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Civic Law and Natural Value: Enforcing Environmental Ethics

by Dr. Holmes Rolston III*

Plenary Session Address from the 2004 Yosemite Conference

INTRODUCTION BY JAMES L. PIERCE

We are very, very fortunate to have Dr. Rolston with us today. Since 1975, Dr. Rolston has been writing about the religious imperative to respect nature. Dr. Rolston is an avid backpacker, a field naturalist, a bryologist—that's the study of mosses, correct? He spent his childhood summers exploring the woods of Virginia and the swamps of Alabama where he was raised and it was there that he developed a passion for the wonders of nature. Dr. Rolston became alarmed about how quickly the natural world was changing and being lost to pressures from humanity, such as development. He has also said he feels he has learned as much directly from nature as from any scholar. However, this particular scholar's passion for ethics and nature raises our collective consciousness, allowing us the full sense of urgency in thinking about our environment, protecting our environment, and addressing the myriad issues that make nature so complicated and so fascinating. With that I'd like you to welcome Professor Rolston.

PLENARY SESSION ADDRESS: CIVIC LAW AND NATURAL VALUE—ENFORCING ENVIRONMENTAL ETHICS

Well, thank you, James, it's a privilege to be at Yosemite.

I have been spending some time thinking about environmental ethics. I was for a number of years called the "Father of Environmental Ethics," but it seems like lately it's been the "Grandfather of Environmental Ethics." So perhaps I can interest you, at least for a bit of time, in thinking about environmental ethics. I think it shows a lot that a bunch of lawyers are willing to listen to a philosopher on Saturday morning in a place like this.

I want to talk about mixing civics and nature. You can't put all of ethics into law—maybe some of it you can, and maybe some of it you can't or shouldn't put into law. My first point is bad news: law-like forms of ethics are in great disrepute these days in philosophical circles and sometimes in political circles. They say the idea of "command and control" is not a good way to address environmental problems. We need at least incentives. The country people of my rearing would say: "Use carrots and not sticks." In philosophical vocabulary, philosophers might say: "Ethics needs to be based on virtues and not laws." Take somebody like myself—I think I'm virtuous enough that I'm not tempted to murder. You don't need to write laws for virtuous people; they will do the right thing, and do so without benefit of command and control.

Or if we talk to the feminists these days, they say a law-like ethic is "too masculine." Such an ethic was invented by the same sort of people who invented the British Empire; they liked command and control. Caring is the feminine side of things and you need an ethic that's based on caring. So there has been a re-thinking of the whole question of a law-based ethic.

In contrast, I would like to observe that we do legislate a lot of environmental care, and I'm using the word "care" in the context of a law-like word. Of course, we have acts of Congress. If you count all the wilderness acts and laws of that type, there are hundreds of these laws: the Clean Air Act, the Marine Mammal Protection Act; it just goes on and on. I don't need to tell this audience about the innumerable acts of Congress. There are myriad international agreements. I've got a whole book that lists hundreds of such agreements with an environmental aspect to them. Or consider such a place as where we are right now—in a national forest, right outside a national park (Yosemite): There we have myriads of regulations.

A summer or two ago, I was backpacking. I had hiked hard all day up to the subalpine. There was more snow than I thought there would be and I had a little hard time finding a campsite to pitch my tent. When I got up the next morning—it was midday, really, before I looked back around—I discovered my tent was closer to a trail than it was supposed to be. So, sure enough, a forest ranger came through in the latter part of the afternoon and he said, "You're in the wrong campsite, you can't camp here." Well, he was a reasonably humane ranger and since I was leaving the next morning, he didn't actually have me move my tent but he could have, or have taken me to court. If you add up all these big things such as international agreements and acts of Congress, and on down to campsite regulations, I guess I would say that most environmental ethics are "enforced" at some level or another.

We do need a personal ethic. I've got that kind of personal ethic. Yes, I don't want to camp too close to a lake and trash up the place. But do we need also laws? With

the environment you're dealing with a communal space, so maybe we need to put a different spin on an ethic in a communal space than one inside a family. We have to think in that context about doing things in concert, we have to think about cheating—a fairly strong term—and coercion. We don't like cheating, we don't like coercion. We might like to believe we are all concerned about things that are held in concert. When we're dealing with such an environment, however, there are a lot of things you cant do *unless* you do them together, because it turns out that a lot of things that are individually good, in the aggregate turn into "bads."

That's not new. That's the lesson of Garrett Hardin's *Tragedy of the Commons,* from—what—30 years ago or more. But maybe we have to keep on learning it. That is to say, we don't think—whatever we believe about the invisible hand in some parts of the marketplace—we don't think there's sort of any invisible hand that aggregates individual goods into public benefits in environmental care. Rather maybe we need—and this is Garrett Hardin's phrase again—"mutual coercion mutually agreed upon." It's kind of a teasing phrase, isn't it? Agreement on mutual coercion.

Now let's leave philosophy a minute and go to biology, I think the biologists are probably right that evolutionary history has shaped us for doing things that are short-range and tribal. Evolutionary history has shaped us so that we like sugar and salt, because we could hardly get enough of those things—and fats, right?—to make it through the winter in Pleistocene times. Well, now we have plenty of sugars and salts and fats, and we have difficulty dealing with the problems of excess. Likewise, evolutionary history, I think, may have shaped us to work together tribally. That's where Hardin might have gone astray a bit. If you're working with your family or near kin, your tribe, maybe a "commons" ethic will work. But evolutionary history has probably not shaped us to work for national good and for common good, especially when we're dealing with global kinds of aggregating trends and commercial capitalism on international scales.

Serving the common good is going to require a broad social agreement—yes, we can't enforce an ethic on everybody against their will—but it's going to require enforcement if it is to be done for the common good. That is the problem with the so-called "cheaters"—and I do put that word in scare quotes because it turns out that things that are individually good can in the aggregate produce evil. So now we have a person doing something that is not cheating when seen on the individual level, maybe something people have been doing for years and there is nothing wrong with it. Camping by a lake somewhere. But these individual acts aggregate into common evils. As my ancestors said, it's similar to the "one rotten apple spoils the bushel" phenomenon. Corruption of that sort is contagious. If a few people start doing it—camping by the lake or polluting the stream—then other people will join in. Unless the ethic of protecting the resource is done in concert, it's not going to work. Therefore you have to police the conduct.

Also we have to deal with the fact that the impact of behavior changes overtime—James Russell Lowell, "Time makes ancient good uncouth." Things that were good to do yesterday may not be good tomorrow. A lot of people are going to think that everybody has a right to air, water, to soil. We think of them as nature's gifts to which we are all entitled. But now all of a sudden they have to be policed—air quality and so forth—in ways they weren't before. At this point, long-held vested interests are going to complain, interests that think they have a right to continue to use nature's gifts in the ways they had been using them before. It's going to be hard to offset these vested interests, The "vested" interests are going to have to be "divested; so to speak, because things that were right to do yesterday turn out to be wrong to do tomorrow. So there will have to be some pushing and shoving. In environmental affairs we're going to have to constantly be nudging people out of old habits and established privileges. That's going to take some enforcement.

Think about smoking and about clean air. I don't

have to have laws to keep me from smoking. I grew up in the U.S. South—in tobacco country—but fortunately I escaped that habit. When I came in this hotel yesterday, I asked for a no-smoking room and the clerk said this entire establishment is "no smoking." I'm delighted. Maybe you would think that virtuous people wouldn't smoke in public anyway, but if you think of what we've done with smoking in public places, it didn't work out that way, right? We had to enforce it at my university. You can't smoke in any of the buildings. But there were smokers that we had to nudge out of their established patterns.

Likewise with clean air. People want clean air and, yet, we just would not have achieved the clean air standards that we have in the United States—we've got a long ways to go but we have achieved a lot—and we wouldn't have achieved that without, I think, legal enforcement. Likewise, with clean water. My point is that these are things that we want—clean air and water—you might say everybody wants them, that you don't have to write laws about these things to get them, but it doesn't work like that for public goods.

Everybody likes liberty." That's a great word, Nobody likes "enforcement." I didn't want to have to move my campsite that was too close to the trail. But, as lawyers know better than philosophers, these two—liberty and enforcement—go together. I don't have certain kinds of liberties, for example, to live in my home in peace and quiet, unless there is enforcement by the police against thieves who would like to come and take my property, perhaps my life.

Next, let's think of the civil rights movement in my lifetime. I grew up in the U.S. South, and I speak as a southerner whose great-grandparents owned slaves. The civil rights movement is a good filing, something we ought to have done, something I think southerners now are proud of having done. Yet, this would never have happened in the way it did without the pressures of enforcement

Similarly with women's rights, equal pay for equal work, or with increasing the number of women faculty at my university, Colorado State University. These are things that people want. The men on the campus would be the first to agree that it would be fair to have more women faculty. But unless you have pressure in terms of enforcement those things tend not to happen.

Then if we turn to environmental affairs and you think about fluorocarbons in the environment, we're glad to have them out of refrigerators, yes. We like that. We're proud of what we done, but, nevertheless, it had to be mandated by law to take place.

Think about wilderness areas. We've got a lot of good wilderness areas in Colorado; you've got a lot of good ones in California. People want that kind of landscape; they enjoy it when they're there. But if those areas are going to be useable for all, you must have regulations about, well, how close you can camp to trails. Think about putting the wolves back into Yellowstone. The nation is proud of having put wolves back on the landscape, but again, that took some enforcement. There were people who didn't want those wolves on the landscape, and we have to regulate the circumstances where you can, and can't, shoot a wolf.

What does enforcement do? "Enforcement" is when we've got an agent doing something that the agent wouldn't do or wouldn't yet do, because outside forces are being brought to bear. There are dozens of ways of doing this and here's where you people, I'm sure, are much more knowledgeable than I. The change in behavior can occur because of boycotts. It can be done by ostracism, which is often quite effective. It ran be done by tariffs or fines or prohibition of access. 'You can't take an automobile up this old road. The road has been closed to public use." "You can hike up there but you can't take your motorcycle up the trail," for another example. If you do take your motorcycle into the wilderness and a ranger catches you, he's going to lock it up and you've just lost your motorcycle. And, of course, we can use jail, though you don't typically have to go that far.

Now I'll be the first to say that if you enforce an ethic you haven't really got a whole ethic yet; it's incomplete. You do need virtue, you need caring, but you're going to need this enforcement en route.

Enforcement can work the wrong way. There is a tendency in enforcement to favor the status quo, not change. To some extent environmentalists do want enforcement of the status quo. We want enforcement to keep the lake in good condition by not having people camping too close to it. But typically environmentalists are going to want to introduce change. Typically enforcement is going to be by and in support of the establishment. By contrast, the environmentalists are supporting changes for conservation, preservation, putting the wolves back or setting wilderness aside, that are anti-establishment or reformatory. You also have to notice, I think, that enforcement has a certain prestige, right? People just say, "That's the law and you ought to obey it."

Philosophers, at least, and I know lawyers too, ask questions about the law: "Yes, that is the law, but ought that to be the law?" Maybe the law should be enforcing some different value. Enforcement is certainly no substitute for argument in the larger public context. I don't think that policemen have to argue very much. They can just enforce the law. But if you get into court, the lawyers have to argue about the law, and certainly philosophers have to argue for an ethic. It won't do just to enforce an

ethic without its being sustained rationally. When we do make those arguments I think we need to have the idea that while we are enforcing behavior—it's not what that particular actor wants to do—that it is not really contrary to that actor's larger welfare. The actor in the short term may lose a little money if he or she can't pollute the streams. But there is going to have to be more support for arguing that in the context of the actor being a citizen in the State of California or wherever, it is in the actor's better interest as part of serving the larger welfare for this enforcement to take place.

That moves us to the connection between democracy and enforcement and I'd like to address that for a minute. Certainly an ethic takes place in lots of different circumstances. We deal with each other ethically in politics. We pursue our values there, and we pursue our values as customers in stores, we may pursue our values in church and school. In the market, we are consumers, but we're not just consumers, we are also citizens in other roles. We've got to mix our interest as consumers and our interests as citizens. We often like to think that our interest as citizens can counterbalance our interest as consumers. Our interest as citizens will show up in the way we vote and in the way we behave as Rotarians and so forth. Our interest as consumers will show up as the way we behave in Wal-Mart. But the one ought to cross check the other.

If we apply that to environmental issues, I would like to think that we don't consider ourselves just consumers, we're not just citizens, but we like to think of ourselves as residents living on a landscape in the marvelous States of California or Colorado. And in that place, living on the landscape is a kind of public good, it's a common heritage. Therefore we think that that aspect of it—living on a landscape as citizens—will not be something that Wal-Mart takes care of; it will have to be something that is taken care of in the democratic process by making laws.

But now the problem is that democracy—lawyers know this better than philosophers—is no more perfect than capitalism. The problem is that the same humans who do business at Wal-Mart are the people down at the county courthouse. So the question then is: Will there be a more comprehensive sense of public good when these same citizens get together to form a government than when they do business with each other? We would hope that democratic process would have a more comprehensive sense of the public good. We'd hope that in debates at the courthouse, citizens will cross check each other in a way that might not take place when they are shopping at Wal-Mart. We hope that we can use the democratic processes to make the market more humane; therefore we will have worker safety laws; we will have equal pay for equal work, for example.

The question is: Can we have that more comprehensive sense of the public good in addressing the environment? One thing democracy can produce is discussion. Not always, of course, but democracy does better at producing discussion than people who are in the marketplace, where there isn't the larger public debate about what is the public good.

Another problem immediately rises. In environmental affairs, you may need experts. It isn't necessarily the case that when the people get together at the courthouse to discuss the environment, they will know how many parts per million in the air will cause damage to the trees. So the degree to which expertise can be brought into these processes is, I think, an issue.

Even then you're often going to find that the experts don't know or that the experts don't agree. When you don't know or when you're uncertain, what do you do? Typically those favoring market forces will say, "Well, we'll go ahead until we find we've done some damage and then well pull back and fix it." Right? But you might say at the courthouse, "No, it's the other way around." Thinking as citizens, we will want to use the precautionary principle. You have to show that there'll be no damage before you go ahead.

The problem in addressing uncertainty is that it's hard to make long-term decisions. It's hard to make long-term decisions in business because you got to answer to the quarterly reports. It's hard to make long-term decisions in a democracy because you've got to be re-elected every four years. With effects on the environment, we're often dealing with long lag times. It takes 25 years for the effects of an action to show up, but the Senators have got to be elected every six years. This is a real problem.

Environmentalists frequently want people in the democratic process and in their business affairs to go in directions in which people may suspect they ought to go, but they don't want to go there yet. Environmentalists typically have to put consciously into the public thought process what is still latent and hasn't been waked up into explicit awareness. Here I'll offer one of those Virginia country proverbs: "You never miss the water 'til the well runs dry." We don't want to wake up when it is too late to fix it.

We like to think that one thing democracy does have, which the economic system doesn't necessarily have, is a system of checks and balances. As you learned in your first law class in the university, we have legislative, executive, and judicial branches of government. We worry some about the effects of legislators in Congress and the President having to face re-election so often. There may be virtue in the fact that the judiciary is not so immediately subject to the democratic process. Of course, judges are limited to enforcing laws that legisla-

tive bodies have made, but the judiciary is not subject to the immediate constraints of democracy in the same way as a legislative body. Many people think that's an important part of the checks and balances system. That means that at least one branch of government can take a longer-range view. I would be interested in hearing any comments you might have about that.

Let's also think about how we would address rights and responsibilities. You could say, "Well, we can get at this pretty easily. We will make it a matter of human right to have environmental security or to have a quality environment. We will make the right to have a quality environment a matter of the larger public interest."

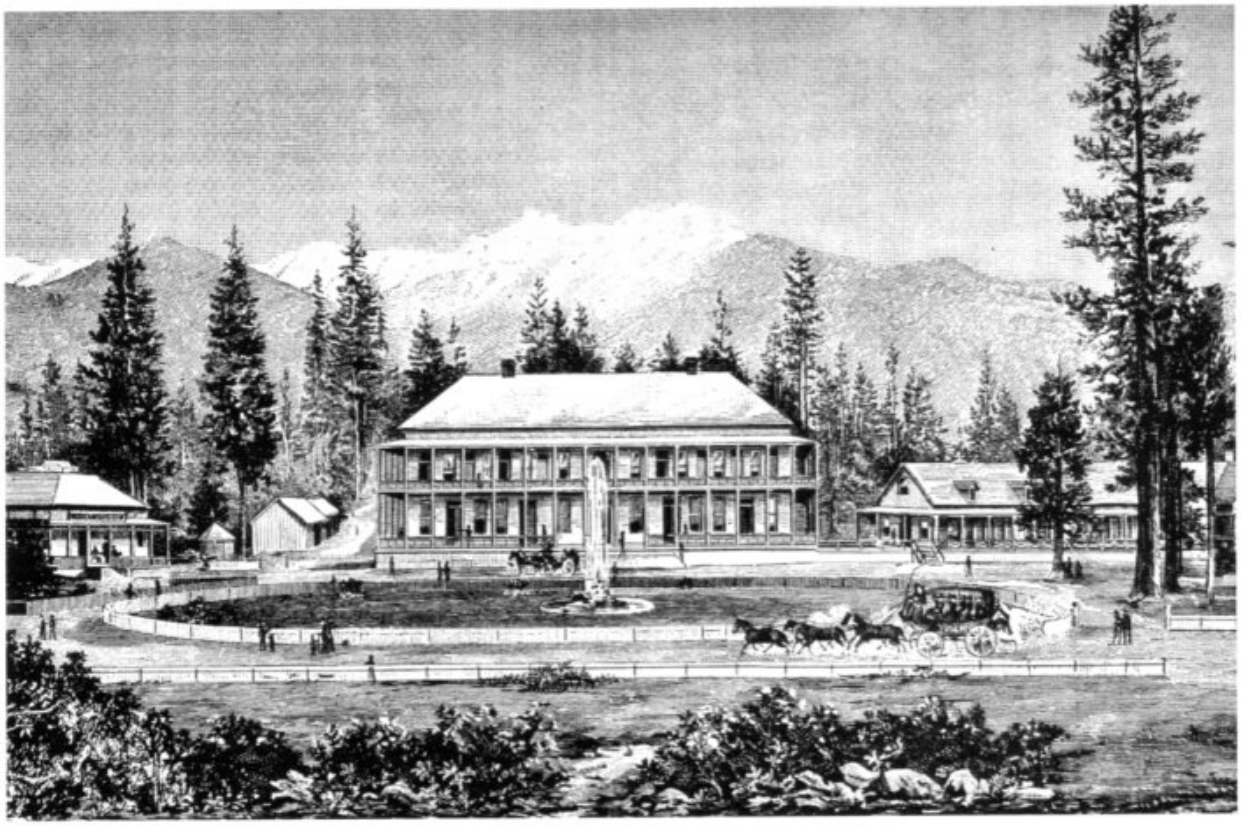
Will that get us an environmental ethic? It will get us a long ways toward an environmental ethic. But not, I think, all the way. Think next of the laws we have had that reflect our concern for the welfare of the natural world—animals, living things. Where I grew up there were laws against cock fighting or against bullfighting. We have laws in some states—I think maybe California does—constraining certain uses of leghold traps.

We replaced hunting with lead shot with requiring the use of steel shot by law in many waterfowl areas, in the interest of not causing suffering among the waterfowl. In my state, we prohibited spring bear hunting because too often the mama gets shot and the cubs will starve. If I try to take a hike during most of the year on Specimen Mountain in Rocky Mountain National Park, the sign says, "No, you can't go up there." Why not? Because the bighorn sheep are in lambing season.

A rancher in Wyoming built a fence to disperse an antelope herd[which prevented them from migrating to their winter feeding ground]. The case stayed in the courts for years, but eventually he was told he had to take that fence down or modify it so that the antelope could crawl underneath it. So now I'm saying yes, in many cases I think we do enforce an environmental ethic that is larger than an ethic based solely on the quality of human life.

In many of these cases, one could say that it is just a matter of telling people not to be cruel, telling them to be humane, but notice that at least in some instance's we also tell people they can't be humane. The ethic in many wild areas is to "let nature take its course." People who want to rescue wild animals are told that they can't do it, as happened famously when some people were prohibited from rescuing a bison that had fallen through the ice in Yellowstone National Park. To some extent the Endangered Species Act shows some concern for human welfare and human benefits, but to a greater extent it is based on a concern for the whooping cranes, for the welfare of endangered species.

Now you may say, "But we still have to be convinced that this is in our larger public good or we wouldn't do



it." So consider whether there are any cases where humans lose, so to speak, and nature wins. Humans versus nature. Most of my philosopher friends, especially my eco-feminist friends at this point will say, "You have now gotten yourself too much into the legal system." In their view, "versus" is just not a good word, it is too adversarial. We need to look for win-win situations, for the caring situations that we spoke of above. Look for things that are in harmony, not in opposition to each other. Get the word "versus" out of your mind when you try to do ethics or you will be a loser from the start. Get cases where you can get people together.

Let's look at a few cases. Let's take the Hopis in northern Arizona. What do these Hopis want to do? Some of them, not the whole tribe but a significant number in the tribe, would like to capture up to 40—they say they probably wouldn't take 40 but they do want to take eight or ten—baby eagle chicks from their nests on public land, at the Wupatki National Monument. They plan to take really good care of an eagle chick for a year and then what are they going to do? They're going to sacrifice ft—they're going to smother it to death. Why? So that the eagle can go to their ancestors and tell their ancestors what they need and their ancestors will help them meet their needs. Federal authorities have differed on responding to this. But I would argue that even though this killing of eagles involves a religious belief of theirs, it is not permissible on public land, even public lands they claim were once their sanctuaries.

Or let's go off to the U.K. and consider kosher slaughter of animals by Orthodox Jews. It can be shown that if they were to use stun guns there would be less animal pain, but the Orthodox Jews have refused to use them. There has been some effort to pass legislation requiring them to use stun guns, but so far that has failed on grounds that you ought not to enforce an ethic in that way. But I might be willing to enforce an ethic of that kind.

Or let's take the poachers in Africa. The black rhinoceros population has declined dramatically in 50 years from some 65,000 to 2,500 animals. In recent years in Zimbabwe—I'm not sure they're still doing it this way exactly—they have shot about 150 poachers. That's pretty draconian, but I would argue that that's permissible enforcement of environmental ethics.

Or take tiger sanctuaries in Nepal. Take Royal Chitwan National Park in Nepal, which I've visited. There are a number of endangered species at the tiger sanctuary but that's not the only thing at stake. Where is this tiger sanctuary? It's in an area called the Terai Lowland which once was so full of mosquitoes that nobody could live in it. In 1950 a small number of people lived there, but they eradicated mosquitoes, thanks largely to Western aid. Now huge numbers of people have moved into the area. They are all poor, most of them are desperately poor and, of course, they would like to go into the tiger sanctuary and graze their cattle there and cut thatch and so forth. So there are frequent violations, resulting in the impoundment of cattle. My claim would be that if you want to have any tigers survive, you're going to have to preserve the tiger sanctuary in the face of this uncontrolled, escalating desperately poor human population.

> What am I trying to give you? I'm trying to give you some examples of where it does seem to me that enforcement is permissible even though it's contrary to immediate human interests.

What's the sum of this? The sum of this is that enforcement represents an incomplete ethic, but it represents an ethic that is morally permissible, given certain features of human nature that have to be over-come—in the light of human perversity, and also in the light of human carelessness, thoughtlessness. We need guys and gals like you enforcing an environmental ethic if it's ever going to work.

* *Holmes Rolston III is University Distinguished Professor and Professor of Philosophy at Colorado State University, Fort Collins, Colorado. He has written several books, including* Philosophy Gone Wild *(Prometheus Books, 1986),* Environmental Ethics *(Temple University Press, 1987),* Conserving Natural Value *(Columbia University Press, 1994),* Science and Religion: A Critical Survey *(Random House, McGraw Hill, Harcourt Brace) and* Genes, Genesis and God *(Cambridge University Press, 1999). Professor Rolston received the Templeton Prize in Religion in 2003; the award was given by Prince Philip in Buckingham Palace.*