-Bulska and Osafo 1991; Weiss *et al* 1992). Providing social security is a principal justification for nation-states, a principle of justice for both domestic and foreign policy. The transition now needs to extend to environmental security and justice, nationally and internationally.

Consider the possibility that most of these myriad nations could enter into a treaty guaranteeing a universal human right to a quality environment (Westing 1999). The United Nations General Assembly has decreed: "All individuals are entitled to live in an environment adequate for their health and well-being" (United Nations General Assembly 1990). A UN-related group, the InterAction Council, consisting of over two dozen former heads of state, prepared in 1997 a *Universal Declaration of Human Responsibilities* on the occasion of the fiftieth anniversary of the *Universal Declaration of Human Rights* (1948). Although that document has not been officially adopted by the UN, it does contain widely recognized principles. Of particular interest is one of its nineteen principles:

Article 7: Every person is infinitely precious and must be protected unconditionally. The animals and the environment also demand protection. All people have a responsibility to protect the air, water

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and soil of the earth for the sake of present inhabitants and future generations.

(InterAction Council 1997)

Such language is broad, and, like all international consensus documents, subject to interpretation. Still, there is the idea that humans in their environments, their biosphere, warrant protection, and all persons may be held so responsible. That does not guarantee enforcement; but again, the suggestion is that enforcement at some levels and degrees could be appropriate. Often such UN resolutions are only a rhetorical veil over power relations. But national powers can and do enter into various kinds of international relations, which can bring levels of enforcement.

What start out as hortatory ideals can, in due course, become formal international commitments, as happened with the *Universal Declaration of Human Rights*. This declaration was first promulgated in 1948, and it took eighteen years, but by 1966 there had been widely adopted international covenants, to which about three quarters of the states on Earth are now party. Something like this could be on the horizon for environmental concerns.

Could this ever extend to a more fundamental protection of nature? The *World Charter for Nature* (United Nations General Assembly 1982) is another aspirational declaration that might be deepened into formal international commitments, eventually guaranteeing appropriate respect for nature for what it is itself. That route would probably be by discovering that, in trying to assert human rights to and over the environment, the problem is deeper than we first thought. Asserting our rights and "aggressing against animals, plants, species, ecosystems" that stood in our way, demanding our human rights to a quality environment, we would be increasingly confronted by population growth and desires for economic advance.

By then the tigers and rhinos would long be gone, but we might begin to realize that both of these thwarting problems result from regarding nature as nothing but natural resources. Environmental justice, so we had thought was a matter of settling conflicting human rights claims. Justice is for "just us" people. After all, only persons can be just; whooping cranes and sequoia trees cannot. Maybe we would realize that it does not follow that persons cannot behave rightly or wrongly with regard to animals, plants, nature. It might become clearer to us that to see nature and its conservation solely in terms of natural resources is as much part of the problem as the answer. There is no rule of ethics by which cultural values automatically and always trump natural values. Human systems and natural systems have entwined destinies; what we ought to seek, indeed what we must seek for any workable, or enforceable solution, is a complementary welfare.

We do not seek more intelligent and sustainable exploitation; when we seek that and that only, we overshoot. Maximizers always overshoot. We

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ought to seek, and enforce, harmony, sustainable development but equally a sustainable biosphere, human citizenship in a biotic community, civic law protecting natural value.

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