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# The 'Ascent of Man': Legal Systems and the Discovery of an Environmental Ethic

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*"Nature, in the common sense, refers to essences unchanged by man: space, the air, the river, the leaf. Art is applied to the mixture of his will with the same things, as in a house, a canal, a statute, a picture. But his operations taken together are insignificant, a little chipping, baking, patching, and washing, that in an impression so grand as that of the world on the human mind, they do not vary the result."*<sup>1</sup>

A decade ago, firefighters in a warehouse on the Rhine in Switzerland washed chemicals, solvents, and mercury into the river, destroying all life in the river for miles, killing millions of fish, and endangering the water supplies of cities in Germany and the Netherlands. This tragedy galvanized the river valley states into action. They vowed to clean up the river, not just from that incident but from the effects of having used the river as a sewer for two centuries. But how clean is clean? The goal for this calculated plan, which will take decades to achieve, is symbolized by the salmon. When salmon spawn again in the Rhine, then it will have been restored. Will these nations succeed? If the twenty five year history of our Clean Water Act offers a precedent, "restoring and maintaining" the waters of the United States for fish and swimming,<sup>2</sup> the prognosis may be good.

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1. RALPH WALDO EMERSON, NATURE (Houghton, Mifflin and Co. 1902).
  2. Clean Water Act, 33 U.S.C.A. § 101 (1994).

Meanwhile, however, the wild salmon of the Pacific Northwest become endangered in river after river because of over-fishing, dams, and run-off from logging and development. The Pacific salmon runs are going the way of the Atlantic runs which are but a trickle in the northeast of our continent. Meanwhile also, we are slaughtering the sturgeon in the wild in Eurasia, mostly for the caviar trade in New York and Europe, and having wiped out most sturgeon in the United States of America (U.S.) and Canada a century ago, we are, in this decade, wiping out sturgeon in the rest of its wild range. The sturgeon are an ancient fish, surviving from eras before humans left measurable imprints on the Earth.

Why do these icons of the seas affect us so? Or fail to affect us? Why is the icon of restoring the wolf as a predator in Montana or the Adirondacks such a powerful icon? And why can we never hope to restore the grizzly bear to its traditional habitat in much of North America's west, like California where it graces the state's official flag? Will we succeed in restoring the California condor, the largest bird in North America, to its vast range? We took the last wild condors into captivity in order to save the species from extinction due to eating poisoned coyote carcasses or attracting the bullets of riflemen; what makes us think we can let them live in the skies again?

Humans evolved as one species among all the flora and fauna of Earth, and it is perhaps because of (rather than in spite of) our familiarity with animals that we have yet to arrive at a consensus about our appropriate relationship with the fauna and flora with which we have co-evolved. Of course, a minority opinion still discounts the fact of evolution, choosing not to accept the findings of Charles Darwin any more today than in 1871 when he wrote *The Descent of Man*.<sup>3</sup> Darwin observed that:

"The main conclusion arrived at in this work, namely, that man is descended from some lowly organized form, will I regret to think, be highly distasteful to many. . . . Man may

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3. CHARLES ROBERT DARWIN, *THE DESCENT OF MAN AND SELECTIONS IN RELATION TO SEX* (Princeton Univ. Press 1981) (1871).

be excused for feeling some pride at having risen, though not through his own exertions, to the very summit of the organic scale; and the fact of his having thus risen, instead of having been aboriginally placed there, may give him hope for a still higher destiny in the distant future.”

Putting aside debate about whether humans indeed are at the “very summit of the organic scale,” few would deny that we are a dominant and dominating species. Anthropogenic change makes an impact on the Earth like that of no other species. This Annual Conference on Animals and the Law offers an opportunity for us to reflect on the content of this high destiny in the distant future. We can step back from the controversies surrounding road kills of deer in the suburbs, or coping with a coyote roaming inside New York City’s limits, or making Jamaica Bay safe for birds and jet plane, or restoring the fishable waters to New York Harbor. We can take the long view as Darwin did. Let us take a moment to look at the origins of our thinking about animals in the law, and ponder whither we are tending? Is there an “ascent of man” toward a still higher ethical destiny? How should our ascent bring us to better understand our relationships to animals, and all of nature?

Environmental law, subsuming as it does the traditional sectors of wildlife conservation law and the newer subjects of endangered species law, is the principal field in which our assumptions about animals are being changed. The philosophers who parse concepts about the rights of animals have yet to leave the sort of impact in the halls of Congress or our State Houses or our diplomatic conferences that the environmental conservationists have imprinted. The evolution of our legal concepts about animals, therefore, needs to be examined through the thinking of those whose insights brought us the still young field of environmental law.

Since Ralph Waldo Emerson wrote his seminal essay *Nature* in 1836, society has evolved enormously in appreciating the spiritual values that it finds in the natural environment, and in giving expression to those values through adoption of formal public policy and law. Emerson’s slim little volume,

*Nature*, is the fountainhead of the conservation and environmental movements in the United States of America. Little read today, *Nature* has had an influence far beyond the pigeon hole to which formal philosophers today relegate it, as being primarily an exposition on transcendentalism. Emerson's *Nature* was the inspirational textual authority for Thoreau and Muir and Borroughs. In this work, Emerson made discoveries, consciously for the first time in American literature, that Aldo Leopold was to make anew a century later in *A Sand County Almanac*<sup>4</sup> and Rachael Carson a century and a quarter later in *Silent Spring*.<sup>5</sup> It is worth recalling these roots of modern - or should we say post-modern - environmental law progressing from nature appreciation through natural history to ecology, for they bespeak an evolution in our understanding of natural systems and in the power of the human assault on nature. Our generation needs to discover them anew.

James Boswell's *Life of Samuel Johnson* quotes Dr. Johnson as observing that "hunting was the labour of the savages of North America, but the amusement of the gentlemen of England."<sup>6</sup> It was so seen in England because the early inhabitants of the country, since at least the Roman occupation, denuded the land so extensively that the Norman Conquerors shortly after 1066 had replanted "forests" as the hunting preserves of the aristocracy, the gentlemen, and created fish and game regimes as the prerogative of the upper classes. By the time Elizabeth I reigned as monarch, as Manwood's treatise of the *Forest Laws* amply demonstrates, there was an elaborate system of administrative law to regulate the taking of all manner of animals and a sizable number of plants in England.<sup>7</sup> The law served to allocate rights to nature according to the privileges of class.

We abandoned this aristocratic relationship to animals during the colonization of the "new world." Here, the supply of natural resources seemed inexhaustible, but increasingly

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4. ALDO LEOPOLD, *A SAND COUNTY ALMANAC* (Oxford 1987) (1949).

5. RACHEL CARSON, *SILENT SPRING* (Boston: Houghton Mifflin Co. 1962).

6. JAMES BOSWELL, *LIFE OF SAMUEL JOHNSON* (Richardson 1873).

7. *MANWOOD'S FOREST LAWS* (Printed for the Societie of Stationers 1615).

there were those who saw through the illusion that nature would yield its bounty forever. Emerson and Thoreau bemoaned the coming of the mills and railroads of the early industrial revolution, for they saw it cut people off from their access to nature, and left the wastes of industry to accumulate. Muir, and the Sierra Club he founded, campaigned for the creation of the national forests and national parks. Popular campaigns caused the Yellowstone and the Adirondack preserves to be set aside. Teddy Roosevelt fought for the elimination of the indiscriminate commercial hunting of wild animals, favoring the ethics of the "sportsman," so that today we still ban the sale of game in most of the U.S. The nation's first "Biological Survey" became the Fish & Wildlife Service, and nature sanctuaries were established. The Audubon Societies fought to ban the commercial taking of wild birds for their plumage.

When he convened the 1908 White House Governors' Conference on Conservation, President Theodore Roosevelt succeeded in making conservation a major national policy issue.<sup>8</sup> Conservation took hold in Europe too, where in 1948 the International Union for the Conservation of Nature and Natural Resources (IUCN) was established. But it would not be until the 1972 Stockholm Conference on the Human Environment that the United Nations would put these sorts of issues before the international community, and then not for twenty years later in the 1992 United Nations Conference on Environment and Development, the "Rio Earth Summit," that all the heads of State of all the nations would convene to place these issues on the global agenda of governments. While "animals" as such are not debated, the Earth Summit saw the adoption of the United Nations Convention on Biological Diversity,<sup>9</sup> in which the states "conscious of the intrinsic value of biological diversity and the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its compo-

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8. Proceedings of a Conference of Governors (May 13-15, 1908).

9. United Nations Convention on Biological Diversity, June 5, 1992, S. TREATY DOC. NO. 20 (1993), reprinted in 31 I.L.M. 818,824.

nents, and conscious also of the importance of biological diversity for evolution and for maintaining life sustaining systems in the biosphere" adopted a new legal paradigm for rethinking our uses of nature, and hems our relationship to nature. In the same year, the United Nations Economic Commission for Europe adopted a Code of Practice for the Conservation of Threatened Animals and Plants.

This reconfiguring of how we envision our relationship to nature started in the second half of the 19th century and evolved further as the study of natural history became more systematic and the discipline of ecology was developed. Leading wildlife biologists, such as Aldo Leopold, made the intellectual journey from *Game Management*<sup>10</sup> to the formulation of his "Land Ethic" in *A Sand County Almanac*. Leopold observed that "despite nearly a century of propaganda, conservation still precedes at a snail's pace...The usual answer to this dilemma is 'more conservation education.' No one will debate this, but is it certain that only the *volume* of education needs stepping up? Is something lacking in the *content* as well?" Leopold, the scientist, discovered anew that the moral content was lacking, just as Emerson had posited the need for the moral content a century before.

What Leopold called for was an "ethic dealing with man's relation to land and to the animals and plants which grow upon it." He worried that, "land, like Odysseus' slave-girls, is still property. The land-relation is still strictly economic, entailing privileges but not obligations." Leopold would have us extend our human ethics that permit civilized behavior among people, to embrace the living systems of the land as a part of our community of interdependent parts. His extension "of our moral system of ethical relations simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land." Albert Schweitzer had found the same truth in the tropical nature of Africa: "Ethics is nothing else than reverence for life."<sup>11</sup>

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10. ALDO LEOPOLD, *GAME MANAGEMENT* (Univ. Of Wisconsin Press 1986) (1933).

11. ALBERT SCHWEITZER, *CIVILIZATION AND ETHICS* (A. & C. Black, ltd. 1923).

When we neglect this ethic and choose to destroy agricultural "pests" with pesticides that also widely kill or harm other life forms and impair the relationships which exist among these, we may well end up destroying our song birds, and more, and bringing cancers to ourselves as Rachel Carson described in *Silent Spring*. Justice Blackmun's dissent, with Justices Brennan and Douglas, in *Sierra Club v. Morton*,<sup>12</sup> came close to understanding this when he cited John Donne's *Devotions XVII*: "No man is an island, intire of itselfe; every man is a peece of the Continent, a part of the maine...any man's death diminishes me, because I am involved in Mankinde; And therefore never send to know for whom the bell tolls; it tolls for thee."<sup>13</sup>

Should not lawyers today reflect upon this evolution of thought in society, if only because our law books still carry the statutes and rules enacted to reflect, as if frozen in time, the values of past eras as the policies of the present? Where science is dynamic and displaces old hypothesis for new and more refined understandings, and where philosophy admits of self-criticism and seeks refinement, our legislation tends merely to accumulate. It becomes encrusted with a dusty sense of legitimacy made more authoritative with age. Environmental law, rapidly assembled by society only in the last quarter century in response to the teachings of Rachel Carson and others, has still not shifted the accumulated weight of the past's statutes and decisions about nature. Aldo Leopold's ethic is hardly a household concept.

What, then, is the content of the environmental laws that today comprise our Environmental Conservation Law of the State of New York or volumes 16 and 40 of the United States Code? Let us just limit our examination to animals and the law. Why do we have six well taught courses involving animals in our law school today: (1) all of our property law teaches us that animals are chattel, and that the capture of a fox, in *Pierson v. Post*,<sup>14</sup> on the beaches of a long-ago Brook-

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12. *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361 (1972).

13. *Id.* at 760, 1378.

14. *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).



lyn is fair game; (2) the nearly universally taught environmental law pollution control courses, such as the Clean Water Act's administrative systems to restore and maintain swimmable and fishable waters or the Clean Air Act's national secondary air quality standards to preserve our welfare and in which animal tests determine human exposure limits to given chemicals, somehow also includes the Endangered Species Act,<sup>15</sup> although the jurisprudential link to pollution is a tenuous one; (3) conservation law courses, rarely taught, involve maintaining the sustained yield of renewable natural resources, including wildlife, and the managed use of non-renewable resources; (4) the also rarely taught animal welfare or rights course, involving the humane laws for domestic animals and the articulation of legal and moral rights for animals and plants; and (5) more widely taught are food and drug laws, in which animals are tested to ensure that cosmetics or foods and drugs will not be harmful to humans when used, since we do not ethically experiment on fellow humans; and (6) natural resources law, which while concentrating on oil and gas and hard rock mineral extraction, also treats timber and hydro-electric water rights, with flora and fauna as an interest that is either expendable during extraction, or the subject of some mitigation practices.

These six courses - all equally valid bodies of law from a positivist's normative point of view - are premised on mutually inconsistent policy foundations. Humane animal welfare laws would prevent unnecessary suffering by "sentient" animals during the toxicity testing of animals which are used to estimate safe ambient environmental exposure limits for human health purposes or safe internal consumption or skin contact uses for food and drug products. In conservation law, we ban cruel killing and require that game have a sportsman-like chance against the hunter, yet in an animal rights course we would ban all hunting as cruel. In our natural resources law sector, animals are of such little economic importance

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15. Endangered Species Act of 1973 (ESA), 16 U.S.C.A. §§ 1531 to 1544 (1994).

that the law of "incidental take" is hardly worth teaching about.

It must strike us as extraordinary that we can teach, side by side, inconsistent jurisprudential theories of the status of flora and fauna in the law, and few among us take notice. This phenomenon betrays the shallowness of our social consensus and the poverty of our legal and intellectual thinking. We lawyers both accept and reflect this fractured social view that our society has toward animals.

Before we can make jurisprudential sense of this legal relationship of human society to the flora and fauna comprising various ecosystems, we need (a) to go beyond embracing the rules of the past simply because we inherited them, and (b) to attempt not just to define the ethics necessary to guide human conduct amidst the community of all life, but to design legal systems of conduct to stimulate us toward discovering that ethical relationship.

Emerson gave us a template for this. Emerson's *Nature* recited the uses of nature in ways not unlike that of the preamble of the Biodiversity Convention. That so many of his perceptions have become accepted by the nations of the Earth in a treaty is, in the Darwinian sense, real progress, but in Leopold's view, it is hardly yet enough. Emerson, in 1836, divided our uses of nature into four categories: (1) commodity, (2) beauty, (3) language, and (4) discipline.

In commodity, we find most of our property laws about flora and fauna. We consume plants and animals as renewable resources, whether in our shoe leather or luncheons, our fur coats or the pages of our books and newspapers. Flora and fauna serve us as a recreational objective, in hunting and fishing and bird-watching, and we regulate these activities to sustain them. Flora and fauna serve us as domestic animals, in producing our milk or wool, and in serving as test animals for our life-saving drugs and vain cosmetics. Few of us would deny our dependence upon Emerson's category of commodity, and it is precisely because we have so many different sectors using animals, from farms to farm factories, from plantations to pet stores, from pharmaceutical enterprises to the garment industry, that we have enacted the hodge podge of different

laws that we law professors dutifully teach each generation of lawyers.

In beauty, we prize the commodity that is attractive, paying more for the handsome horse to ride, or pet or cat or bird. We preserve extraordinary natural beauty in national parks and monuments, state parks and local parks. We admire the beauty of a wild bird or butterfly. We place the Hudson River school of paintings in our museums and listen to the tone poem in music, as in Debussy's *Afternoon of a Faun*.<sup>16</sup> The laws on parks and even wilderness lands, and the emerging land use laws on countryside protection and green way management, grow out of the society's consensus about protecting beauty.

In language, the metaphors of nature still creep into our English or Spanish or other tongues. We speak of a sunny personality, or a dark suspicion, a rosy disposition or badgering boss. Nature has shaped our culture, our poetry and literature, our song and myth, our movies and plays. The deep seated integration of language and natural imagery may have little to do with the law, but it certainly spices up our advocacy about animals.

But it is in discipline that the rule of law has found its greatest evolution, for here science and the love of nature come together. Emerson saw discipline as the laws of nature. You plant when the frost is gone, and can do little to force the seasons. You breed when the time is right in natural cycles. As you learn the laws of nature, you can harness them to your advantage, as in the use of steam power or gravity flows, but you must follow those rules carefully. We today know that to build on a flood plain or a barrier island is to court destruction of our structures during the now predictable flood or hurricane. We know that collectively through the hydrologic absorption of the slender grasses a wetland stands up more strongly against the storm surge than does the cement dike or the rip rap of a rock barrier along the coast. Emerson could only glimpse into what became the teachings of today's ecologists, but he knew that the laws of nature provided a

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16. CLAUDE DEBUSSY, *AFTERNOON OF A FAUN* (Phillips 1993).

framework in which human life, and all life, existed. Emerson, also of course, went beyond these utilitarian concepts of nature. That others have not done so suggests that we need new systems to facilitate that further evolution.

Most of our environmental laws today seek to harmonize human conduct with what we have found science telling us about how best to sustain human health and ecological systems. We identify and contain externalities that our economic markets disregard. We seek to safeguard species of life threatened or endangered with extinction through the Endangered Species Act or the Convention on the International Trade in Endangered Species (CITES).<sup>17</sup> We have repealed the laws for the draining and "reclamation" of wetlands, and seek to preserve our remaining salt and freshwater wetlands. We establish federal and state wildlife sanctuaries, so that species may breed without human interference. We identify migratory species and seek agreements among public and private land holders and governments throughout the range of the species to protect their habitats. We detect acid snow and rain, perceive how they interrupt the food chain and reproductive systems of biota, and, in turn, seek to use the Clean Air Act to eliminate the precursors of water vapor pollution. We identify chemicals that biologically accumulate in the food chain of the Great Lakes and seek to eliminate them at their source anywhere in the vast watershed of that hydrologic system, lest the whales and marine life at the mouth of the St. Lawrence River continue to be poisoned.

Yet, as Aldo Leopold fretted, we still do not make the progress we must. Indeed, as the Earth Summit documented in 1992, the accumulated impacts of our human population growth constantly raise the height of the hurdle we seek to pass. The land ethic will not become a social consensus through education alone. The content of our law must fashion systems to induce such a change.

Ethical precepts become effective through social systems. Ethical imperatives can produce social change, and let us

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17. Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249.

cope with the environmental challenges we shall face. The U.S. used "technology forcing" to induce the technological revolution to clean up our surface waters. This October 1997, is the twenty fifth anniversary of the Clean Water Act,<sup>18</sup> and the surface waters are clear of the gross pollution that accumulated after the second World War. Do the challenges of the next century lend themselves to such firm solutions?

Today, all flora and fauna alike, along with humans, suffer the consequences of the loss or erosion of the stratospheric ozone layer. All biota alike are part of the web of life, and with the rapid rate of species extinctions, the mutual relationships that have been characterized as a biological diversity are weakened. Air pollution harms all living things, as does water pollution. Climate change will have global as well as local consequences, with the loss of coastal ecosystems to the rising sea levels and coastal storms, and with the disruption of migration patterns and food supplies. Human induced erosion and desertification still afflict vast areas. Tropical and temperate forests alike, and wetlands around the world, are being eliminated rapidly. Our human agriculture may well face new threats by changed climatic conditions, the introduction of exotic pests, and the familiar pests more resistant to over-use of chemical commercial poisons.

The human ecology of our cities will be sorely tested. The United Nations demographic projections are sobering. As we add one billion more people in this coming decade, Earth will have some 6.2 billion humans. At the 1972 Stockholm Conference and when the Endangered Species Act was adopted, we humans were only four billion. When Albert Schweitzer discovered his ethic of *Reverence for Life*,<sup>19</sup> we were a mere two million. When Emerson wrote *Nature*, Earth held only one billion of us. The United Nations Children's Fund

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18. The Clean Water Act was amended in 1972 strengthening the Federal Water Pollution Control Act of 1965 by making all discharges illegal through section 301, and the name was ultimately changed to the CWA in the 1977 amendments.

19. ALBERT SCHEITZER, *REVERENCE FOR LIFE* (Reginald H. Fuller trans., Harper & Row 1969) (originally published in German in 1966).

(UNICEF) reports that 40,000 children die each day of water borne diseases. In the space of this key note, statistically 1700 lives will be lost that routine sanitation could have saved. Our growing numbers crowd our cities, for shelter, jobs, education, companionship. Mexico City at the time of the 1972 Stockholm Conference held some nine million people, about the same as New York City today. Mexico City now has over twenty million, and by 2000 may have twenty five million, or more than all of the population of Canada.

So what can we do? Confronted with these developments, how can we afford to worry about discovering an environmental ethic? Indeed! How can we afford not to make that discovery? If we are the prisoners of our accumulation of past practices and laws, we also have the key to our jail. We have pioneered reforms in the law that permit us to create new social patterns, new systems. Ecology is the study of systems, and where our laws shape complete systems, we trigger decision-making that takes nature into account.

In 1969, Congress fashioned a new system to let us anticipate and avoid adverse environmental impacts. The National Environmental Policy Act (NEPA),<sup>20</sup> and in the states laws like SEQRA<sup>21</sup> or CEQA,<sup>22</sup> have been extraordinary successes in guiding us toward understanding the interrelationships of our acts with those of other living systems. We stop to look hard before we leap, and see the immediate and ripple effects of our acts. I have seen real estate developers identify and leave wildlife corridors in new housing projects, accept the role of buffer zones near wetlands and water courses, and preserve habitat. The Environmental Impact Assessment (EIA) has been copied all over the world, and is law in every Canadian province. What is sad is that less than half the States in the U.S. have adopted legislation for EIA, and the

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20. National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.A. §§ 4321 to 4370d.

21. State Environmental Quality Reveiw Act (SEQRA), N.Y. Conserv. Law §§ 8-0101 to 8-0117(McKinney 1997).

22. California Environmental Quality Act (CEQA), Cal. Pub. Res. Code §§ 21,000 to 21,178.1 (1997).

105th Congress has bills to weaken NEPA.<sup>23</sup> Moreover, as you know, the U.S. Supreme Court over the past thirty years has declined to accept the substantive duty that NEPA was thought to have had, that upon identifying the alternatives to a proposed action, the alternative version of the project that least harms the environment should be selected. This substantive test is the law in California and New York under our "little NEPAs", but since *Vermont Yankee*<sup>24</sup> has not been the law under NEPA. Even when a system to promote an environmental ethic is enacted, old attitudes are threatened and oppose its implementation or continuation.

Another illustration is the shift to state and federal wetlands protection. As a third year student, I wrote the New York State Tidal Wetlands Act,<sup>25</sup> and then lobbied it through the legislature working with the Environmental Planning Lobby twice, as Governor Rockefeller vetoed it once. Others like me have done the same in two-thirds of our states, and Congress extended the federal protection through Section 404 of the Clean Water Act.<sup>26</sup> Wetlands law, and the lore learned from wetland protection battles, has done more to shift our human society's relationship with the community of flora and fauna that protect wetlands than is the case with most environmental laws. A good illustration of this is a decision of the Supreme Court of Minnesota, in *County of Freeborn v. Bryson*,<sup>27</sup> preventing a County from building a highway across a marsh, under the Minnesota Environmental Rights Act:

To some of our citizens, a swamp or marshland is physically unattractive, an inconvenience to cross by foot and an obstacle to road construction or improvement. However, to an increasing number of our citizens who have become concerned enough about the vanishing wetlands to seek legis-

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23. HR. 2400, 105<sup>th</sup> Cong. § 502 (1997).

24. *Vermont Yankee Nuclear Power Corp. v. NDRG*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d. 460 (1978).

25. NY. State Tidal Wetlands Act, N.Y. Env'tl. Conserv. Law art. 25 (McKinney's 1984 & 1996 Supp.).

26. 33 U.S.C.A. § 1344.

27. *County of Freeborn v. Bryson*, 243 N.W.2d 316 (1976).

lative relief, a swamp or marsh is a thing of beauty. To one who is willing to risk wet feet to walk through it, a marsh frequently contains a spring soft moss, vegetation of many varieties, and wildlife not normally seen on higher ground. It is quiet and peaceful — the most ancient of cathedrals — antedating the oldest manmade structures. More than that, it acts as nature's sponge, holding heavy moisture to prevent flooding during heavy rainfalls and slowly releasing the moisture and maintaining the water tables during dry cycles. In short, marshes and swamps are something to protect and preserve.

A generation ago, the conservationist Aldo Leopold espoused a 'land ethic' which he described as follows: 'All ethics so far evolved rest upon a single premise: that the individual is a member of a community of interdependent parts. His instincts prompt him to compete for his place in the community, but his ethics prompt him also to co-operate (perhaps in order that there may be a place to compete for). The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land. In short, a land ethic changes the role of homo sapiens from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such.'<sup>28</sup>

On this authority, the Minnesota Supreme Court in 1987 rejected an application to drain a wetland on a farm that had been in the family since 1877, when some of the wetlands were ditched and drained. Upholding the constitutionality of Minnesota's wetlands law, and citing *County of Freeborn* and Leopold, the court held:

We reaffirm our statement there that the state's environmental legislation had given this land ethic the force of law, and imposed on the courts a duty to support the legislative goal of protecting our state's environmental resources. Vanishing wetlands require, even more today than in 1976 when *Bryson* was decided, the protection and

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28. *Id.* at 322.



preservation that environmental legislation was intended to provide.<sup>29</sup>

These illustrations suffice to confirm Darwin's prognosis. There is a further ascent to which human society can aspire and evidence that we are climbing that path. This record suggests that individual attempts to save and rehabilitate and release to the wild individual animals, however laudable as a humanitarian act, are doomed unless we save the "wild." If the habitats that flora and fauna require are also not preserved, or at least maintained in a fashion so that we humans can co-exist with other species (something we can no longer do for the grizzly bear in California and may fail to accomplish with the reintroduction of the California condor), then we shall lose not only the individuals of those species, but the species itself. We cannot long allow the automobile to replace the hunter as the "predator" of deer in the suburbs, without society finding the deer to be a pest and applying a poison; sportsmanship is already gone from this relationship and is replaced by road rage. What does it avail us to try to restore the salmon long extinct from the Rhine while we extinguish it from Washington and British Columbia?

We cannot wait for more education, or in a pollyanish way hope that more of us (in and out of the 105th Congress) will be interested in discovering the community of life and finding an environmental ethic. The Bar has a responsibility here. Lawyers are the architects of the orderly processes of society. Despite the growth of environmental laws, society has still an unsatisfactory, unsustainable, and intellectually barren jurisprudence on "Animals and the Law." We cannot afford to wait for a more refined consensus to emerge about our human relationship to nature. We need to advocate the strengthening of NEPA, the enactment of "Little NEPAs" in Connecticut and New Jersey. Ultimately, we need to do what scores of other nations have done in revising their constitutions, we must amend the U.S. Constitution to provide the rule that Minnesota has accepted. We must rethink our accu-

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29. In the Matter of the Application of Allard Christenson, 417 N.W.2d. 607, 615 (1987).

mulated laws and redesign new legal systems akin to what we know of ecological communities.

So long as *we* primarily defend biodiversity strictly on utilitarian grounds, society will not make the discovery that we on Earth are one interdependent community of life. So long as *we* apply the teachings of the science of ecology to our human projects, to work primarily within the "discipline" of nature, *we* shall not learn that *we* too need to fashion our own systems to reflect our interdependence with animals and other flora and fauna. So long as lawyers are content to leave in full force the legal clutter of past ethical perceptions, *we* shall retard others in making the sort of discovery about the community of life that is today the precedent before the Supreme Court of Minnesota.

Do we not need to open ourselves to the implications of Emerson? When we comprehend nature, is not the impression "so grand" upon our minds that it must be that each one of us, individually, has the capacity to discover the ethics of the community of life? If the deliberations of this Third Annual Conference lead us to fashion the legal systems to help us all make this discovery, to make this climb up Darwin's ascent, then our time will have been well spent.



LISA WEISBERG

“The quality of our environment is fundamental to our concern for the quality of life. It is hereby declared to be the policy of the State of New York to conserve, improve and protect its natural resources and environment . . . in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being. It shall further be the policy of the state to foster, promote, create and maintain conditions under which man and nature can thrive in harmony with each other, and achieve social, economic and technological progress for present and future generations. . . .”<sup>1</sup>

This statement, which is set forth in Article 1 of the New York State Environmental Conservation Law (ECL), in part, comprises the declaration of policy of the state regarding its wildlife, and sets forth the mandate of the Department of Environmental Conservation (DEC). One might think that as stewards of the environment and its inhabitants our responsibility is to preserve all species for their innate value, and to foster a viable and sustainable environment for them and their future generations. This is not entirely the case. As with animal protection laws in general, wildlife protection laws and policy represent a balancing of interests between mankind and the animals.

Many of today’s environmental conservation laws can be traced back to the early 1900s when hunting and trapping went unregulated. These laws are a reflection of mankind’s traditional consumptive management of the species for recreation and commercial purposes or as a means to eradicate those species we have deemed undesirable or a nuisance. This historical balancing of wildlife preservation laws with human use and pursuit of the species, however, is becoming increasingly less a reflection of the majority of modern day

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1. NY. Env'tl. Conserv. Law § 1-0101 (McKinney 1997).

people both in New York and in states across the country. This can be seen through the recent defeat of harmful legislation in New York, last year's approval of progressive ballot initiatives in various states, and the mounting demands on our national parks for recreation and enjoyment. Yet, as we will see, deficiencies in the legislative process combined with the current composition and structure of conservation agencies and their funding base continue to perpetuate a primarily consumptive based wildlife philosophy and programs.

### General Functions, Powers, Duties and Funding of the DEC

Like many other state environmental conservation agencies across the country, New York State's Department of Environmental Conservation is mandated to "provide for the propagation, protection and management of wildlife and the preservation of endangered species. . ."<sup>2</sup> Within the DEC is the Division of Fish, Wildlife and Marine Resources whose specific purpose is "the efficient management of the fish and wildlife resources of the states."<sup>3</sup> In developing and implementing this management directive, the Division is "(a) to promote [the] natural propagation and maintenance of desirable species in ecological balance," (b) observe "sound management practices. . ." and (c) have regard for "the compatibility of production and harvesting of fish and wildlife crops and the importance of fish and wildlife resources for recreational purposes. . ."<sup>4</sup> Of paramount significance in the formulation and implementation of DEC wildlife management policies and programs, is the establishment of the Conservation Fund Advisory Board, formerly the Conservation Fund Advisory Council.<sup>5</sup> As we will see, this advisory board greatly influences how sound management practices are implemented and how recreational purposes are defined.

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2. *Id.* § 3-0301(1)(c).

3. *Id.* § 11-0303(1).

4. *Id.* § 11-0303(2).

5. *See id.* § 11-0327(1).

The Conservation Fund Advisory Board was created by an act of the New York State Legislature in 1994, and was established within the DEC.<sup>6</sup> The board is composed of eleven members, each one a resident of the region he or she is representing.<sup>7</sup> Of particular significance under section 11-0327 of the Environmental Conservation Law is the directive that the board be representative of individual and organized sportsmen's interests in each region of the state.<sup>8</sup> In fact, the law requires that any person designated or appointed to the board "shall have demonstrated a long-standing interest, knowledge and experience in fish and wildlife management including hunting or fishing, as evidenced in part by the holding of a valid New York State hunting, fishing or trapping license" at that time.

Among its duties, the board makes recommendations to state agencies on DEC's "plans, policies and programs affecting fish and wildlife."<sup>9</sup> In particular, it reviews the "allocations and expenditures of the department for fish and wildlife purposes," and makes reports to both the commissioner and the legislature, and to sportsmen regarding its findings on the allocations and expenditures of the conservation fund and the fish and wildlife program.<sup>10</sup> Finally, it works to "encourage both residents and non-residents to hunt, fish and trap in New York."<sup>11</sup>

The source of DEC's funding is another integral component to how policies are formulated and what programs are supported and implemented. In the fiscal years of 1995-96, sportsmen contributed \$43.2 million to support New York State's fish and wildlife program. Of that money, \$34 million was income derived from hunting and trapping licenses. The remaining \$9.7 million consisted of New York's apportionment of Federal Aid in Fish and Wildlife Restoration. These monies represent approximately 75% of the total expendi-

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6. *See id.*

7. *See id.*

8. *Id.*

9. *Id.*

10. *Id.* § 11-0327(3).

11. *Id.* § 11-0327(3)(f).

tures for New York's fish and wildlife program. It is also estimated that several million dollars is generated each year for the state in hunting and trapping activities.

Given the large proportion of license fee monies that comprise the fish and wildlife budget and the tremendous amount of revenues generated to the state from these activities, it should come as no surprise that the majority of New York State's environmental conservation laws addressing wildlife pertain to hunting and trapping as a management tool.

The hunting laws can be found in sections 11-0901 through 11-0931 of Title 9 of the ECL.<sup>12</sup> Generally, they represent a mandate by the legislature authorizing DEC to set in each region of the state the open hunting seasons, the manner of taking, whether by firearm, bow and arrow or muzzleloaders, and the "bag" or take limit per person for each species.<sup>13</sup> The species are categorized by either big game, small game or game birds which includes migratory game birds and upland game birds.<sup>14</sup>

In New York, big game consists of "deer, bear, moose, elk [other than] captively bred and raised North American elk . . . caribou and antelope."<sup>15</sup> Small game is defined as "black, gray and fox squirrels, European [and] varying hares, . . . rabbits, frogs, land turtles, box and wood turtles, and the bog turtle . . . , coyotes, red [and] gray fox except [those captively bred], raccoon, opossum, weasel, skunk, bobcat, lynx, muskrat, mink [other than farm raised], fisher, otter, beaver, sable and marten . . ."<sup>16</sup>

In determining the open seasons and bag limits for each species in each region DEC's overriding objective is the "proper management of that particular species." What does that mean? In order to maintain what is considered a desirable population in ecological balance, as the declaration of policy tells us, consideration is to be given to the compatibility of

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12. *See id.* §§ 11-0901 to 11-0931.

13. *See id.*

14. *See id.*

15. *Id.* § 11-0103(2)(b).

16. *Id.* § 11-0103(3).

production and harvest of wildlife with other land uses, the importance of wildlife for recreational purposes, and public safety. Traditionally, the practice has been to allow the species to overpopulate to justify a hunting season, and at times to expand the open season and allow additional bag limits.

Nowhere has this been more evident than with big game hunting regulations for deer. Historically, preference has been given to the taking of the males for the trophy value of their antlers. Until recently, this left the females thriving and continuing to reproduce. Given the mounting political pressure by both homeowners, whose shrubbery was being consumed by exploding deer populations, and public safety concerns over increasing numbers of vehicular accidents involving deer, special deer licenses recently have been authorized to lower and control the deer population. To adapt to fluctuations in conditions and population levels, every year DEC issues proposed rule makings in the *New York State Register* to which the public has forty-five days to submit comments. It is interesting to note that under the alternatives section of the regulatory impact statement, DEC invariably will state that any deviation from or alternative to its proposed harvesting plan, would "make it more difficult to appropriately manage that species." As we will later see, non-consumptive management programs, like the deer contraceptive program implemented on Fire Island has met with great success; maybe too successful for DEC.

### Recent Legislation

Although some inroads are being made, the majority of recently proposed and enacted legislation generally maintains the traditional philosophy of the consumptive use of wildlife.

Typical legislation in New York State consists of re-authorizing DEC's power to regulate the various species, and to expand the open season and the manner of taking, consistent with the need to maintain the ecological balance. However, in this era of downsizing and streamlined government regulations, we are witnessing the introduction of measures to elim-



Other evidence of state programs to promote and expand hunting and trapping can be seen in recently enacted legislation that allows hunting on Sundays in the Southern tier of New York, the lowered hunting age from fourteen years old to twelve years old, the creation of a new harassment statute for unlawfully interfering with lawful hunting and trapping, and the attempted repeal of the current prohibition on the use of bait or hounds to hunt bear.

### Deficiencies in the Legislative Procedure

To fully understand and appreciate how and why laws pertaining to wildlife are enacted, and why they are not necessarily in the best interest of the species, one must look to the deficiencies in the legislative process. Unlike legislation that may have potential fiscal implications to the state, and must be set forth as such in the justification statement of the bill sponsor's memorandum of support, legislation pertaining to wildlife is not subject to any analysis for its potential environmental impact until after it becomes law. In fact, legislation is specifically exempted under the regulations of the New York State Environmental Quality Review Act, better known as SEQRA.<sup>17</sup> This is just the opposite of proposed actions by agencies outside of DEC whose plan may have a substantial impact on the environment and generally must comply with the requirements of SEQRA prior to such program going forward. Legislation affecting wildlife is not reviewed pursuant to SEQRA until it becomes law and DEC is mandated to promulgate regulations to implement it. However, the newly enacted environmental conservation law which directly affects a species, may have just as much, if not more, of an impact on the species' population and survival as a proposed action by the Department of Transportation (DOT).

An example of this can be seen with legislation introduced in 1992 that has greatly expanded bear hunting in New York State. The 1992 bill would have repealed the prohibition on the use of bait and hounds to hunt bear and the

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17. State Environmental Quality Review Act, N.Y. Envtl. Conserv. Law §§ 8-0101-0117 (McKinney 1997).

taking of cubs less than one year old, and it would have allowed the issuance of unlimited permits to hunt bear and permit the trade in bear parts. Although the bill was amended and passed in 1993 without the provision strictly allowing for baiting and hounding and the taking of cubs that appear under one year of age, as enacted it directed DEC to "fix by regulation the possession and disposition of bear parts, the intentional and incidental feeding of bear, and the manner of taking bear."<sup>18</sup> Based on this broad mandate, DEC promulgated regulations that now allow the sale of bear parts with little oversight by DEC, the training of dogs to track bear, and the tracking of nuisance bear by dogs. Although, technically, the dogs are not allowed to tree a bear for a hunter to shoot, also known as "hound hunting," in practice there is a very little difference on the effect trained tracking dogs will have on the bear.

Upon issuing its proposed regulation, DEC cited its compliance with SEQRA pursuant to its generic environmental impact statement entitled "Wildlife Game Species Management Program." This generic impact statement, which was issued back in 1980, was based on studies conducted in the late 1970s. To my knowledge it has not been updated, although under section 3-0303 of the ECL, DEC is required to periodically revise a "statewide environmental plan for the management and protection of the quality of the environment and the natural resources of the state and its habitat."<sup>19</sup> Certainly, the populations of species and their habitat have changed since then. One cannot help but question the basis upon which DEC can rely on this report to justify implementing any management program, such as the expanded bear hunting program, that will have such a substantial impact on the species.

### Promising Legislative Efforts and Reforms

Legislation to preserve the species and foster the non-consumptive enjoyment of wildlife is certainly in abundance

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18. N.Y. Evtl. Conserv. Law § 11-0903 (McKinney Supp. 1997).

19. *See id.* § 3-0303

on both the state and federal levels, and receives widespread public support. Recent examples of this in Congress are the "Captive Exotic Animal Protection Act,"<sup>20</sup> which would prohibit the interstate or foreign commerce in tame, exotic mammals for the purpose of killing or injuring the animal for entertainment or the collection of a trophy, also known as "canned hunts," and the "Bear Protection Act,"<sup>21</sup> which would ban all interstate and foreign commerce in these traps and in the furs from animals caught in them. Comparable measures are pending in the New York State Legislature and state legislatures across the country.

Many of these bills are strongly supported by the public, yet either fail to pass both houses to become law, or become so watered down as to be of questionable effectiveness. Unfortunately, this is a testament to the clout of the still powerful and financially resourceful hunting and trapping lobby, and the conservation agencies that are greatly influenced by them. It is because of these political impediments that ensue during the legislative process, that citizen initiatives have been launched recently in many states, and with great success. In bypassing the legislative process, issues affecting wildlife are presented directly to the people to decide, and the people have spoken loud and clear. Last year in Massachusetts sixty four percent of the people voted to prohibit bear baiting and hound hunting, and to ban the leghold trap. Fifty two percent of the people in Arizona took the lead in 1994 to ban trapping on public lands. Colorado followed by a fifty two percent margin with a similar ban in 1996 by amending its state constitution. The people of Oregon, also in 1994, widely supported Measure 18 that banned bear baiting and hounding, and despite subsequent attempts by the hunting lobby, Oregonians defended the ban by defeating a 1996 measure to overturn it. Again in 1996, Washington State, through its initiative, prohibited the use of baiting and hounding to hunt bear, bobcat and cougar. Finally, California celebrated two victories, that would not have been possible to achieve

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20. H.R. 1202, 105th Cong. (1996).

21. H.R. 618, 105th Cong. (1996).

through the legislative process, by prohibiting in 1990 the trophy hunting of mountain lions, and again preserving this ban last year, by defeating Proposition 197.

Unfortunately, the initiative process is primarily restricted to western states. However, it is a tool that clearly allows for the establishment of wildlife policies and practices, which accurately reflects the majority of the people in those states. Although the initiative process is not available in New York State, it is important to note that less than one percent of New York State residents are licensed hunters and trappers. Consistent with this figure, the majority of New Yorkers support many beneficial conservation projects through the Return a Gift to Wildlife program. This program, which is funded with hundreds of thousands of state income tax return dollars, makes possible projects, such as the New York Heritage program which collects and provides information on rare and endangered species to protect the state's biological diversity, the Marine Mammal and Sea Turtle Stranding Network, which helps save and rehabilitate injured or stressed whales, seals, dolphins, and sea turtles, the Long Island Endangered Species Management project and others.

Further evidence of the tremendous public support by a majority of the American people for the non-consumptive enjoyment of wildlife and our natural resources, can be seen in the increasing numbers of visitors to our state and national parks, and their willingness to pay user fees to maintain them. For example, in 1996, the Forest Service recorded 829 million visits to 191 million acres run by the agency. This represents an all time high. The Forest Service expects to take in thirteen million dollars in user fees by the end of this year. According to Interior Secretary Bruce Babbitt, "Overall, the whole (user fee) experiment is a home run. It has exceeded our best expectations."<sup>22</sup>

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22. Timothy Egan, *Adapting to Fees for Enjoying Public Lands*, N.Y. TIMES, Aug. 21, 1997, at A1.

### Conclusion

Vehicles, like the Return a Gift to Wildlife, ballot initiatives and user fees, are just some of the ways to establish and promote wildlife policies and programs that reflect the majority vote on these issues. Certainly, they and others like them, can, and should be developed and enhanced. However, if we are to continue in this direction and prevent destructive wildlife measures from continuing to be pursued, it is imperative that fundamental changes be made in both the way laws are enacted and policies formulated.

To this end, the funding basis for state and federal programs must change. Rather than be predominantly funded by hunting and trapping licenses, user fees and other non-consumptive generating revenue needs to be developed. In conjunction with this, and partly because of it, more representation by environmental and wildlife advocates in state agencies like DEC, and on conservation advisory boards, like the Conservation Fund Advisory Board, must occur.

The introduction of natural predators back into the state will also vitiate DEC's argument justifying the need for hunting to keep wildlife populations in proper ecological balance. You will undoubtedly hear more about this today with the proposed re-introduction of the wolf.

Finally, procedural changes must be implemented in how legislation affecting wildlife and habitat are considered in the legislature. In this regard, this committee has drafted legislation, which we hope to have introduced in Albany during the 1998 session, which would establish an office of the Wildlife Advocate. Through the Wildlife Advocate, pertinent legislation will contain a preliminary assessment of how it could affect the targeted species, their population, habitat, and the overall ecological balance. In this way, our legislators who presumably represent the interests of their constituents can make informed, sensible decisions. It is through these innovative measures and initiatives that we can see a more humane and respectful preservation of our wildlife and the environment, which has been entrusted to us.