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Legal rights and natural objects.

Karen, Warren
University of Massachusetts Amherst

LEGAL RIGHTS AND NATURAL OBJECTS

A Dissertation Presented

By

Karen Joyce Warren

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By

KAREN JOYCE WARREN

Approved as to style and content by:

Robert Paul Wolff

Robert Paul Wolff, Chairman of Committee

Robert John Ackermann, Member

(for Malcolm B.E. Smith)

Malcolm B. E. Smith, Member

Lester Mazor, Member

Robert C. Sleigh, Department Head
Department of Philosophy

To

my mother

and

Steve

ABSTRACT

Legal Rights and Natural Objects

September 1978

Karen Joyce Warren, B.A., University of Minnesota

M.A., University of Massachusetts

Ph.D., University of Massachusetts

Directed by: Professor Robert Paul Wolff

The main thesis of this dissertation is that it is compatible with American legal theory on legal rights and legal right-holders to ascribe legal rights to non-human, non-human made "natural objects" such as forests, rivers, and seals, thesis (T). The defense of (T) involves two basic moves. One move is to defend (T) against objections which are based on the historical positions in American legal theory on what a legal right is and on who or what can have legal rights. The other move is to defend (T) against objections which do not presuppose any particular historical position. Taken together, these two moves establish that it is neither absurd nor unreasonable to construe natural objects as legal right-holders.

The development of the argument for (T) by chapters is as follows. In Chapter I thesis (T) is stated and the two-move strategy for defending (T) is outlined. In

Chapter II various concerns which motivate the move to give natural objects legal rights are discussed. This discussion shows how the issue "rights for natural objects" arises and sets the stage for the main argument that natural objects could be legal right-holders.

The notions of a legal person and a legal representative are discussed in Chapter III. This discussion furnishes the basis for the argument, made repeatedly throughout the dissertation, that theorists cannot hold the positions they do and feel they must hold regarding the doctrines of legal personality and legal representation and deny the possibility of ascribing legal rights to natural objects.

In Chapter IV the notion of a legal fiction is examined. It is argued that it is consistent with accepted legal theory on the nature, purposes and justification for proper use of a legal fiction to suppose that the notion of environmental personality is, or involves, a legal fiction. Thus, even if ascription of legal rights to natural objects is, or involves, a legal fiction, the argument for (T) is not damaged by it.

The various positions in American legal theory on legal rights and legal right-holders are discussed in Chapters V and VI. In particular, eight historical

positions are identified. They are referred to as two "strictly natural law positions" (The Moral Sense and Moral Validation Positions) and six "non-strictly natural law positions" (the Interest, Power, Claim, Rules, Prediction and Correlativity Positions).

It is argued in Chapters VII and VIII that none of the eight historical positions on legal rights and legal right-holders poses a successful objection to (T). Furthermore, at least the favored Claim and Rules Positions provide suggestions of specific legal rights natural objects might be said to have.

In Chapter IX remaining objections are stated and defeated. These include objections which call into question the significance of establishing (T), rather than the truth of (T). The case for (T) then is reviewed and brought together in the Conclusion, Chapter X.

The defense of (T) provided may not dispel doubts one might have about the desirability of giving natural objects legal rights, since no attempt is made in the dissertation to show that natural objects should have legal rights. But it should dispel doubts one might have about the possibility of ascribing legal rights to them. It establishes that natural objects could be legal right-holders.

T A B L E O F C O N T E N T S

C H A P T E R I

THE PROGRAMME OF THE DISSERTATION

Introduction

That there is an "environmental problem" is clear. That action needs to be taken to combat the problem also is clear. What is not so clear is the appropriate nature and direction of remedies to the problem. What is disputed, then, is how to solve the problem.

Many remedies have been proposed. Despite differences between them, all point to the need for supportive legal principles to handle environmental policy. A search for relevant legal mechanisms is underway. One noteworthy feature of that search is that the various legal maneuvers suggested or used construe the central question "Who has, or should have, which legal rights as environmental plaintiffs?" as a question about humans and their legal rights. This is natural and to be expected. After all, basically legal systems are designed to safeguard human interests and to adjudicate cases and controversies between individuals assumed "equal before the law." Legal relations (e.g., legal rights, duties, powers and privileges) are construed as relations which hold between persons. The familiar view is that ultimately

humans are the bearers of legal rights and legal duties. Thus, a search for legal mechanisms to protect the natural environment suggests the plausible move of expanding or redefining the legal rights of humans in environmental cases.

That move may be very helpful. But there is another possible move, one which represents a significant departure from current environmental law. *It is to construe the natural objects themselves--forests, rivers, wildlife, etc.--or the natural environment as a whole, as having legal rights.* This unusual but promising tack has been proposed by Christopher Stone in his provocative essay, Should Trees Have Standing? Towards Legal rights for Natural Objects.[1] Stone's thesis is not simply that the law of standing ought to be liberalized to include natural objects as entities having legal standing. He argues that natural objects themselves should have legal rights.

Stone's proposal suggests an innovative legal means for handling environmental litigation, an alternative to means currently in use. Yet he claims that the move to give natural objects legal rights is supported by conventional legal scholarship. He argues that the history of American law provides many examples of entities or classes of entities who/which once had no legal rights yet now are

genuine legal right-holders. They are entities or classes of entities to which the law has attributed legal personality.

The attribution of legal personality to an entity is an important juristic device for extending legal rights to hitherto legally rightless entities. Stone argues that the law ought to recognize natural objects as legal persons, just as it has recognized as legal persons many other non-human entities, e.g., corporations, ships and trusts.

A move to ascribe legal rights to natural objects is a serious move. It is a move away from construing humans only as legal right-holders where environmental matters are concerned. It is motivated by many different kinds of concerns--legal, political, economic, religious, philosophical. Obviously any thorough defense or rebuttal of Stone's thesis that natural objects *should* have legal rights must address these various concerns. But if Stone's thesis is to be taken seriously at all, it also must be shown that natural objects *could* be said to have legal rights within the American legal framework.

To date no one has done that; no one has shown that ascription of legal rights to natural objects is compatible with the positions in American legal theory on legal rights and legal right-holders. I intend to provide

such an argument in this dissertation. I will show that, given the prima facie exhaustive positions in American legal theory on legal rights and legal right-holders, natural objects could be legal right-holders. By showing that familiar legal concepts can be fitted to handle the striking case of natural objects, the argument offered here shows that a conceptual basis for giving natural objects legal rights is available within the American legal framework. In addition, the argument provided defeats a whole set of reasonable objections to the move to confer legal rights on natural objects--objections based on theories of what a legal right is and on who or what meaningfully can be said to have legal rights. As such, the argument of this dissertation sets the stage for any argument designed to establish Stone's thesis that natural objects should have legal rights.

The Main Thesis of the Dissertation

The main thesis of this dissertation is that it is compatible with American legal theory on legal rights to ascribe legal rights to non-human, non-human made "natural objects" such as seals, forests, streams and mountains,[2] thesis (T):

> (T) Ascription of legal rights to natural objects is compatible with American legal theory on legal rights and legal right-holders.

(T) is a thesis about the possibility of ascribing legal rights within a particular legal system to a new class of entities. It must be distinguished from another intuitively related thesis, thesis (S):

(S) Natural objects should have legal rights.

The distinction between the main thesis of the dissertation, (T), and thesis (S) is important to the argument of this dissertation. The claim at (S) is that ascription of legal rights to natural objects is desirable or justified and ought to be implemented. The claim at (T) is that ascription of legal rights to natural objects is possible, given a particular legal framework. The truth and defense of (T), then, is independent of both the truth and defense of (S). As such, the defense of (T) provided in this dissertation does not include arguments for (S).

Appeal to the distinction between theses (T) and (S) points to the basic difference between the account provided here and the account provided by Christopher Stone in Should Trees Have Standing? Stone's book attempts to establish that natural objects should have legal rights, thesis (S). This dissertation attempts to establish that natural objects could have legal rights, thesis (T). This basic difference is manifested in several significant ways. First, the thrust of Stone's book, quite unlike the thrust of this dissertation, is to

discuss concerns which warrant or justify the conferral of legal rights on natural objects. Here, concerns underlying the move to give natural objects legal rights are discussed just insofar as they do or might motivate, rather than justify, that move. Second, the account provided here includes a detailed, systematic analysis of the notions of a legal right and a legal right-holder, and of the attendant notions of a legal duty, legal person and legal fiction; this is necessary for a defense of (T). Stone's account does not attempt any such analysis; a defense of (S) does not require it.[3] Third, after cataloging and discussing the various positions in American legal theory on legal rights and legal right-holders, the reasonable basic kinds of objections to (T) based on each position are stated and defeated in the account provided here. In addition, several kinds of objections which call into question the significance of establishing (T) are stated and defeated. Accordingly, the survey of basic kinds of objections to (T) provided here is taken to be exhaustive.[4] In Stone's account, where objections are considered, they are, for the most part, objections to (S) only.[5] Furthermore, Stone's treatment of them is not, and is not intended to be, exhaustive of the kinds of objections which might be raised against (S).

These three specific differences between the account provided here and Stone's account underscore the basic difference between the two accounts, viz, that Stone's book is a defense of thesis (S), whereas this dissertation is a defense of thesis (T). Nonetheless, by establishing (T), this dissertation shows that it is possible to speak meaningfully of non-human, natural objects as legal right-holders. In effect, then, it removes a host of objections to arguments in favor of Stone's thesis, (S).

The Organization of the Dissertation

The defense of (T) provided in this dissertation involves two basic moves. One move is to defend (T) against objections to it which are based on the various historical positions in American legal theory on legal rights and legal right-holders. The other is to defend (T) against objections which do not presuppose any of the historical positions. These are objections which could be advanced by theorists of any of the historical positions. Thus, the first and second moves are aimed at defeating the following two sorts of objections to (T), respectively: "Legal rights are claims. But natural objects cannot make claims. Thus, natural objects cannot

have legal rights." "Legal rights are ascribable to moral persons only. Since natural objects are not moral persons, natural objects cannot have legal rights."

The chapter organization of the dissertation roughly is as follows. The programme of the dissertation is explained in Chapter I. In Chapter II, the various concerns which motivate the move to give natural objects legal rights are discussed. This discussion explains how the issue "rights for natural objects" arises. In Chapters III through VI, material necessary to the defense of (T) against plausible objections to it is laid out. In Chapters VII and VIII, the basic kinds of objections to (T) based on the various historical positions in American legal theory on legal rights and legal right-holders are stated and defeated. Other objections are stated in Chapter IX. The argument for (T) is reviewed and brought together in the Conclusion, Chapter X.

The two-move strategy for defending (T) provided in this dissertation may not dispel doubts one might have about the desirability of, or justification for, giving legal rights to natural objects, since it does not attempt to show that one should give natural objects legal rights. But it should dispel any reservations one might have about the possibility or meaningfulness of ascribing legal rights

to them within the American legal framework. Thus, the defense of (T) should show that the position taken by philosopher John Passmore in Man's Responsibility for Nature is untenable:

> The supposition that anything but a human being has 'rights' is, or so I have suggested, quite untenable.[6]

It also should establish that the views of legal theorists Hearn, Korkunov and Corbin, respectively, are incorrect:

> ...it is to men and not to things, whether animate or inanimate, that duties and rights exclusively belong.[7]

> It is, as we have seen, only men who can be subjects to legal relations.[8]

> All jural relations are between persons, either as individual or in groups. "Things" do not have rights, and there is no "legal relation" between a person and a thing.[9]

By showing that it is neither absurd nor impossible to give natural objects legal rights, this dissertation renders unfounded any view which assumes otherwise.

C H A P T E R I I

WHY GIVE NATURAL OBJECTS LEGAL RIGHTS?

Introduction

This dissertation is a defense of thesis (T) only. It is not an attempt to show that one should give natural objects legal rights, thesis (S). Nonetheless, a brief consideration of concerns which motivate the move to give natural objects legal rights not only points to the significance of establishing (T); it also neatly puts into focus how the issue "rights for natural objects" arises.

Moves to secure legal support for environmental policy fall into two groups. One move involves giving natural objects legal rights. I refer to it as "the natural object move" or, simply, NOM. The other move does not involve giving natural objects legal rights. I refer to it as "a non-natural object move" or, simply, NONOM.

In this chapter I discuss those concerns which have motivated or might motivate the natural object move, NOM. Although many of these concerns also have motivated or might motivate the alternative move, NONOM, no attention is given to that move. Furthermore, no attempt is made to discern whether any of the concerns motivating NOM

provides compelling grounds for granting natural objects legal rights. As such, none of the arguments offered in favor of NOM are assessed. The point of the discussion simply is to outline the different sorts of answers theorists do or might give to the question "Why give natural objects legal rights?" and thereby to furnish an effective backdrop for the main argument of the dissertation, viz., a defense of (T).

Concerns motivating NOM. Many concerns have motivated NOM--prudential, economic, social (including psychological, recreational and aesthetic concerns), religious, moral, philosophical and legal concerns. Roughly, the prudential and economic concerns focus on pollution and resource depletion, the most visible target of environmental policy. The others focus on broader issues, such as the desirability of abandoning anthropocentric attitudes toward the natural environment and the need for increased understanding of biospherical relationships.

Prudential concerns. Prudential concerns implore us to provide legal protection of the natural environment so that future generations will have adequate resources and natural areas for consumption. They call for "species self-restraint" in resource allocation and use by appealing

to our self-interest, to "what's in it for us." In his defense of NOM, Christopher Stone argues that

> ...the strongest case can be made from the perspective of human advantage for conferring rights on the environment.[1]

Thus, the concern that there be adequate protection of natural objects now in order to guarantee their availability and usefulness for future generations underlies NOM.

Economic concerns. Economic concerns are linked closely to prudential concerns. Nearly all theorists agree that legal regulation of resource use is necessary to ensure future commodity production. Some argue that legal means are necessary to help remedy important defects in the allocation and valuation mechanisms of the market. For example, it is argued that where pollution is an "external diseconomy," i.e., a cost not included in an industry's production costs and presently borne by individuals or groups in addition to those generating the pollution, legal constraints on pollution activity are needed to guarantee cost-internalization by producers. Where non-economic or "social" costs (e.g., injury to health imposed on individuals by pollution activity) are incurred, legal devices are needed to guarantee that these costs are weighed in the balancing of interests between the injury ("cost") to individual plaintiffs and the

social utility ("benefit") of the production activity.

Such economic concerns have motivated NOM. Defenders of NOM argue that costs to natural objects themselves, and not merely costs to humans, should be included in interest balancing and in damage calculations. The rationale is that natural objects themselves are injured by pollution and resource use activities. By making natural objects legal right-holders, one provides a legal means for natural objects to seek legal remedies for damages to them, for injury to natural objects to be taken into account in granting relief, and for the relief awarded to benefit the natural objects directly. As we shall see, these three legal-operational advantages of awarding natural objects legal rights are the cornerstone of Stone's argument that natural objects should have legal rights.

Social concerns. Various social concerns--interrelated psychological, recreational and aesthetic concerns--also have motivated NOM. Psychological concerns focus on the untoward effects of unchecked environmental degredation on humans. One view advanced is that the presence of untamed nature is essential for our emotional well-being.[2] Sidney Wolinsky argues that a justification for NOM might be based on the psychological concern that

"the world of nature may serve as an antidote to our culture's most prevalent problem--alienation."[3]

One might frame other psychological concerns in support of NOM along lines suggested by Kant and Bentham. Kant argues that since cruelty to animals may induce in us a callousness toward human suffering, we have a duty not to be cruel to animals.[4] Bentham argues against cruelty to animals on the grounds that animals are capable of suffering.[5] Suppose it is desirable to discourage callousness toward the suffering of animals by imposing legal sanctions for cruelty to animals. One might argue that the conferral of legal rights on at least some natural objects (e.g., animals) is one effective way of checking such abuse legally.

Many theorists have argued that humans need places to walk, hike, canoe, fish, picnic and the like. These social concerns underlie J. S. Mill's argument against unlimited increase of population and wealth. In his Principles of Political Economy Mill argues that humans need, and ought to have, places of solitude in "the presence and grandeur of natural beauty."[6] The need for, and desirability of preserving such places constitute part of Mill's argument against unchecked population expansion and economic growth.

Mill's concern is shared by contemporary theorists who argue that the worth of natural objects as invaluable sources of inspiration and as irreplacable aesthetic wonders provides a reason for implementing NOM. For instance, in his dissenting opinion in Sierra Club v. Morton, Justice Douglas cites the need to protect "all the aesthetic wonders of this beautiful land" from "the bull-dozers of progress" as a reason for supporting NOM.[7]

Religious concerns. Several theorists base their support of NOM on religious concerns. Some appeal to the attitude that "nature is sacred" in their arguments for making certain kinds of behavior toward natural objects subject to legal, as well as moral, sanction. Some call for "a new religion," "a new ethic," "a land ethic," an ethic to replace the anthropocentric attitude that humans have full rein to exploit nature's bounty at will, in their support of NOM. For example, Christopher Stone argues that by giving natural objects legal rights a change in the view that nature exists only for humans might be accomplished.[8]

Ecosophic concerns. Arne Naess describes an "ecosophy" as a "philosophy of ecological harmony and equilibrium."[9] Borrowing Naess's terminology, ecosophic concerns are at the heart of the rationale for the National Environmental Policy Act of 1969:

> The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[10]

The function of the Council on Environmental Quality is to guarantee that "presently unquantified environmental amenities and values may be given appropriate consideration in decision making."

Similar ecosophic concerns have led several theorists to urge giving natural objects themselves the legal rights to seek their own protection. For example, in Sierra Club v. Morton, Justice Douglas cites the need to "protect nature's ecological equilibrium" and to ensure that all forms of life and all the values of an ecological group are represented in environmental cases as reasons why "environmental issues should be tendered by the inanimate object itself."[11] Justice Douglas goes on to suggest two other ecosophic concerns motivating NOM: the need to prevent the destruction of species we know nothing about, and the need to increase our scientific understanding of the natural environment. His illustration of the importance of these ecosophic concerns to NOM is engaging:

> A teaspoonful of living earth contains 5 million bacteria, 20 million fungi, one million protozoa, and 200,000 algae. No living human can predict what vital miracles may be locked in this dab of life, this stupendous reservoir of genetic materials that have evolved continuously since the dawn of the earth. For example, molds have existed on the earth for about 2 billion years. But only in this century did we unlock the secret of the penicillins, tetracyclines, and other antibiotics from the lowly molds, and thus fashion the most powerful and effective medicines ever discovered by man...When a species is gone, it is gone forever. Nature's genetic chain, billions of years in the making, is broken for all time.[12]

Moral and philosophical concerns. Moral and philosophical concerns surface in connection with other concerns motivating NOM. For example, underlying certain prudential and economic concerns is the assumption that present generations have a "duty to prosperity" to conserve natural resources. Bentham's injunction against cruelty to animals rests on the assumption that it is wrong to inflict unnecessary pain on beings capable of suffering. Mill's argument against unlimited increase in population and wealth is grounded in his famous "greatest happiness principle." Some religious concerns are based on the view that humans ought to revere all forms of life, and some ecosophic concerns are based on the view that it is wrong to destroy species. Arne Naess makes explicit this link of ecosophic concerns to normative principles when he states,

> To the ecological field-worker, the equal right to live and blossom is an intuitively clear and obvious value axiom. Its restriction to humans is an anthropocentrism with detrimental effects upon the quality of humans themselves.[13]

However, sometimes NOM is endorsed outright by appeal to moral and philosophical principles. For example, so-called "principles of diversity" (e.g., the principle that it is better to maintain a multiplicity of life forms than not) have been invoked to show that, e.g., a species ought not be destroyed and that the moral and legal onus always is, or should be, on humans who destroy to justify their actions. Clarence Morris appeals to such principles to show that a presumption in favor of the natural, akin to the presumption of innocence in criminal law, provides a reason for supposing that natural objects should have legal rights.[14]

Despite differences between the various moral and philosophical concerns motivating NOM, a concern which underlies each of them is that

> There would have to be something a bit wrong with a legal system freely given over to questions like whether the shirts really were burned at the laundry but which refuses to allow a judge to determine whether the society's most precious assets can be destroyed forever.[15]

Supporters of NOM argue that giving natural objects legal rights is one way to insure their protection.

Legal concerns. The most complete account of why natural objects should have legal rights is given by Christopher Stone in Should Trees Have Standing? Stone identifies three specific legal-operational advantages which legal right-holders have and natural objects, as non-legal right-holders, lack:

> They are, first, that the thing can institute legal actions at its behest; second, that in determining the granting of legal relief, the courts must take injury to it into account; and, third, that relief must run to the benefit of it.[16]

According to Stone, all three advantages

> ...go towards making a thing count jurally--to have a legally recognized worth and dignity in its own right, and not merely to serve as a means to benefit "us" (whoever the contemporary group of right-holders may be).[17]

Stone's illustration compares a society, S_1, in which a master can collect reduced chattel damages from someone who has beaten his slave, with a society, S_2, in which the slave can institute the proceedings himself, for his own recovery. Stone argues that though neither society leaves wholly unprotected the slave's interests in not being beaten, the slave has these three operationally significant advantages in S_2 that it lacks in S_1.

According to Stone, to say natural objects do not, but ought to, have legal rights is to emphasize these three legal-operational advantages which natural objects

lack but ought to have. Since in large part Stone's argument for NOM turns on his discussion of these three advantages, a few remarks on each are appropriate.

The advantage of allowing natural objects to initiate legal actions on their own behalf involves giving natural objects legal standing. 'Legal standing' refers to a plaintiff's capacity to maintain legal action in a particular instance. Usually "standing to sue" refers to the capacity to sue where more than the plaintiff's own interest is involved. Parties having legal standing may invoke the judicial process to initiate suits, or to seek review on the correctness of an official action, an agency decision, or a court ruling.

A move to give natural objects legal standing has certain legal advantages over moves to liberalize present laws of standing which do not involve giving natural objects any legal capacities as plaintiffs. First, it provides a basis for saying that they have certain legal rights, e.g., the rights to initiate suits, to seek redress in their own behalf, to seek review of a court ruling. Second, it provides a mechanism for ensuring that natural objects receive certain benefits, e.g., legal awards in injunctive settlements. Third, it provides a legal means for challenging environmental activity which

does not require showing "injury in fact" to human interests, economic or otherwise.

The last point deserves elaboration. There are three customary criteria for standing: the existence of a genuine dispute, the assurance of adversariness, and a conviction that the party whose standing is challenged will adequately represent the interests he/she asserts.[18] However, often it has not been clear in environmental litigation what conditions must be met for an environmental plaintiff to have standing. At one time the invasion of a "legally protected interest" was required.[19] But, in the important Data Processing Case (1970), the Supreme Court rejected the legal interest test and declared a new, two-part test for standing: the plaintiff must assert that "the challenged action caused him injury in fact, economic or otherwise," and that "the interest sought to be protected...[is] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[20] The Data Processing case expanded the notion of "interests" to endorse non-economic interests--aesthetic, recreational and conservational interests--as a sufficient basis for injury. In Sierra Club v. Morton (1972), the Supreme Court upheld that non-economic interests could be the basis for requisite injury, but it warned that "injury in fact"

requires that the party seeking relief has suffered an injury. Since the Sierra Club had not alleged that it or its members had been injured personally, the court ruled that the Club did not have standing. Like Justice Douglas, Justice Blackman argued in his dissenting opinion that the traditional concept of standing ought to be expanded to enable an organization like the Sierra Club to litigate environmental issues.[21] Both suggest that the customary three criteria of standing ought to be expanded to include the fourth condition that the litigant be one who speaks knowingly for the environmental values he asserts.[22]

The denial of standing has been a serious obstacle to environmental plaintiffs seeking court relief. Some theorists suggest that by giving natural objects themselves legal standing, a route is provided for bypassing the often circuitous, cumbersome task of establishing "injury in fact" to humans when the real issue at hand is some injury to some natural objects.

The second legal advantage right-holders have that non-right-holders lack is that recognition of injuries to them are taken into account in adjudicating the merits of a controversy. In environmental cases, typically only injuries to identifiable humans are considered and balanced. What is not included is any damage or "cost" to

natural objects themselves. By making natural objects legal right-holders, costs to natural objects would be included in damage calculations. Stone argues that one way to measure damage to natural objects is to calculate the "costs of making the natural object whole." He writes,

> The costs of making a forest whole, for example, would include the costs of reseeding, repairing watersheds, restocking wildlife--the sorts of costs a Forest Service undergoes after a fire. Making a polluted stream whole would include the costs of restocking with fish, water-fowl, and other animal and vegetable life, dredging, washing out impurities, establishing natural and/or artificial aerating agents, and so forth.[23]

If "costs" or damages to natural objects are recognized, then injury to them could be balance in granting legal relief.

The third legal advantage right-holders have is that they are the beneficiaries of favorable judgments. In the present system, if a plaintiff repairian wins a damage suit for water pollution, cash benefits go to the repairian. The decision whether or not to use the relief to "clean up" the water is a matter left to the repairian. In a legal system in which natural objects had legal rights and were beneficiaries of favorable judgments, cash awards would go to them, to repair damages to them or to otherwise "benefit" them.

Underlying Stone's argument in favor of NOM is the view that it simply is not the whole picture to construe environmental problems as problems of human needs and preferences only, and to construe environmental costs and benefits as costs and benefits to humans only. In a legal system which implemented NOM, one must address the questions "What is the cost to the environment itself?" "What damages to it must be balanced?"

An altogether different legal concern motivating NOM is that it is conceivable that environmental cases could arise which properly are construed as involving only natural objects, i.e., where no human activity, interest or injury is involved, at least in any direct or legally significant way. In such cases, the appropriate description of the legal situation would be that it concerns a case and controversy between natural objects. Were the legal machinery available for doing so, legal action could be brought by one natural object against another.

For example, suppose that in some isolated place, unoccupied by humans, an animal species A is threatened with extinction because of the overpopulated presence of animal species B, A's natural predator. Where previously there had been a natural balance between them, there no longer is one. Perhaps the present imbalance resulted from prior human activity. Hunters may have killed a

significant portion of the population of A though not of B. In addition, suppose that there is no "injury in fact" to any humans by the threatened existence of species A, except perhaps the "remote" injury to humans incurred by the possible extinction of the species. In the present system, it is unlikely that favorable judgments for animals of species A would be forthcoming. One reason for this is that present court practice is to discourage environmental litigation by parties only remotely injured, by disallowing proof of damages to those parties. Parties must show "proximate cause."[24] In our example, any humans who brought suit as environmental plaintiffs would be likely to fail this "proximate cause" test. It is an example of a case where a "judgment of remoteness" is likely.

The legal situation would be quite different if the animals of species A had some legal rights against the animals of species B. The legal representatives of animal of species A could initiate court action on their behalf against the animals of species B. To borrow Justice Douglas's phrase, they could "sue for their own preservation." A favorable legal judgment in an injunctive settlement could provide sufficient funds and human energy to safeguard their survival.

This example raises many difficult issues. Who

are the legal representatives of the species? Is each species to have a single representative, or is a single agency to stand for all? Nonetheless, if plausible, it illustrates that legal situations could arise where the relevant environmental problem is, and correctly is construed as being, between natural objects. The concern that a legal means be available to handle such cases might motivate NOM.

Another legal concern motivating NOM is that giving natural objects legal rights could speed up the process of preserving or protecting those objects. Suppose an industry's activity threatens to pollute a river. By giving natural objects legal rights, legal representatives of the natural objects could bring suit against the industry based on considerations of actual or potential injury to the river itself. This could be done in the absence of any regulation enjoining such activity or of any evidence of possible injury in fact to any humans. Although administrative or legislative enactment might eventually forestall such activity, ascription of legal rights to natural objects could hasten the process.

Much is at stake by granting or refusing to grant legal rights to natural objects. By conferring legal rights on natural objects one plugs into a whole system of rights which can be much more powerful and efficacious

than anything which might be warranted by policy considerations alone. For example, if a river has a right to seek redress for damages to it caused by the presence of toxic pollutants, then persons and institutions (industries, agencies, courts, governments) may be required to spend much time, energy and money to secure that right, e.g., by cleaning up the river, constructing treatment facilities to handle waste, or restocking the river with fish. Mere considerations of social policy or of human interest may justify only limited preventive measures.

Summary

Many concerns motivating NOM have been offered. Each provides an explanation of how the issue "rights for natural objects" arises and a reason why theorists have or might argue for awarding legal rights to non-humans, natural objects. No attempt has been made to assess these reasons or to identify the disadvantages of giving natural objects legal rights. Thus, the question whether one should give natural objects legal rights, has been left open.

C H A P T E R I I I

LEGAL PERSONS AND LEGAL REPRESENTATIVES

Introduction

The argument of this dissertation is that ascription of legal rights to natural objects is compatible with American legal theory on legal rights, thesis (T). To establish (T) one must show that none of the *prima facie* exhaustive positions on legal rights within the American legal framework raises a successful objection to (T). Although the positions on legal rights and legal right-holders differ greatly, in many cases my argument in defense of (T) makes essentially the same move. It is that theorists cannot hold the positions they do and feel they must hold regarding legal persons and legal representatives and deny the possibility of ascribing legal rights to natural objects. This move is straightforward. However, in the context of law and in the case of natural objects, it involves coming to terms with some knotty concepts, principles and arguments. It requires considering in detail each position on legal rights and legal right-holders, and defeating a whole set of objections to (T) based on them. Nonetheless, the purpose of chiseling away

at the different positions is always the same, namely, to show that attempts to exclude natural objects as possible legal right-holders fail.

In this chapter I discuss the notions of a legal person and a legal representative. I argue that there is a reasonable, prima facie case for describing natural objects as legal persons whose legal affairs could be conducted by legal representatives. In the next chapter, I discuss the notion of a legal fiction. I argue that no noxious legal fiction is involved in describing natural objects as legal persons. The arguments of these two chapters lay the groundwork for arguments in succeeding chapters that attempts to exclude natural objects as legal right-holders are unsuccessful.

The Notion of a Legal Person

Traditional legal theory assumes that legal rights and duties are ascribed to persons. But not all humans always have been recognized by law as legal right-holders. At different times women, racial minorities, children and mentally incompetent persons have not been. Furthermore, often entities other than individual humans have been recognized as legal right-holders, e.g., corporations. nation-states, churches, funds, trusts, idols. What, then,

is the legally relevant notion of a person according to which all legal right-holders are "persons"?

What is a legal person? In law and in legal theory, a distinction is made between the notions of human personality (or, a human or "natural" person) and legal personality (or, a legal person). Often this distinction is put by saying that the expressions 'person' and 'personality' have both a philosophic sense or use and a legal sense or use. In its philosophic sense or use, 'person' designates rational beings, moral agents, "choosers." In its legal sense or use, 'person' designates entities or units which the law recognizes as having legal rights and bound by legal duties. Setting aside discussion of the concept of human personality, or the philosophic view of persons, just what is the concept of legal personality, or the legal view of persons?

The standard definition of a legal person is that it is "a right and duty bearing unit," "the subject of legal rights and duties." Some (e.g., F. K. von Savigny) loosen this definition by defining a legal person as simply the subject or bearer of a legal right.[1] Others (e.g., A. Kocourek) loosen the definition by defining a legal person as a right or duty bearing unit, an entity to which the law attributes a capacity for legal rights or

duties.[2] Some legal theorists offer expanded versions of the standard definition. For example, T. E. Holland defines a legal person as "such masses of property or groups of human beings as are in the eyes of the law capable of rights and liabilities, in other words, to which the law gives a status."[3] F. Pollock defines it as "a subject of duties and rights which is represented by one or more natural persons."[4] Nonetheless, the standard view is that a legal person is the subject of legal rights and legal duties.

Who or what can be a legal person? It is common to classify legal persons in the following way:[5] (a) ordinary individual humans, i.e., adult men and women with legally sufficient mental capacities; (b) non-ordinary individual humans, e.g., children, infants, mental incompetents; (c) juristic persons, e.g., corporations, nation-states; (d) animate non-humans, e.g., animals; (e) inanimate non-humans, e.g., ships, idols. Legal persons fitting the descriptions given at (a) and (b) are "natural persons;" those fitting the descriptions given at (c), (d) and (e) are "artificial persons."

One important feature of the legal view of persons, then, is that it admits that individual humans may be genuine persons. F. Pollock states the legal view succinctly

when he claims that in law, "a person is such not because he is human, but because rights and duties are ascribed to him."[6]

Legal persons as mere legal constructions. Legal theorists generally regard the notion of a legal person as a mere juristic, technical notion. Hans Kelsen describes it as "a juristic construction" which must be distinguished from the notion of a physical or natural person. Kelsen argues that it is a tautology that only legal persons exist within the law.[7] G. W. Paton puts the same point slightly differently:

> Legal personality is a particular device by which the law creates units to which it ascribes certain powers...legal personality remains, in essence, merely a convenient juristic device by which the problem of organizing rights and duties is carried out.[8]

The notion of a legal person is an artificial creation of the law, a convenient juristic device whereby entities are created or recognized and to which the law ascribes certain legal advantages and disadvantages.

To regard the notion of legal personality ultimately as a technical legal construction is not to regard it as a wholly contrived, novel or insignificant notion. It is not a wholly contrived notion since in ordinary speech, groups or units often are personified and treated

as having a continuity and identity separate from that of any particular individual members. For example, we speak of property "belonging to the Club," of contracts "made with the University," of actions "brought by the Government." In common parlance, it is the Club, the University or the Government, taken as a whole or unit, and not any individual members thereof, which is said to own property, make contracts, or bring and defend actions. They are the entities or units to which rights and duties are attributed. Where the law recognizes these units as legal persons, it endows them with a definite legal capacity for exercising and vindicating their rights, or for safeguarding their property.

Nor is the notion of legal personality the novel development of an advanced, highly complex legal system. In early Roman law, in the interval between the death of the ancestor and the assumption of the inheritance by the heir, the estate or "hereditas" of the deceased was treated as a legal person.[9] By personifying the estate, the law provided a way to have the estate represented during the time when no natural person actually owned the estate. Similarly, in order to have some person who could represent the claims of the public, Roman law created the legal person the "fiscus" or "treasury." It was proper legal talk to speak of property belonging to the estate

and of money belonging to the public treasury. The case is the same in modern law. It is proper to speak, e.g., of contracts made with a firm, or of liabilities of a corporation, where the rights and duties spoken of actually are attributed to the firm or corporation and not to members of the firm or corporation. The firm or corporation is the legal person in such cases.

Furthermore, the device of awarding legal personality is an important juristic device, since it permits the law to recognize and create legal right and duty bearing units where the property and legal relations of individual humans is not relevant or at issue. For example, it permits recognition of municipal governments, administrative offices, professional societies, religious organizations and trading corporations as having legal capacities and a continuous legal existence which are not necessarily dependent upon the existence of any specific human beings. Of course, many of the legal capacities of these artificial persons differ from those of natural persons. There are acts which artificial persons are incapable of performing, or which the law does not recognize as their having the capacity to perform, e.g., marrying or authorizing a crime. Still, the device of ascribing legal personality to entities or units is a helpful and accepted legal instrument for handling the legally

relevant affairs of non-humans.

What emerges as the most striking feature of the notion of legal personality is that the existence of natural persons is neither a test of legal personality, nor a condition for ascribing legal personality. Since the creation of legal persons always is a matter of positive law and regulation, legal personality can be, and has been, awarded to non-humans. The views of Paton, Holland and W. Markby, respectively, emphasize this point:

> It is socially and economically false, as well as legally untrue, to say that only individual men can be the bearers of legal rights.[10]

> An artificial person may, however, also exist without being supported by any natural persons. It may consist merely of a mass of property, of rights and of duties, to which the law chooses to give a fictitious unity by treating it as a 'universitas bonorum.' The most familiar example is a 'hereditas' before it has been accepted by the heir...[11]

> A juristic [legal] person is generally an aggregate of real persons, but there is no difficulty in creating an imaginary person which does not contain any real person.[12]

The Notion of a Legal Representative

A legal person is a legal right and duty bearing unit, created or recognized by law, to which the law ascribes certain legal capacities. Given that some legal persons are "artificial persons," how are their legal affairs conducted? The answer is the same for all legal

persons, natural as well as artificial persons. It is always and only one or more natural persons who manage the legal affairs of legal persons. These natural persons are the legal person's legal representative or agent.

The doctrine of legal representation. What I shall refer to as "the doctrine of legal representation" is the doctrine that a duly-appointed or authorized agent legally is empowered to act in the name of, and on behalf of, the legal person it represents, and thereby to secure or safeguard the property, legal rights or other legal relations of the represented legal person. This agent is always a natural person or persons. When the agent acts in the name of, and on behalf of, the entity it represents, its acts, within limits specified by law, are imputed to the represented entity itself, and the rights secured or safeguarded are the rights of the represented entity.

The legal representative or agent. Natural persons employed to do an act or acts for another are called "agents." Usually, an agent is employed for the purpose of bringing the employer into legal relation with a third party.[13] A general principle of agency is that the act of an authorized legal agent done in the name of, and on behalf of, another (the principal) has the same legal

effects or results as if the principal had done the act. This principle holds whether the principal is a natural or an artificial person. Unless the legal conditions specify otherwise, the principal is bound directly by the acts of the agent. In general, if the agent acts within the specified terms of its authority, he/she is not personally liable for contracts made in the principal's name.

There are many forms of representation or agency. A familiar one arises for purposes of business convenience. Paton says of this form of agency,

> An agent (in this sense) is one who acts as a conduit pipe through which legal ralations flow from his principal to another. Agency is created by a juristic act by which one person (the principal) gives to another (the agent) the power to do something for and in the name of the principal so as to bind the latter directly.[14]

The guardianship method of legal representation is another form of agency. Legal guardians are appointed to represent the wills of infants and to take effective steps in safeguarding their property and wealth. In The Law of Guardian and Ward, H. B. Taylor describes a guardian as

> ...a person to whom the law has entrusted the custody and control of the person or estate, or both, of an infant, whose youth, inexperience, and mental weakness disqualify him from acting for himself in the ordinary affairs of life.[15]

Suits brought by and against infant wards are brought in the name of the ward. The guardian is considered the

"statutory agent of the ward."

In general, the guardianship method of legal representation provides for the care, protection or supervision of persons and their property where the persons are unable, for one reason or another, to manage their own affairs. In addition to its use in the case of infants and minors, the guardianship approach is used to handle the legal affairs of "legal incompetents," natural persons who are de jure unable to conduct their ordinary affairs. Their incapacity may be by reason of old age, disease, weakness of mind, or other cause."[16] Courts are empowered to appoint someone guardian (or, "conservator," "committee") for legal incompetents.

Another form of agency is the trusteeship. Typically, a trustee is a natural person to whom property is committed for the benefit of others.[17] For example, when a corporation becomes bankrupt, courts often appoint a trustee to oversee the corporation's affairs and to report on it to the court at the appropriate time.

Legal representatives for non-humans. Appeal to the doctrine of legal representation explains how non-humans can be said to act as legal right and duty bearing units. Even theorists who suppose that having a will or having a capacity to act is a necessary condition of having legal

rights typically concede that it is a condition which non-humans could be said to satisfy. As long as there is some natural person empowered to act as legal agent for the non-human legal person, the legal person is said to have a will or to have a capacity to act.

The discussions of legal personality offered by theorists J. C. Gray and W. Markby serve as illustrations of this point. Gray argues that even though only humans have real wills, "idiots," horses, steam tugs and corporations are or could be legal persons, having legal rights:

> The step [of attributing a will to an entity] is as hard to take and no harder, whether he, she, or it be an idiot, a horse, a steam tug, or a corporation. Neither the idiot, the horse, the steam tug, nor the corporation has a real will; the first three no more than the latter.[18]

Whether the thing to which the will is attributed is an actual entity (e.g., a man, a ship, a dog) or a "juristic entity" (e.g., a corporation), the entity attributed the will is the legal right-holder.

Similarly, Markby argues that corporations satisfy the condition of having the capacity to act insofar as there is a legal representative to perform the acts of the corporation it represents. He states,

> This is so clear, that when a corporation is created the capacity to act need not be specially granted. So far as it is possible that acts should be done through a representative it will be presumed that a corporation may do

> those acts, provided that they are consistent with the purposes for which the corporation was created.[19]

This account of the doctrine of legal representation suffices to show that there is nothing bizarre, unusual or sneaky about speaking of legal representatives making claims on behalf of, and in the name of, the entities they represent. The doctrine provides a familiar, accepted legal means for protecting, securing or gaining recognition of rights for entities who/which are not themselves capable of doing so. They may be incapable of actually making demands because of their peculiar circumstances (e.g., infants and mental incompetents); or, they may be legally ineligible to make demands or inititate legal transactions (e.g., juveniles); or, they may be recognized legally as empowered to make demands or conduct legal affairs only through specifiable legal agents (e.g., corporations). Whatever the reason for appointing a legal representative for an entity, it is the represented entity who/which is said to have the rights or duties in question.

Natural Objects as Legal Persons

Could natural objects be legal persons? Obviously, a full defense of the claim that natural objects could be legal persons requires showing that they could be said to have legal rights and to bear legal duties. As such, that

defense is possible only after the notions of a legal right and a legal duty, and the attendant notions of a legal right-holder and a legal duty-bearer, are discussed. Still, what has been said so far provides a *prima facie* case for describing natural objects as legal persons.

First, legal persons are entities recognized or created by positive law; they need not be moral persons, rational agents or "choosers." Second, legal precedent exists for recognizing non-humans as legal persons. Some theorists suppose that these two features of the notion of a legal person constitute sufficient grounds for awarding legal personality to at least some natural objects. For example, Paton writes,

> [The law] says that certain things shall be units for the purposes of the law, and that these units shall possess the capacity of being parties to the claim-duty and power-liability relationship. It would be absurd, but not impossible, for the law to award legal personality to trees, sticks, or stones.[20]

Paton cautions that the law must adapt the device of legal personality to the nature of the recipient, whereby differences between, e.g., natural persons, corporations and natural objects would be taken into account. But he concedes that natural objects could be legal persons.

Legal persons which are "artificial persons" can perform legal transactions only through their legal

representatives; they are not the sort of entity which, under any circumstances, could make claims on their own behalf. Appeal to the doctrine of legal representation, then, provides both an explanation and a legal justification for describing non-moral, non-rational entities as genuine legal right-holders. Extension of that doctrine to cover the case of natural objects would provide an acceptable legal means for gaining recognition of natural objects as legal right-holders.

Christopher Stone argues that the law should appoint legal guardians for natural objects. If present statutes fail to provide sufficient grounds for such a move, he suggests enacting special environmental legislation to permit the move.[21] In his dissent in Sierra Club v. Morton, Justice Douglas gives Stone's proposal serious endorsement:

> Permitting a court to appoint a representative of an inanimate object would not be significantly different from customary judicial appointments of guardians ad litem, executors, conservators, receivers or counsel for indigents.[22]

Of course, to say that ascription of legal personality to natural objects is plausible is not to say that natural objects would or should be awarded the same legal capacities as humans or as other artificial persons. Nor is it to say that the rights of all natural objects would or should be the same. The rights of communal natural

objects such as lakes may be very different from the rights, if any, of natural objects on private land. Furthermore, as with other legal persons, a natural object's legal capacities for performing legal acts through its legal representative would be limited by the purposes for which its legal existence is recognized. Recognition of some specific legal rights for natural objects would not amount to a "no holes barred" position on ascription of legal rights to them. The legal capacities of natural objects may be much more limited than those of humans, and may be different in some respects from those of other artificial persons.

Despite differences between natural objects as legal persons and other legal persons, presumably many of the tasks of the appointed legal representatives of natural objects would be the same as those of legal representatives generally. These would include "protective tasks," such as representing the natural objects at administrative hearings on environmental quality standards, "litigation tasks," such as bringing legal action on behalf of the natural object, and "administrative tasks," such as overseeing any funds created in the name of the natural objects, particularly where natural objects are beneficiaries of monetary awards.

Determining whether the guardianship form or some

other form of legal agency is best suited to the case of natural objects involves solving many practical problems. Who qualifies as a guardian for natural objects? What procedures should be followed in applying for and creating guardianships for natural objects? What criteria should be used for determining when a natural object should be recognized as a legal person? But such problems basically are tactical ones. They bear on the question whether, and if so, how, one should award legal personality to natural objects. Solving them is not necessary to showing that natural objects could be awarded legal personality. The possibility of making natural objects legal persons rests on showing that the notions of a legal person, a legal representative, a legal right and a legal duty pose no insurmountable obstacles. What has been said here provides a prima facie case for that view.

Objections

There are three reasonable objections to describing natural objects as legal persons. The first is that a damaging legal fiction is involved in describing them as legal persons. The second is that it is incompatible with theories of legal rights and legal duties to so describe them. The third is that the argument for so describing

them rests on a faulty analogy between natural objects and corporations. Since the first two objections are handled in subsequent chapters, only the third is discussed here.

The third objection is that natural objects cannot be legal persons because ascription of legal personality to them mistakenly assumes a strict analogy between natural objects and corporations. It seems to be a fairly plausible objection. Is it telling against (T)?

Suppose the argument for saying that natural objects could be legal persons does assume an analogy between corporations and natural objects. Does the analogy fail? Certainly there are important differences between corporations and natural objects. Corporations are comprised of individual humans. They are created by humans expressly for special purposes, which purposes allegedly serve human interests. Unlike natural objects, their very existence is presumed to be a matter of positive law and regulation. But there are also important similarities between them. Neither corporations nor natural objects are moral persons, rational agents, entities having an actual will or a capacity to act; they are not themselves decision-makers, choosers, entities having actual wants, desires or interests.[23] Corporations are presumed capable of performing acts, expressing a will or

having interests just insofar as the acts, will, or interests of their legal agents or of the individual humans which comprise them are attributed to the corporation. Furthermore, their capacity for performing legal acts is restricted by the explicit purposes for which their legal existence is recognized.

One might point out here that corporations and individual humans are dissimilar in just these respects. Humans are moral persons, rational agents, decision-makers, choosers; they are carriers of actual wants, desires and interests. Unlike corporations, individual humans have an independent capacity to act. Still, both humans and corporations are or can be legal persons. Thus, while there are these important differences between corporations and individual humans, they do not suffice for withholding ascription of legal personality to corporations, while awarding legal personality to humans. Stated differently, with regard to the question of who or what can be a legal person, they are not legally relevant differences.

The case of natural objects is like that of corporations in this respect. Like corporations, and unlike individual humans, natural objects are not, or typically are not considered to be, moral persons, rational agents, choosers. But this alone does not establish that they cannot be legal persons.

Suppose the objection is that, on the balance, the legally relevant dissimilarities between corporations and natural objects outweigh the legally relevant similarities.[24] In order to provide the strongest possible case against (T), suppose this is true. Does this show that natural objects cannot be legal persons?

I think not, for several reasons. For one thing, ultimately the argument provided in this dissertation for saying that natural objects could be legal persons does not rest simply on a presumed analogy between natural objects and corporations. It involves two quite distinct arguments. The first, already laid out, is that commonly accepted legal theory on the notions of a legal person and a legal representative permits the description of natural objects as possible legal persons. Since funds, idols and ships may be or have been legal persons, use of the example of corporations is an instructive, though not the only, illustration of non-human legal persons. The second argument, laid out in subsequent chapters, is that it is compatible with American legal theory on legal rights (and legal right-holders) and legal duties (and legal duty-bearers) to describe natural objects as legal right and duty bearing units, i.e., as legal persons. Taken together, these two arguments constitute the case for saying that

natural objects could be legal persons. Thus, although the analogy to corporations may be helpful, the case for describing natural objects as legal persons does not stand or fall on it.

For another thing, even the most significant difference between corporations and natural objects does not constitute sufficient grounds for withholding ascription of legal personality to natural objects. This difference is that corporations are comprised of individual humans. It would constitute sufficient grounds only if it were true, or accepted as true, that only humans and aggregates of humans could be legal persons. Indeed, this view has been advocated. In a series of articles on the juristic person, G. T. Deiser argues that "personality is an attribute of humans or of groups of humans acting as a unit for the attainment of a common end."[25] For Deiser, the juristic person is "the collective will of the group."[26] But, Deiser's view contrasts markedly with the favored view that other than individual humans and groups of humans can be legal persons. Paton argues that animals have been legal persons in some systems.[27] Gray argues outright that animals can be legal persons.[28] O. W. Holmes grants that ships in admiralty could sue and be sued.[29] J. Austin argues that there have been cases where

land "is erected into a legal or fictitious person."[30] The commonly accepted view, then, is that a legal person need not be an individual human or a group of individual humans. Thus, even if there is this difference between natural objects and corporations, it is not a difference which determines whether or not natural objects can be legal persons.

Granting that one important feature of corporations is that they are created to serve human purposes, does this generate a legally significant difference between them and natural objects? The usefulness of natural objects for human purposes is a given. Making natural objects legal persons need not affect their general usefulness to humans for economic or non-economic activities. A river may be awarded rights against industrial polluters yet have only limited rights against canoeists. A forest may have specific rights against lumber companies, e.g., the right to receive some form of compensation for lumbering activities, without having a right to disallow all lumbering whatsoever. A private landowner may have a right to cut down trees on his/her property even though some trees (or a stand of trees) not on privately owned property have rights against being cut down. The point is that the use of natural objects may continue to serve

human purposes even though some natural objects have legal right-holder status.

Thus, even if one assumes that there are some legally relevant differences between natural objects and corporations, this does not show that natural objects cannot be legal persons. Furthermore, the argument for saying that natural objects could be legal persons does not depend on a strict analogy between them and corporations. For these reasons, the objection to describing natural objects as legal persons misses its mark.

Summary

It has been argued that the objection that natural objects cannot be legal persons because they are not like corporations fails on three counts. First, it assumes incorrectly that the case for so describing natural objects rests on a strict analogy between natural objects and corporations. Second, even if there are legally relevant differences between natural objects and corporations, these differences do not establish that natural objects cannot be legal persons. Third, there are important, legally significant, similarities between natural objects and corporations.

The discussion of the notions of legal personality

and legal representation in this chapter sets up the argument, made repeatedly throughout the dissertation, that theorists cannot hold the positions they do hold regarding these notions and deny the possibility of awarding legal personality to natural objects. Therefore, it provides a prima facie case for describing natural objects as legal persons.

C H A P T E R I V

LEGAL FICTIONS

In all fields of law, lawyers and legal theorists make statements they know or assume are false but which, stated as pretenses or conceits, have an undeniable utility. For example, often it is said that "the plaintiff is deemed to have knowledge of the law" when, clearly and in fact, he/she does not, or that "the grantee of a gift is presumed to have accepted the gift" when it is evident he/she has not. These statements are called "fictions."

In this chapter I discuss the notion of a legal fiction. I then argue against a rather powerful objection to (T), what I call "the Legal Fiction Objection." I conclude that even if ascription of legal rights to natural objects is or involves a legal fiction, it is or involves one which is not damaging to the case for (T).

The Notion of a Legal Fiction

Much has been written about the legal fiction. Perhaps the single, most comprehensive account of legal fictions is given by Lon Fuller in his book Legal Fictions.[1] There Fuller discusses the notion of a fiction, the motives

which give rise to the legal fiction, and the indispensability of fictions in law. Citing a wide range of opinions and providing helpful examples from the sciences and philosophy, as well as from law, Fuller provides a well-documented account of the legal fiction. The discussion of the legal fiction provided here is largely a compendium of Fuller's views, insofar as those views are relevant to the defense of (T). No attempt is made to assess the particular details of Fuller's account.[2]

What is a legal fiction? In Legal Fictions, Fuller defines a legal fiction as follows:

> A fiction is either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility.[3]

Fuller distinguishes a fiction from a true statement, a lie and an erroneous conclusion. A statement which is literally true, or which the author believes to be true, is not a fiction. A fiction is not intended to deceive and, hence, is not a lie. Since a fiction is adopted by its author with at least partial knowledge of its falsity, it is not an erroneous conclusion. A fiction is an expedient but "consciously false" assumption.

According to Fuller, in actions of trover, a statement alleging that a defendant found a chattel which he/she actually took by force is a fiction. So, too, in

actions arising under the "attractive nuissance doctrine," the statement that a defendant invited children to visit his/her premises when he actually was ignorant of their presence and activities is a fiction.[4] They are literally false statements which treat certain facts as present (e.g., that a defendant found a chattel or invited children onto his/her premises) when, in fact, they are not present.

The form of the legal fiction. The ordinary legal fiction construes a fact or event A as present when it is not. It has two forms, the "assumptive" and the "assertive" forms. The "assumptive" or "as if" form is the construction that event or fact A is treated as if it were B when, in fact, it is not B. For example, a typical description of juristic persons (e.g., corporations) is that the law treats them as if they had wills of their own, or as if they had an independent capacity to act, when, in fact, they do not. The acts of a corporation's legal representatives are treated as if they were the will of the corporation itself, when, in fact, they are not. The "assertive" or "is" form of the fiction is the construction that event or fact A is B when, in fact, it is not B. This is the form used when the description of the corporation is simply that it has a will or a capacity to act. Here, the view is not that corporations actually have human wills or have an independent capacity to act, but that a will or capacity to act

has been attributed to them.

The distinction between these two forms of the fiction is a structural or grammatical one. It makes no substantive difference whether a fiction is of the assumptive or the assertive form.

Generally the pretenses involved in legal fictions are about non-legal facts and events which are regarded as having legal consequences. An illustration is from what Fuller calls "probably the boldest fiction to be found in modern law--the 'attractive nuissance doctrine'."[5] A landowner generally is liable for failure to use due care toward "invitees," those whom he/she has permitted, expressly or impliedly, to come on his/her land. A landowner owes no duty to "trespassers." This fact is stated by saying that a landowner has a duty of care to "invitees," though not to "trespassers." Where a court decides that a defendant "is deemed to have invited" a plaintiff to use his/her premises, even though the defendant may be ignorant of the plaintiff's presence, it treats the plaintiff as an "invitee" rather than as a trespasser. Here a pretense is made concerning the actual facts and events, making the defendant liable for failure to use due care.

Could there be pretenses about legal relations, e.g., about legal rights and legal duties? Could statements about them be legal fictions? Fuller's answer is fairly

clear. If, when treated by the courts, an alleged (or, "pretended," "assumed") legal right or legal duty actually is enforced, then it is a real right or duty. Stated in general terms, "a legal relation, accurately described and actually enforced, cannot with utility, be regarded as a fiction."[6]

Suppose a legal representative, Brown, signs a contract in the name of the Starship Corporation, according to which Smith owes the corporation $1,000 for services rendered. If, on action brought by the corporation against Smith, a court upholds the corporation's claim to $1,000, then the corporation has a legal right against Smith and Smith has a legal duty to the corporation. If the statement 'Smith owes the Starship Corporation $1,000' accurately describes the legal situation, and if the courts actually enforce the corporation's right to receive $1,000 from Smith, then the statement is not a fiction. However, if the statement fails to describe accurately the situation (e.g., if the acts performed by Brown were performed in an unofficial capacity) and courts fail to recognize the corporation as right-holder, then the statement is false. According to Fuller, some such false statements deserve to be called fictions, viz., those which are misleading or inaccurate descriptions of legal relations.

The purposes for which legal fictions are used. Fuller discusses the purposes or functions of the legal fiction in terms of the motives from which they proceed. The general purpose of any legal fiction is "to reconcile a specific legal result with some premise or postulate."[7] According to Fuller, the legal fiction of corporate personality basically is intended to preserve the premise that only persons can have legal rights. The legal result of allocating legal capacities to corporations is reconciled with that premise by treating corporations, for certain purposes, as if they were natural persons.

Sometimes the use of a legal fiction is aimed at escaping the consequences of a specific legal rule.[8] In attractive nuissance doctrine, the rule that landowners have no duty to use care toward trespassers is circumvented by adopting the fiction that a plaintiff was invited onto the landowner's property.

A legal fiction may have a persuasive or an expository function. The "persuasive" or "emotive" function is intended to induce a conviction that a given legal result is appropriate, desirable or just. The "expository" or "descriptive" function is intended as a "convenient shorthand," describing in fictitious terms a legal situation which allegedly could be described, however awkwardly, in non-fictitious terms. In some cases, a fiction may waiver

between a purely expository and a purely persuasive function. A fiction which was intended originally to persuade may be retained for its expository function.

One way to distinguish between the persuasive and expository functions of fictions is in terms of whether or not changes have occurred in the meaning of the relevant expressions used in the fiction. With persuasive fictions, the linguistic change has not occurred; with expository fictions, it almost always has occurred. Since "finding" does not mean "taking," and "inviting" does not mean "attracting," the fictions that a defendant is presumed to have found, or is deemed to have invited, a plaintiff are persuasive fictions.

Types of legal fictions. Fuller discusses two basic types of fictions, the "historical" and the "non-historical" fictions. He describes these, just as he describes the functions or purposes of fictions, in terms of the motives from which they arise.

The "historical" or "creative" fiction is intended to introduce a change into the law. Its function basically is persuasive. Fuller gives four specific motives from which it arises, only one of which is discussed here.[9] It is what Fuller calls "the motive of intellectual considerations." In a particular case, often a judge or legislator may want to introduce a change or reform into the law

and yet feel unable to explain the principle or concept on which the change is based in non-fictitious terms.

Fuller's example of an historical fiction adopted because of intellectual considerations again is from attractive nuissance doctrine. Suppose a young girl is injured while playing on a turntable maintained by a railway on an unfenced lot. A suit is brought on her behalf against the railway. Is the railway legally responsible for the injury? For any number of reasons, the presiding judge may feel the case is more like that of the "invitee" than that of the trespasser, even though, in Fuller's words, "it is clear that this child was legally a 'trespasser'."[10] On what principle should the judge's opinion be based? The judge may be unable to settle on a clear principle stated in non-fictitious terms. Instead, the judge may state simply that the defendant is deemed to have invited the plaintiff onto the land. The judge's intent is not to conceal the fact that he/she is making law; nor is it to prevent discommoding current notions. The judge simply may know no other personally acceptable way to resolve the case. According to Fuller, this is an example of an historical fiction adopted out of intellectual considerations. It illustrates how a new situation is made "thinkable" by converting it into familiar terms.

Unlike the historical fiction, the "non-historical"

or "abbreviatory" fiction is not adopted in order to introduce a change into the law. Sometimes it is adopted for purposes of expounding already existent doctrine; sometimes it is adopted as a vestige of an earlier historical fiction which retains its expository function. In either case, its function basically is expository. They are called "abbreviatory fictions" because their general purpose is "to avoid inconvenient circumlocution" which would be necessary if the fiction were abandoned.[11]

Fuller's example of a non-historical or abbreviatory fiction concerns the legal capacities of ships. In several court cases, legal proceedings against ships have been construed as proceedings "against the vessel for an offense committed by the vessel."[12] Citing the following quote from Justice Holmes, Fuller attributes to Holmes an appreciation of the function of the abbreviatory fiction:

> A ship is not a person. It cannot do a wrong or make a contract. To say that a ship has committed a tort is merely a shorthand way of saying that you have decided to deal with it as if it had committed one, because some man has committed one in fact...The contrary view would indicate that you really believed the fiction that a vessel had an independent personality as a fact behind the law.[13]

By treating the ship as if it were a person, one can speak of offenses "committed by the ship," even though, properly speaking, it is natural persons who actually have committed the offenses. Presumably (Fuller is not clear here) the

abbreviatory fiction is treating the ship as a person, capable of committing a tort. Use of the fiction dispenses with the need "for a lengthy repetition of the legal consequences" of natural persons committing torts.[14] Presumably, it is a fiction retained basically for its expository power.[15]

Live and dead fictions. According to Fuller, there are live and dead fictions. He writes:

> A fiction dies when a compensatory change takes place in the meaning of the words or phrases involved, which operates to bridge the gap that previously existed between the fiction and the reality.[16]

In a live fiction, this change in the meaning of key expressions in a fiction has not occurred.

One way to test whether a fiction is alive or dead is to determine whether or not the relevant statement involves a pretense. Live fictions, unlike dead ones, still contain the element of pretense. If, when correctly formulated, a statement is of the form 'A is legally treated as if it were B' when, in fact, A is not B, the fiction is live; if, when correctly formulated, a statement is of the form 'A is B' or 'In a technical legal sense,'A is B,' then the fiction is dead. To use one of Fuller's examples, in the action of trover, if "taking" just meant "finding" in some technical legal sense, then, where a defendant takes a chattel by force, the statement 'The defendant found the

chattel' would be a dead fiction. Since 'finding' does not (yet) mean "taking," the statement remains a live fiction.

According to Fuller, the death of a fiction is a process which is going on all the time. It is the process whereby a change in the meaning of key expressions involved in the fiction occurs; the expressions acquire a new, non-fictional meaning. This process is not confined to the law. It takes place "in the whole of our language."[17] It occurs wherever metaphorical language is used. In ordinary language or in literature, some metaphors are alive (i.e., are used and accepted with an awareness that they are substitutes for their literal equivalents); others are dead (i.e., have been used so often that they are used and accepted without awareness that the words used are not literal). As such, diminution of the fiction from law often means only substituting dead metaphors for live ones.[18]

Recall that Fuller describes the "non-historical" and "historical" fictions in terms of the motives from which they arise. The non-historical fiction basically has an expository function, and typically is adopted for purposes of expounding existent legal doctrine. The historical fiction basically has a persuasive or emotive function, and is adopted in order to introduce a change into the law. These two basic types of fictions also could

be described in terms of the purpose of any metaphors involved in their use. Metaphors may be used for their expository purpose only, as "convenient shorthand" for what might be expressed, however cumbersomely, in literal terms, as a plain statement of fact. Metaphors also may be used for the sake of their emotive powers only; their function is persuasive. Any metaphor involved in the non-historical fiction basically has an expository function, while any metaphor involved in the historical fiction basically has an emotive or persuasive function.

According to Fuller, use of metaphors having emotive power is desirable. Their use helps

> ...to keep the form of the law persuasive. Metaphor is a traditional device of persuasion. Eliminate metaphor from the law and you have reduced its power to convince and convert.[19]

In particular, use of metaphor as a persuasive device befits the historical or "creative" fiction; it is a fiction intended to induce a conviction that a given legal result is desirable or just.

This discussion suggests that fictions are not simply false statements; rather, they are literally false statements. Fuller actually concedes this when he states that "a fiction is frequently a metaphorical way of expressing a truth."[20] His discussion of the types and functions of legal fictions is further evidence that he thinks fictions often are true statements, on a

metaphorical or figurative reading. Thus, it seems fitting to construe Fuller as maintaining that legal fictions are literally false statements, and not, simply, false statements, as he suggests initially.

Is the use of legal fictions inevitable, desirable, or justified? Fuller argues that there are two distinct methods for accomplishing a wholesale elimination of fiction from the law, "rejection" and "redefinition." A fiction is rejected when its use is discarded entirely, e.g., by a statute or court decision declaring that henceforth certain actions shall be allowed without the allegations which formerly involved making pretenses.

Suppose corporate personality is (still) a legal fiction. The fiction could be eliminated in either of two ways. It could be rejected by a ruling that, henceforth, actions brought by corporations shall be allowed without the pretense of corporate personality. Or, it could be redefined if a change in the meaning of 'person' occurred such that, in a technical legal sense, the meaning of 'person' includes the designation of other than individual human beings as persons. Both methods provide a way of eliminating the fiction of corporate personality. Stated differently, both would make the fiction of corporate personality a dead fiction.

Fuller argues that it is neither possible nor desirable to eliminate fictions from law by a wholesale process of rejection or redefinition. He grants that it is conceivable that fictions could be redefined so that statements of the form 'A is B' are substituted for statements of the form 'A is treated as if it were B.' But he argues that

> ...such a wholesale process of redefinition could not be carried out. One cannot introduce sweeping changes in linguistic usage by an arbitrary fiat; ...And even if it were possible, the proposal ought not to be carried out because it would only result in encumbering the language of the law with a grotesque assemblage of technical concepts lacking the slightest utility.[21]

His verdict is the same for the proposal to reject all legal fictions:

> This is also impossible, and inadvisable if it were possible. It is inadvisable because to reject all of our fictions would be to put legal terminology in a straightjacket--fictions are, to a certain extent, simply the growing pains of the language of the law. It is impossible because fiction, in the sense of a "strained use of old linguistic material," is an inevitable accompaniment of progress in the law itself and this progress can scarcely be expected to wait out of deference for the tastes of those who experience an unpleasant sensation at the sight of words browsing beyond their traditional pastures.[22]

By fitting new law into existent legal categories, by proceeding analogically from old cases to new cases, use of the legal fiction helps to account for and facilitate what legal theorists often call "the growth of the law." To

discard them all would be "to put legal terminology into a straightjacket" and prevent that growth. The proper solution, according to Fuller, is to reject some and redefine others.

If the use of legal fictions is inevitable and desirable, how is it justified? For many legal theorists that use of the legal fiction is expedient and necessary for the growth of the law is sufficient justification. For example, Jhering writes:

> ...the fiction can have a certain justification as the first step toward the mastery of a new thought, in a situation of theoretic necessity. Better order and easy mobility with the fiction, than disorder and stagnation without it![23]

> It is easy to say, 'Fictions are makeshifts, crutches to which science ought not to resort.' So soon as science can get along without them, certainly not! But it is better that science should go on crutches than to slip without them, or not to venture to move at all.[24]

However, Fuller's account is different. He locates the justification for using legal fictions in social and economic policy considerations:

> A doctrine that is plainly fictitious must seek its justification in considerations of social and economic policy; a doctrine that is non-fictitious often has a spurious self-evidence about it.[25]

If legal fictions are here to stay, is there any precept or test for their proper use? Fuller's answer is by way of a quote from Vaihinger: "The fiction must drop out of the final reckoning."[26] The dropping of the fiction

amounts to a rejection or redefinition of a legal fiction. Likened to a scaffolding, Fuller describes a fiction as a helpful, necessary device ensuring the growth of the law which, ultimately, must be removed.[27] While at any time use of a particular fiction may be unavoidable, desirable and justified, its proper use requires recognition that, ultimately, it could be eliminated.

Summary. To review, a fiction is a literally false statement which either has a certain utility, or is propounded with awareness of its falsity. Fictions may be stated in assertive or assumptive form. They may be live or dead. Their function may be persuasive or expository. In general, the purpose of the legal fiction is to reconcile a legal result with some premise. In particular, the purpose of the historical fiction is to introduce some change into the law; the purposes of the non-historical fiction are to expound an already existent legal doctrine, or to avoid an inconvenient circumlocution. The historical legal fiction proceeding from intellectual considerations attempts to make new law "thinkable" by converting it into familiar terms. The use of the legal fiction is considered necessary, desirable and justified.

The Legal Fiction Objection to (T)

The Legal Fiction Objection to (T) is that (T) is false because the statement that natural objects have or could have legal rights either is itself a legal fiction or involves a legal fiction. In this section I show that if there is a legal fiction involved in ascribing legal rights to natural objects, the argument for (T) is not damaged by it.

Suppose, as one disjunct of the objection claims, it is a legal fiction to say that natural objects have or could have legal rights. What does this mean?

One interpretation of the claim is that there are no such things as rights, and, hence, no such things as rights which natural objects could be said to have. The fiction is treating rights as if they were real things, when they are not. The pretense involved in the legal fiction is about the legal rights attributed to natural objects, and not about the non-legal facts and events which give rise to those rights.

However, if this is all that is meant by saying that the statement 'Natural objects have or could have legal rights' is a legal fiction, the case for (T) is secure. It amounts to saying that the case for ascribing rights to natural objects is no better, but no worse, off than a case for ascribing legal rights to any entity

whatsoever. It generates no objection to (T) in particular. Furthermore, it conflicts with the widely accepted view that there are non-fictitious legal rights, viz., those which courts actually enforce. Finally, it departs from the standard view that the pretenses involved in legal fictions concern non-legal facts and events. For these three reasons, the first interpretation of the claim that it is a legal fiction to ascribe legal rights to natural objects does not pose any reasonable objection to (T).

A second interpretation of the claim that it is a legal fiction to ascribe legal rights to natural objects is more likely. It is that ascription of legal rights to natural objects is merely a convenient shorthand for describing a legal situation which, when filled out properly, describes some humans as having the rights at issue. This interpretation could be expanded along either of two lines, one suggested by Fuller and one suggested by Markby. The line suggested by Fuller is that the fiction is an "abbreviatory fiction." Like the fiction of the personality of ships, it is a shorthand way of saying that the law treats natural objects as if they had legal rights when, in fact, they do not. The pretense involved is the assumption that natural objects themselves have or could have legal rights; it is actually only humans who have or could have legal rights. The line suggested by Markby is that the

description of natural objects as legal right-holders is figurative language only; it fails to describe the legal situation accurately. The rights spoken of as "belonging to natural objects" really attach to natural persons who successively are owners of the natural objects, or who have a legally recognized interest in them.

Is this interpretation of the first Legal Fiction Objection disjunct, whether along the lines suggested by Fuller or those suggested by Markby, damaging to (T)? I think not. Consider the Markby line first. In his discussion of an estate which is held liable for a debt, Markby makes clear what it is to describe the legal situation figuratively or literally. The language is figurative if the statement that the estate is liable is intended to assert and define the liability of any natural persons who successively are owners of the estate. There is no legal person "the estate" to which the liability attaches. The language is literal if the statement is intended to identify the status of the estate itself as a legal right or duty bearing unit. There is a legal person "the estate" to which the liability attaches. By allowing that an estate may be a legal right-holder, Markby allows that not all talk of legal rights for non-humans is mere figurative language. Thus, on the Markby view, one can speak literally and correctly of legal rights for non-humans.

The line suggested by Fuller is that the statement 'Natural objects have or could have legal rights' is an abbreviatory or non-historical fiction. Recall that the non-historical fiction, unlike the historical fiction, is not used to introduce a change into the law. Typically, it is used to expand existent doctrine in terms which, however awkwardly, could be stated in non-fictitious language. But, if the personality of natural objects is a legal fiction, it is an historical legal fiction. Its adoption would be intended to reform the law such that natural objects could be recognized as legal right-holders. Thus, according to Fuller's account of abbreviatory fictions, it is false that the statement 'Natural objects have or could have legal rights' is an abbreviatory fiction; it is not a "convenient shorthand" for describing an existent legal situation.

What about the other Legal Fiction Objection claim, viz., that ascription of legal rights to natural objects involves a legal fiction? Is it damaging to (T)?

Recall that, according to Fuller, the general purpose of any legal fiction is to reconcile a specific legal result with some premise. The legal fiction of corporate personality was (is) intended to reconcile ascription of legal rights to corporations with the premise that only "persons" can have legal rights. Presumably, the legal

fiction involved in ascription of legal rights to natural objects would be treating them as if they were humans, natural persons, when they are not. If any pretense is involved, it is to reconcile ascription of legal rights to non-humans with the assumption that only persons can have legal rights. I shall call the alleged fiction of the personality of natural objects the "fiction of environmental personality."

Suppose, then, that ascription of legal rights to natural objects involves the fiction of environmental personality. Still, this does not furnish an argument against (T). The five point discussion which follows shows that what is involved in saying that environmental personality is a legal fiction is compatible with accepted legal theory on the nature, purposes and justification for correctly using legal fictions. It shows that, even if there is a legal fiction involved in ascription of legal rights to natural objects, the case for (T) is not damaged by it.

First, a legal fiction is a literally false statement, either propounded with awareness of its falsity, or recognized as having a certain utility. The statement that natural objects are humans, natural persons, is false, known to be false and not propounded with the intention of deceiving anyone into thinking otherwise. Its utility is that its adoption would permit one to construe natural

objects as having certain legal capacities. Thus, there is nothing unusual about describing the personality of natural objects as a legal fiction.

Second, the function of the alleged fiction of environmental personality basically is persuasive, viz., to convince that ascription of legal rights (or of legal capacities generally) to natural objects is appropriate, desirable or just. Its function is neither to describe an existent legal situation, nor to provide a convenient shorthand for delimiting the rights of humans. Thus, its function is not expository. The persuasive function of the fiction of environmental personality is an instance of a legitimate and important function of legal fictions. Its use is consistent with accepted purposes for proper use of legal fictions.

It is important to note that while the fiction of environmental personality may contain or imply the literally false proposition that natural objects are humans (natural persons), it does not follow straightway that natural objects cannot have legal rights. This is because it is not a necessary condition of having rights that an entity is an individual human (a natural person). Furthermore, the fiction of environmental personality does not by itself imply the proposition that natural objects cannot be legal persons. In fact, the main reason to adopt

the legal fiction of environmental personality would be to award natural objects legal personality. Thus, while it may be literally false that natural objects are persons (i.e., humans, natural persons), I hope to show that it is literally true that natural objects can be legal persons. Use of the fiction of environmental personality may be construed as a metaphorical or figurative expression of a truth, viz., that natural objects can be persons (i.e., legal persons).

Third, the fiction of environmental personality is an example of an important kind of fiction, viz., the "historical" or "creative" fiction. Since historical fictions are intended to introduce a change into the law, there is nothing objectionable about invoking the fiction of environmental personality for that purpose.

The adoption of the fiction of environmental personality most likely would proceed from what Fuller calls "motives of intellectual considerations." A judge or legislator may want to award certain legal rights to natural objects yet be hard-pressed to base a decision to do so on any principle stated in non-fictitious terms. The judge or legislator may assert simply that, for certain purposes, the law deems natural objects to be persons, or treats them as if they were persons, when they are not. Like other historical fictions proceeding from intellectual

considerations, adoption of the fiction of environmental personality would allow a new legal situation to be made "thinkable" by construing it in familiar terms.

In Should Trees Have Standing? Christopher Stone points out that it once was unthinkable to construe corporate bodies (e.g., the church, the state, modern corporations) as persons. So, too, it may seem unthinkable to construe natural objects as persons. Use of the historical legal fiction provides an expedient, accepted legal device for fitting new cases to old doctrines and thereby making them "thinkable." As an example of an historical fiction, use of the fiction of environmental personality would be an acceptable way to introduce new law in the guise of old law, making the new law "thinkable," without altering the form of existent legal doctrine.

Fourth, ultimately the fiction of environmental personality could be eliminated either by the method of rejection, whereby the pretense of personality would be discarded altogether, or by the method of redefinition, whereby it would be allowed that in a technical legal sense, natural objects are persons. Since it is eliminable, its use need not obstruct later development of different legal concepts and principles to handle legal protection of natural objects. Furthermore, its eliminability ensures that the precept "The fiction must drop out of the

final reckoning" is preserved. Therefore, use of the fiction of environmental personality satisfies the test for proper use of a legal fiction.

One might object that the definition of 'person' never could allow for natural objects as persons, and, hence, that the legal fiction of environmental personality may not be eliminable. In this connection it is interesting to point out that to early jurists, the notion that an artificial entity which exists only in law could have "its" own rights was bizarre.[28] Many theorists objected to extending the notion of a person to corporations. Fuller argues that those who hold that the notion of corporate personality necessarily is or involves a legal fiction must assume that a future change in the meaning of 'person' is impossible, that the meaning of 'person' in a technical legal sense never could include artificial persons.[29] Presumably, the same assumption underlies the objection that the fiction of environmental personality may not be eliminable. The assumption simply is untenable. It is at least conceivable that a linguistic change in the meaning of 'person' could occur such that the notions of corporate and environmental personality are not fictions.[30]

Fifth, legal fictions are considered necessary legal devices for ensuring the growth of the law. For some, this feature of the legal fiction provides sufficient

justification for its use. For these theorists, an argument justifying adoption of the fiction of environmental personality could be framed along the same lines as those used for justifying adoption of legal fictions generally. For others, most notably Fuller, the justification must be found in considerations of social and economic policy. It was shown earlier (in Chapter II) that many defenders of the natural object move, NOM, suppose that just such considerations justify ascription of legal rights to natural objects. The same considerations could be offered for justifying adoption of the fiction of environmental personality.

These five reasons establish that adoption of the fiction of environmental personality would be compatible with legal theory on what a legal fiction is, the purposes for which legal fictions are used, and the justification for using them. Taken together they show that the case for (T) is not damaged by the Legal Fiction Objection.

However, another, different reason for saying that (T) withstands the Legal Fiction Objection deserves mention. One might argue that it makes no substantive difference to the legal right-holder status of natural objects whether or not attribution of personality to them is or involves a legal fiction. The notion of corporate personality provides a case in point. Some theorists defer from

arguing whether or not a corporation is a real entity on the grounds that, for purposes of ascribing legal capacities to corporations, it makes no difference whether a corporation is a real or a fictitious entity. For example, J. C. Gray writes:

> ...I shall not attempt to answer the question whether corporations are realities or fictions, because to do so is unnecessary for my purposes ...Whether the corporation be real or fictitious, the duties of other persons towards it and the wills which enforce the rights correlative to those duties are the same. The law is administered, and society is carried on in precisely the same way on either theory.[31]

M. Wolff agrees:

> If all juristic persons are treated as if they have wills of their own and are capable of acting, it makes no material difference whether you say, "they <u>are</u> real animate beings with wills of their own, and so on," or whether you say, "some of them may be and some certainly are not, but the law treats them all as if they were."[32]

Presumably these theorists would say something similar about environmental personality. If, for specific purposes, the law treats natural objects as if they were persons, then, even if "fictitious persons," they are still endowed with certain legal capacities, including legal rights. They would argue that it makes no substantive difference to the legal right-holder status of natural objects whether they are moral persons, or whether the law merely treats them as if they were moral persons.

Summary

It has been shown that, if the notion of environmental personality either is itself a legal fiction, or involves a legal fiction, it is or involves one which poses no special problem for the case for (T). Use of the alleged fiction of environmental personality is compatible with accepted legal theory in the nature, purposes, and justification for correctly using legal fictions. Consequently, the Legal Fiction Objection is not damaging against (T).

C H A P T E R V

THE AMERICAN LEGAL TRADITION

This dissertation is a defense of the thesis that ascription of legal rights to natural objects is compatible with American legal theory on legal rights, thesis (T). To establish (T) one must show that none of the prima facie exhaustive positions on legal rights and legal right-holders within the American legal tradition presents a satisfactory objection to (T). As such, a discussion of the American legal tradition is relevant to the defense of (T) only insofar as it is helpful in identifying and clarifying the various positions in American legal theory on legal rights and legal right-holders.

The aim of this chapter is twofold: first, to portray the American legal tradition as a tension between natural law and legal positivist theories of the nature of law; second, to determine whether an analogous natural law-legal positivist tension characterizes theories of legal rights. Not only does the discussion provided here clarify the extent to which theories of law correlate with theories of legal rights; it also helps to carve out the area of relevant objections to (T). Specifically, those theories

of law which do not figure in any theory of legal rights do not generate any pertinent objections to (T).

The Two Positions on Law

There are two competing positions on the nature of law within the American legal tradition: natural law and legal positivism.[1] The central controversy between natural law theorists and legal positivists is the nature of the relation between positive law and morality. While they agree that the development of American law has been influenced profoundly by conventional morality, they disagree about the nature of the connection between positive law and morality generally. Is positive law which fails to satisfy some moral criterion binding? Can unjust laws be valid? Is there a sharp distinction between the moral and legal spheres? There is a clear split between natural law theorists and legal positivists on these issues.

As used here, a theory is a "natural law theory" if, and only if, it affirms that the relation between positive law and natural or moral law is a necessary, and not merely contingent or accidental, one and that the nature of that connection is given by appeal to moral principles. A theory is a "legal positivist theory" if, and only if, it denies that there is a necessary connection between positive law and morality. Thus, all and only natural law

theorists affirm, and all and only legal positivists deny, the Law Necessity Thesis given at (1):

> (1) There is a necessary connection between positive law (or, law as it is) and morality (or, law as it ought to be) and the nature of what connection is given by appeal to natural law or moral principles.
> (The Law Necessity Thesis)

There is some disagreement among natural law theorists about what (1) means. Sometimes (1) is interpreted as a thesis about the validation of positive law, (2):

> (2) All and only positive law which conforms to natural or moral law is valid.
> (The Law Validation Thesis)

Sometimes (1) is interpreted as a thesis about the non-autonomy of the legal and moral realms, (3):

> (3) There is no strict separation between positive law and morality.
> (The Law Non-Separation Thesis)

Natural law theorists who hold (2) hold that positive law which violates certain natural law or moral conditions is invalid. Those who hold (3) hold that positive law is a species of morality.

There also is some disagreement among natural law theorists about which entailment relations hold between theses (1), (2), and (3). What they agree upon is that only natural law theorists hold (2) and (3), and that a natural law theorist's endorsement of (2) or of (3) is

taken to be an endorsement of (1). Thus, the commonly accepted view is that each of (2) and (3) provides a sufficient condition of a natural law theory, and that each implies (1).

The characterization of natural law and legal positivism provided here is in terms of (1) only: all and only natural law theorists affirm (1), while all and only legal positivists deny (1). Three features of this characterization deserve mention. First, this characterization is a minimal condition account of natural law and legal positivist. It captures what is agreed upon by theorists of both camps as the central issue of their controversy. Second, it leaves open the states of (2) and (3) as necessary conditions of a natural law theory. While it is noncontroversial whether only natural law theorists affirm (2) and (3), it is controversial whether all natural law theorists affirm (2) and (3).[2] The characterization given here allows that a natural law theorist might concede the validity of "bad law" or grant some sort of distinction between positive law and morality. Third, the characterization of these two theories in terms of (1) only permits the inclusion of two distinctively American positions within the traditional, dichotomous division of theories of law. They are American legal realism and American sociological jurisprudence. Although acknowledged as having a

positivist bent, these two positions typically are not included in discussions of the natural law-legal positivist controversy on the nature of law.

Notice that the characterization of legal positivism as a denial of (1) does not mean that legal positivists hold that laws cannot be morally evaluated or that one should frame positive law without concern for moral considerations. Nothing intrinsic to the legal positivist position prevents a positivist from advocating the use of moral principles to resolve such questions as "What are the tests of the moral value of law?" and "Why ought people obey the law?" Their view simply is that is the province of jurisprudence--law conceived in factual, and not in normative, terms--to answer the questions "What makes a law valid?" and "What is law?" A positivist rejects the view that a law which conflicts with some natural law or moral principle is invalid and, thus, not really law.

To illustrate this point, consider the issue whether the laws of the Nazi regime were genuine laws. Assuming Nazi law was "bad law," a legal positivist would maintain that it was law nonetheless. On the other hand, most natural law theorists would maintain that Nazi law so deviated from the standards of morality that it failed to achieve the status of law.[3]

Could a legal positivist ever accept conformity to

a natural law or moral condition as a condition of validity of positive law? Suppose that in a particular legal system, conformity to a natural law or moral principle is itself one of a set of necessary legal conditions of validity acknowledged by that system.[4] In such a case, natural law theorists and legal positivists need not hold different views on the status of positive law which fails to conform to one of the natural law conditions. If a natural law condition is itself one of the legal conditions of validity of positive law, then a law failing to satisfy this condition is, in virtue of its failure to satisfy one of the necessary conditions of legal validity, not really law. Now take a different case. Suppose that in addition to all legal conditions of validity there is added a non-legal, natural law or moral condition. Then a natural law theorist might hold that a putative law which satisfies all the legal conditions of validity but not the additional natural law or moral condition is invalid, not really law. This position would be unacceptable to a legal positivist.

What is suggested here is that the general issue of the relation between descriptive and normative propositions is at the core of the natural law-legal positivist controversy. The positions of A. P. d'Entrèves and J. S. Mill nicely illustrate this point. Natural law theorist d'Entrèves defines natural law as "the attempt to bridge

the chasm between is and ought, between 'fact' and 'value'."[5] According to d'Entrèves, natural law is the doctrine that law is a part of ethics; they are not autonomous spheres.[6] He argues that "Perhaps the best description of natural law is that it provides a name for the point of intersection between law and morals."[7]

The early utilitarian J. S. Mill attacked natural law for confusing the descriptive and prescriptive senses of 'law' and for making the fundamental mistake of deriving prescriptive statements about what law ought to be from descriptive statements about what law actually is.[8] It is precisely this blurring of the distinction between "is" and "ought" in law that is unacceptable to legal positivists. The positions of d'Entrèves and Mill point out that the issue of the relation between descriptive and normative propositions underlies the natural law-legal positivist controversy on the nature of law.

The natural law-legal positivist split on the nature of law turns on the issue of the relation between positive law and morality, The Law Necessity Thesis, (1). Take a look now at what some natural law theorists and legal positivists actually say.

The natural law position. The most famous expression of the classical natural law view is given by St. Thomas

Aquinas. Aquinas writes:

> As Augustine says, that which is not just seems to be no law at all. Hence the force of a law depends on the extent of its justice...Every human law has just so much of a nature of law as it is derived from the law of nature. But if in any point it departs from the law of nature, it is no longer a law but a perversion of law.[9]

Aquinas' endorsement of the Law Necessity Thesis, (1), is based on his endorsement of the Law Validation Thesis, (2).

Contemporary non-Thomist natural law theorists such as A. P. d'Entrèves, Philip Selznick and Lon Fuller each endorse the Law Necessity Thesis, (1). For example, consider Fuller's position. Fuller's endorsement of (1) is based on an endorsement of (3). In fact, Fuller's endorsement of (3) is the backbone of his definition of 'natural law' and 'legal positivism'. He writes:

> By legal positivism I mean that direction of legal thought which insists on drawing a sharp distinction between the law that is and the law that ought to be...Natural law, on the other hand, is the view which denies the possibility of a rigid separation of the is and the ought, and which tolerates a confusion of them in legal discussion. There are, of course, many 'systems' of the natural law. But what unites the various schools of natural law, and justifies bringing them under a common rubric, is the fact that in all of them a certain coalescence of the is and the ought will be found.[10]

It is in terms of his endorsement of (3) that Fuller endorses (1).

The legal positivist position. The British legal philosopher John Austin denies each of (1), (2) and (3). Austin argues that there is a sharp distinction between law and morality, between law as it is and law as it ought to be. He writes:

> The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one inquiry; whether it be or be not conformable to an assumed standard, is a different inquiry.[11]

Neither the existence nor the validity of positive law is in any way dependent on the existence of natural law or on conformity to natural law or moral principles. Austin proposes a criterion of validity of positive law in terms of a law's derivation, explicitly or implicitly, from the sovereign. His "command" or "imperative" theory of law is a rejection of both the Law Validation and the Law Non-Separation Theses, and, ultimately, of the Law Necessity Thesis, (1).

A more recent formulation of the legal positivist position is given by Hans Kelsen. Kelsen writes:

> Much traditional jurisprudence is characterized by a tendency to confuse the theory of positive law with political ideologies disguised either as metaphysical speculation about justice or as natural-law doctrine. It confounds the question of the essense of law--that is, the question of what the law actually is--with the question of what it should be. It is included more or less to identify law and justice.[12]

Kelsen's "pure theory of law" presumes a clear distinction

between questions of empirical law, or law as it actually is, and questions of "transcendental justice," or law as it ought to be.[13] Kelsen's view is that the validation of positive law is given by proper enactment, and that the concept of law has no moral connotation whatsoever.[14] His rejection of natural law is a rejection of all three natural law theses, (1), (2), and (3).

Austin's and Kelsen's views are representative of the mainstream legal positivist position, often identified as "analytical" or "mechanical" jurisprudence. The two distinctively American positions, American legal realism and American sociological jurisprudence, also fit into the legal positivist camp, although there are grounds for distinguishing them from the analytical jurisprudence of Austin and Kelsen. For one thing, American legal realism and sociological jurisprudence arose largely as a reaction against both the formalist approach of analytical legal positivists and the metaphysically riddled theories of natural law. Legal realists and sociological jurists were concerned with discussing law by reference to publically discernible patterns of behavior and to practices of judges and other public officials, rather than by reference to abstract principles, whether moral or legal principles. For another thing, the intent of American legal realists and sociological jurists was neither to eliminate

ethical considerations from discussions of positive law, as the analytical legal positivists tended to do, nor necessarily to include them, as natural law theorists did. Their intent was to remove ethical considerations from what they viewed as factual concerns only--for legal realists, what courts are likely to do; for sociological jurists, what interconnections actually hold between legal institutions, precepts and decisions, and other social phenomena.

Still, like mainstream legal positivists, American legal realists and sociological jurists insist upon the elimination of ethical considerations from factual legal concerns. They view law and morality as autonomous realms. Furthermore, they agree with mainstream legal positivists that while the justification of positive law may fall strictly within the realm of morality, the validation and existence of positive law does not. Their view is that the relations which hold between positive law and morality are contingent merely. For these reasons, American legal realism and American sociological jurisprudence here are taken to be legal positivist positions.

American legal realism and American sociological jurisprudence are two closely aligned positions. Theorists identified with one school often are identified with the other as well. For example, Oliver Wendell Holmes, Walter Wheeler Cook, Jerome Frank, Herman Oliphant and Benjamin

Cardozo have been referred to both as legal realists and as sociological jurists. Some theorists even describe sociological jurisprudence as a form of legal realism. Hermann Kantorowicz, for example, characterizes "the sociological school of law" as the school which adopts the formal postulate of legal realism that "legal science is not a rational but an empirical science."[15]

Despite similarities between them, however, the emphasis of the two positions differs. American legal realists explain the nature and function of law in terms of generalizations about the way certain people (judges, legislators, public officials) act. They view law as concerned with descriptive statements of what courts do or are likely to do. The following smattering of quotations from O. W. Holmes, W. W. Cook and K. N. Llewellyn, respectively, illustrates the basic American legal realist position:

> What constitutes the law?...The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.[16]

> ...lawyers, like the physical scientists, are engaged in the study of objective physical phenomena---As lawyers we are interested in knowing how certain officials of society--judges, legislators, and others--have behaved in the past, in order that we may make a prediction of their probably behavior in the future.[17]

> What these officials [officials of the law] do about disputes is, to my mind, the law itself?[18]

The legal realist's emphasis on "behavior analysis" and on laws as "judicial decisions" reflects their view that the proper description of law, legal relations and legal systems is stated in factual, descriptive terms.

American sociological jurisprudence attempts "to infuse legal policy and decision making with the perspectives, thoughts and specific knowledge of the social disciplines, including history, psychology, sociology, and economics."[19] The sociological jurist's approach to the study of the nature of law is to describe the interactions which occur between law and legal institutions, as social phenomena, and other social phenomena. They hold that the proper method of legal study is the social scientific method, a method alleged to be evaluatively neutral. According to natural law theorist Philip Selznick, this scientific method assumes an empirical, rather than a normative, concept of law:

> Social scientists are accustomed to treating norms and ideals as facts. But they are disinclined to evaluate those facts. To engage in evaluation, it is thought, will inevitably involve the social scientist in the preconceptions of his own society and his own time; moreover, any tendency to break down the wall of separation between fact and value is intellectually dangerous. This point of view has created a mood favorable to legal positivism and opposed to a normative concept of law. For the latter the legal system is more than a set of related norms to be treated as inassessable factual givens.[20]

According to Selznick, reliance on the scientific method is what sets sociological jurists against natural law theorists. Fuller makes even a stronger claim. He argues that the popularity of legal positivism generally, and not just of sociological jurisprudence, is owed largely to the popularity of the scientific method.[21]

Among the names frequently associated with American sociological jurisprudence are those of Roscoe Pound and Benjamin Cardozo. The following quotes by Pound and Cardozo, respectively, reveal the sociological jurist's emphasis on viewing law in its social context:

> Sociological jurists now insist on the unity of the social sciences, and the impossibility of a wholly detached, self-centered, self-sufficing science of law. They insist that the legal order is a phase of social control and that it cannot be understood unless taken in its whole setting among social phenomena.[22]

> Courts know today that statutes are to be viewed, not in isolation or in vacuo, as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and the framework of present-day conditions, as revealed by the labor of economists and students of the social sciences in our own country and abroad.[23]

Thus, there is a clearly identifiable natural law-legal positivist controversy on the question of the relation between law and morality. Is there an analogous split among legal theorists on the question of the relation

between legal rights and non-legal, natural or moral rights?

The Two Positions on Legal Rights

All and only natural law theorists affirm the Law Necessity Thesis, (1). Do all and only natural law theorists also affirm a rights thesis corollary to (1), the Rights Necessity Thesis given at (4)?

> (4) There is a necessary connection between legal rights and non-legal rights (natural or moral rights) and the nature of that connection is given by appeal to natural law or moral principles. (The Rights Necessity Thesis)

Suppose (4) is interpreted either as a thesis about the validity of legal rights, (5), or as a thesis about the nonautonomy of legal rights, (6):

> (5) All and only legal rights which are based on natural or moral law are valid. (The Rights Validation Thesis)

> (6) There is no strict separation between legal rights and non-legal rights (natural or moral rights). (The Rights Non-Separation Thesis)

Do all natural law theorists affirm, and all legal positivists deny, (5) and (6)?

If there is a clear natural law-legal positivist split on the nature of rights analogous to the natural law-legal positivist split on the nature of law, then American theories of legal rights can be characterized as either

natural law or legal positivist theories, depending on whether or not they affirm (4). Furthermore, if there is a natural law-legal positivist split on the nature of rights, an adequate defense of the main thesis, (T), would require exploring the interconnections between the theories of law and the theories of rights to determine whether, directly or indirectly, a theory of law generates a reasonable objection to (T), a thesis about legal rights. Thus, the question whether all and only natural law theorists affirm (4) is significant here.

Counter to what one might expect, theories of legal rights do not separate neatly into two dichotomous groups--natural law theories, accepted by all and only natural law theorists, and legal positivist theories, accepted by all and only legal positivists. This is because not all natural law theorists accept the Rights Necessity Thesis, (4). Although all natural law theorists accept the Law Necessity Thesis, (1), and, hence, all construe the connection between law and morality as a necessary one, not all accept the Rights Necessity Thesis, (4), and, hence, not all construe the connection between legal and non-legal rights as a necessary one. On the issue of rights, then, there is not the sharp division between natural law theorists and legal positivists that there is on the issue of law.

The emergence of theories of human or moral rights in the twentieth century which bear little, if any, resemblance to the eighteenth century theories of natural rights illustrates this point. So-called natural rights theories gained prominence in the eighteenth century. They posited that "all men" have certain inherent rights of which they cannot be deprived upon entering civil society. Included among these alleged inalienable rights were the rights to life, liberty, happiness, and property. These "natural rights" were described as rights which a human has in virtue of those characteristics that are specifically and universally human. As Jacques Maritain puts it, "the human person possesses rights because of the very fact that it is a person."[24]

The eighteenth century natural rights tradition affirmed that there are rights ("natural rights") humans have because they are persons, and that the nature of the relation between them and legal rights is given by appeal to natural law principles. Sometimes the claim was that only legal rights based on natural law were valid. Sometimes the claim was that legal rights and non-legal rights are not distinct kinds of rights. In any case, the eighteenth century natural rights tradition was a natural law tradition which endorsed the Rights Necessity Thesis, (4), as well as the Law Necessity Thesis, (1).

Modern theories of human or moral rights are strikingly different. Unlike the theories of natural rights of the eighteenth centry, they are endorsed by legal positivists and natural law theorists alike. This is because they, unlike their eighteenth century counterparts, are not coupled with theses about the natural law basis of all rights. Natural law theorist Lon Fuller, for example, rejects the enghteenth century theories of natural rights and suggests that his natural law position on law does not presuppose any such theory of natural rights:

> ...I should like to have it understood at the outset that any compliments which may here be cast in the direction of natural law are not addressed to the doctrine of natural and inalienable rights. This warning would probably be unnecessary if it were not for the fact that we have got into the habit of identifying these two notions and assuming that some conception of the natural rights of man must lie at the heart of every system of natural law...I am not advocating the doctrine of natural rights,....[25]

It is because a natural law theorist may advocate a modern theory of moral rights without thereby advocating an eighteenth century version of natural rights that one cannot describe all natural law theorists as maintaining the Rights Necessity Thesis, (4).

This does not mean that theories of legal rights, unlike theories of law, cannot be characterized at all among natural law-legal positivist lines. All legal

positivists deny (4) and all who affirm (4) are natural law theorists. What is not the case is that only legal positivists deny (4), or equivalently, that all natural law theorists affirm (4). Thus, although there is not the clear-cut split between natural law theorists and legal positivists on legal rights that there is on law, one can capture what split there is by separating those theories which endorse (4) from those which do not. As I shall use the terms, a "strictly natural law theory of legal rights" is one which endorses the Rights Necessity Thesis given at (4); a "non-strictly natural law theory of legal rights" is one which denies (4). Thus, only natural law theorists subscribe to strictly natural law theories of legal rights, while both natural law theorists and legal positivists subscribe to non-strictly natural law theories.

Summary

Insofar as there is a natural law-legal positivist controversy on legal rights analogous to the natural law-legal positivist controversy on law, it centers on the Rights Necessity Thesis, (4). Only natural law theorists subscribe to (4), while both natural law theorists and legal positivists deny (4). "Strictly natural law theories" affirm (4), and, hence, are held by natural law theorists only; "non-strictly natural law theories" deny (4), and,

hence, are held by both natural law theorists and legal positivists. The distinction between strictly and non-strictly natural law theories of rights captures what there is of a natural law-legal positivist split on the nature of legal rights. As such, any objection to the main thesis, (T), based on a natural law theory of law which is not also a strictly natural law theory of legal rights can be dismissed at the outset as not pertinent to the defense of (T).

C H A P T E R V I

THEORIES OF LEGAL RIGHTS AND LEGAL RIGHT-HOLDERS: THE POSITIONS

In this chapter I discuss the prima facie exhaustive positions in American legal theory on legal rights and legal right-holders. The programme is to describe each position and then, after offering comments or criticisms of each, to pinpoint just what is asserted by each position. This provides the basis for determining, in subsequent chapters, what the objections to the main thesis, (T), based on each position are, and whether any is successful.

The Theories of Legal Rights

Strictly natural law theories. In the previous chapter, a "strictly natural law theory of legal rights" was characterized as one which endorses the Rights Necessity Thesis, (4). It affirms that there is a necessary connection between legal and non-legal rights, the nature of which is given by appeal to non-positive law principles. Basically, there are two strictly natural law theories of legal rights. One is a definitional position; the other is not. Although each affirms (4), only the definitional position

involves claims about the meaning of 'legal right.'

The Moral Sense Position. What I shall call "the Moral Sense Position" on legal rights is a strictly natural law theory of legal rights which defines 'legal right' in moral terms. It endorses proposition (7):

> (7) The meaning of 'legal right' is given in moral terms.

It fits squarely in the camp of strictly natural law theories because it unpacks the necessary connection between legal rights and non-legal rights alleged at (4) in terms of a univocal, moral sense of 'right.' Moral Sense Position advocates argue that legal rights and non-legal rights both are rights in a moral sense.

Traditionally, strictly natural law definitions of 'legal right' are associated with the views of the seventeenth century jurists Grotius and Pufendorf.[1] According to Grotius, a right is:

> A moral quality of a person making it possible to have or to do something lawfully [justly].[2]

Pufendorf offers a similar definition:

> [Right is] an active moral power, belonging to a person, to receive something from another as a matter of necessity.[3]

For Grotius and Pufendorf, legal rights are moral qualities or powers recognized and secured by a politically organized society. Because they define 'right' generically in moral terms, they are Moral Sense Position theorists.

The Thomists Ryan and Boland are contemporary advocates of the Moral Sense Position. They argue:

> A right in the moral sense of the term may be defined as an inviolable moral claim to some personal good. When this claim is created, as it sometimes is, by civil society it is a positive or legal right; when it is derived from man's rational nature it is a natural right.[4]

For them, all rights are moral claims. Legal rights and "natural rights" are rights "in the moral sense of the term."

Whether legal rights are defined as moral qualities, moral powers, or moral claims, the definition of 'legal right' is given in moral terms. Both legal and non-legal rights are rights in a generic, moral sense of "rights." This is the Moral Sense Position on legal rights.

The Moral Validation Position. The other strictly natural law theory of legal rights is what I shall call "the Moral Validation Position." It affirms the Rights Validation Thesis given at (5): All and only legal rights which are based on natural or moral law are valid. It seldom is made clear by advocates of this position just what it means to say that rights are "based on" natural or moral law. Presumably, the view is that natural or moral law principles either provide the test for identifying, or the mark of, a valid legal right, or provide the justification for proper ascription of rights. As such, the Moral

Law Validation Position is a position on valid legal rights, rather than a position on legal rights per se.

Nearly all, if not all, Moral Law Validation Position theorists concede that legal rights formally "originate in the state," i.e., in legislative and judicial enactment. What they deny is that positive law provides the criterion of validity of rights, legal or otherwise. This distinction between the source and the validity of rights is found in the discussion by natural law theorists Neill and Rommen of "human rights" which also are legal or positive rights:

> Human rights can have no foundation other than natural law. Legally, of course, they come from the state, but if a legal 'right' is truly to be a right it must be based on natural law--which is only another way of saying that it must be based on man's very nature...Thus the soundest, the only foundation of those human rights so flagrantly violated today is natural law.[5]

Thus, the Moral Validation Position defends the Right Necessity Thesis, (4), by appeal to the Rights Validation Thesis, (5). It is the view that natural or moral law provides the criterion of validity of both legal and non-legal rights.

I have stated that there are two strictly natural law theories of legal rights, the Moral Sense and the Moral Validation Positions. Defenders of these two positions typically invoke a two- (or more) kind doctrine of rights for distinguishing between legal rights and non-legal

rights. However, occasionally a theorist argues that there really is only one kind of right, namely moral rights. This is the position of natural law theorist G. H. Smith, for example:

> But obviously the distinction between moral and legal rights cannot be sustained; for ex vi termini, all rights are moral rights, and there cannot be a right of any other kind.[6]

Smith's view is a clear endorsement of the Rights Non-Separation Thesis, (6). Does it represent a third strictly natural law position on legal rights?

I think not, on any of three reasonable construals of his view. On one construal, Smith's position is that, properly speaking, there are not legal rights. But then Smith's position is not a strictly natural law position on legal rights, since it fails to affirm the Rights Necessity Thesis, (4).

On a second contrual, Smith's position is that there are legal rights, but that 'legal right' is defined in terms of moral rights. What would it mean, then, to say that all rights are moral rights? Usually the expression 'moral right' is used to pick out a kind of right different from legal rights. But this cannot be Smith's view since he does not endorse a two-kind doctrine of rights. Apparently, on this construal his view is that to say "all rights are moral rights" is to say "all rights are

rights in a moral sense." Legal rights, then, are rights in a moral sense. But on this contrual of Smith's view, it simply reduces to the Moral Sense Position, and does not constitute a separate, third position on legal rights.

On a third construal of Smith's position, to say that legal rights are a kind of moral right is to specify that a necessary condition of an entity's having legal rights is that it have, or be capable of having, moral rights. However, so construed, Smith's position is not a strictly natural law position on legal rights, since it is consistent with this position to deny the Rights Necessity Thesis, (4). It is a position on legal right-holders which could be endorsed by both natural law theorists and legal positivists.

Thus, none of these three construals of Smith's position renders it an alternative, third strictly natural law position on legal rights. If there are plausible objections to the main thesis (T) based on the view that there are only moral rights, they are handled properly as objections issuing from either the Moral Sense Position or a non-strictly natural law position on legal right-holders. They do not require separate treatment.

Non-strictly natural law theories. A non-strictly natural law theory of legal rights is one which denies the Rights

Necessity Thesis, (4). As I contrue the American legal tradition, there are six non-strictly natural law positions on legal rights. Stated in the order in which they are discussed here, they are the Interest, Power, Claim, Correlativity, Rules, and Prediction Positions.

The Interest Position. The Interest Position on legal rights was made famous by Jhering, who defined a legal right as a legally protected interest. A more recent defense of the Interest Position has been offered by F. K. H. Maher. He argues that all rights, and not just legal rights, are interests:

> We recognize that right is an 'umbrella word.' Therefore we should not use it except in its most general sense of any interest or advantage recognized by law.[7]

Maher's position might be described alternatively as an Advantages Position view, since he restricts the use of 'right' in its most general sense to "the interest or advantages recognized by law." Another legal theorist, J. Stone, also describes rights as advantages, viz., advantages conferred by law in order to protect de facto interests.[8] For our purposes, the Interest Position is taken to include the view that legal rights are advantages.

The Power Position. The American legal realist J. C. Gray argues that a right is not an interest, as Jhering and others had thought; rather, it is the means by

which an interest is secured. Gray's own view is that legal rights are powers. He states:

> The full definition of a man's legal right is this: that power which he has to make a person or persons do or refrain from doing a certain act or certain acts, so far as the power arises from society imposing a legal duty upon a person or persons.[9]

C. K. Allen's definition of 'legal right' merges the two notions of an interest and a power. He argues that both notions are "inherent in the notion of right and are in no sense mutually exclusive."[10] Allen's view is an amended version of Gray's position:

> The essence of legal right seems to me to be not legally guaranteed power by itself, nor legally protected interest by itself, but the legally guaranteed power to realize an interest.[11]

The Power Position on legal rights has been attributed variously to Hobbes, Spinoza, Winscheid, Savigny and T. H. Green. Often it is advanced as a corollary to a general view of rights as powers. For example, Green argues that a right generally is "a power claimed and recognized as contributing to a common good."[12] He argues that legal rights are powers actually recognized by civil society, and natural rights are powers which should be recognized by civil society.[13]

Sometimes the Power Position is advanced as a view about the derivation of all other legal concepts, including

the concept of a legal right. The contemporary theorist G. Goble, for example, argues that since the basic legal concept is power, all other legal concepts are derived from and defined in terms of the concept power. His definition of 'legal right' is a clear statement of the Power Position:

> ['Right' is, by definition] the power of a person to initiate that sequential combination of powers and acts involved in obtaining a judgment against another person.[14]

Some theorists argue that legal rights are the "capabilities to claim an act from another,"[15] or the "capacity in one man of controlling, with the assent and assistance of the State, the acts of others."[16] The view of legal rights as capabilities or capacities is considered here to be a Power Position view.

The Claim Position. J. Feinberg offers a representative view of legal rights as claims. He defends a two-kind doctrine of rights according to which legal rights and moral rights are rights in the generic sense of "valid claims." Arguing that validity is justification within a system of rules or principles, Feinberg describes legal rights as claims justified by appeal to civil rules, and moral rights as claims justified by appeal to moral rules or the principles of an enlightened conscience.[17]

H. J. McCloskey offers what he takes to be an

alternative to the Claim Position on legal rights. His view is that rights are entitlements, "entitlements to do, have, enjoy or have done."[18] Whether legal, moral, social, institutional or in games, rights are entitlements of some kind.

However, for our purposes, the Entitlement Position is included within the Claim Position on legal rights. There are two reasons for this inclusion, one positive and one negative. The "positive" reason is that claim theorists sometimes describe the Entitlement Position as a version of their own position. For example, Feinberg argues that the view of rights an entitlements is accomodated by the view of rights as claims:

> All rights seem to merge entitlements to do, have, omit, or be something with claims against others to act or refrain from acting in certain ways. In some statements of rights the entitlement is perfectly determinate (e.g., to play tennis) and the claim vague (e.g., against some vague group of potential or possible obstructors); but in other cases the object of the claim is clear and determinate (e.g., against one's parents), and the entitlement general and indeterminate (e.g., to be given a proper upbringing). If we mean by "entitlement" that to which one has a right and by "claim" something directed at those against whom the right holds (as McCloskey apparently does), then we can say that all claim-rights necessarily involve both, though in individual cases the one element or the other may be in sharper focus.[19]

According to Feinberg, entitlements to do, have, enjoy or have done are, or entail, "claims to." Arguing that claims

are both "claims to" and "claims against," Feinberg concludes that the Entitlement Position is subsumed under the Claim Position on legal rights.

Of course, McCloskey would not be happy with this classification of the entitlement view. Arguing that rights are rights to and not rights against, and that claims essentially are claims against, McCloskey denies that rights are claims. A legal right may provide the grounds for a claim, or indirectly may give rise to claims, but it does not consist primarily in such claims.[20]

Suppose one allows that claims may be either "to" or "against," as Feinberg argues. Then, setting aside other difficulties with McCloskey's account, an appeal to a distinction between "claims against" and "entitlements to" does not establish that rights are not claims, as McCloskey assumes. If anything, it helps to substantiate the view that rights are claims.

The "negative reason" for including the Entitlement Position within the Claim Position on legal rights is that, for our purposes, nothing relevant to a defense of (T) is sacrificed by doing so. The rationale for considering these positions on legal rights at all is to defend (T) against objections based on them. But, as will be shown, on McCloskey's view, the main objection to giving non-

humans legal rights is that they cannot have interests or possess anything. Since this objection is handled appropriately with other Interest Position Objections to (T), one need not treat his Entitlement Position separately in order to provide a thorough defense of (T).

The Correlativity Position. Very often a position on legal rights is advanced in conjunction with the view that legal rights and duties are correlative, the main tenet of the Correlativity Position. For example, the famous twentieth century jurist Wesley Hohfeld suggests that the word 'claim' be substituted as a synonym for 'right' and then argues that a "claim-right" (a right in its "limited and proper meaning") is the correlative of a legal duty.[21] Hohfeld's version of the Correlativity Position is that when 'legal right' is used properly, the relation expressed as A's legal right against B is, without loss of meaning, expressed alternatively as B's legal duty to A. Rights "strictu sensu," i.e., claim-rights, are the correlatives of legal duties. Hohfeld distinguishes them from other so-called "rights"--privileges, powers and immunities--in terms of his now well-known schema of jural opposites and correlatives:

Jural Opposites	(right (no-right	privilege duty	power disability	immunity liability
Jural Correlatives	(right (duty	privilege no-right	power liability	immunity disability

Hohfeld's description of rights as the correlatives of duties follows the positivist tradition of Austin. Austin's view is that a person has a legal right when someone else is obliged by law to do or forbear toward that person.[22] Austin endorsed the Correlativity Position view that legal rights properly so-called are the correlatives or legal duties:

> Every legal right supposes a duty incumbent on a party or parties other than the party entitled... If that corresponding duty be the creature of a law imperative, then the right is a right properly so called.[23]

The Rules Position. The position that an adequate account of legal rights must involve the notion of a legal rule is the Rules Position. Sometimes it is advocated in conjunction with another position on legal rights. For example, Feinberg links the notion of a legal right with legal rules in his characterization of rights as valid claims. Since validity is justification within a system of rules or principles, and rights are valid claims, legal rights are claims justified within a system of legal rules or principles. By extension, to have a legal rights is to have a claim against someone, where the recognition of the claim as valid is called for by some set of government legal rules or principles.[24]

Sometimes the Rules Position is advocated by itself. For example, Benn and Peters argue that statements

including the expressions 'rights' and 'duties' prescribe, within a system of rules, how persons shall behave in relation to one another:

> To say that X has a right to £5 is to imply that there is a rule which, when applied to the case of X and some other person Y, imposes on Y a duty to pay X £5 if X so chooses.[25]

Statements attributing legal rights are treated as stating or applying legal rules. The position of Benn and Peters is that 'right' has meaning only in the context of rules.[26]

Sometimes the Rules Position is offered as an alternative to any position which attempts to define 'legal right.' For example, H. L. A. Hart argues that "legal words can only be illustrated by considering the conditions under which statements in which they have their characteristic use are true."[27] Insisting on the futility of attempting to define 'legal right,' Hart's approach is to explain what a legal right is by giving the sufficient conditions for the truth of statements of the form 'X has a legal right' in terms of rules:

> (a) There is in existence a legal system;
> (b) Under a rule or rules of the system some other person Y is, in the events which have happened, obliged to do or abstain from some action;
> (c) This obligation is made by law dependent on the choice either of X or of some other person authorized to act on his behalf so that either Y is bound to do or abstain from some action only if X (or some authorized person) so chooses

> or alternatively only until X (or such person) chooses otherwise.[28]

Hart adds that a statement of the form 'X has a legal right' is used to draw a conclusion of law in a particular case which falls under such rules.

The Prediction Position. The Prediction Position is a distinctively American legal realist-sociological jurist position. O. W. Holmes argues that a legal right, like a legal duty, is:

> nothing but a prediction that if a man does or omits certain things, he will be made to suffer in this or that way by the judgment of the court.[29]

To determine what a right is, Holmes would have us ask two questions: What are the facts about the group in question? What are the consequences attached by the law to the group? A right is just "a consequence attached by the law to one or more facts which the law defines."[30]

Like Holmes, Llewellyn argues that statements ascribing rights are factual statements that in a given situation certain court action is likely. He writes:

> I should like to begin by distinguishing real "rules" and rights from paper rules and rights. The former are conceived in terms of behavior; they are but other names, convenient shorthand symbols, for the remedies, the actions of the courts. They are descriptive, not prescriptive, except insofar as there may occasionally be implied that court ought to continue in their practices. "Real rules," then, if I had my way with words, would by legal scientists be called the practices of the courts, and not

> "rules" at all. And statements of "rights" would be statements of likelihood that in a given situation a certain type of court action loomed in the offing. Factual terms. No more.[31]

The Prediction Position, then, is that rights are conceived in terms of behavior, and that statements about rights are predictive statements about judicial or official behavior.

Two other views about legal rights. Two other views about legal rights deserve mention. The first, encountered already in connection with Hart's view, is that the attempt to define 'legal right' is misguided or futile. Hohfeld, for example, maintains that since definitions of fundamental legal terms such as 'right' are "sui generis," attempts at formal definitions of them always are unsatisfactory, if not totally useless. He assumes that his procedure of explaining legal relations by organizing legal concepts in a scheme of jural opposites and correlatives replaced the need for definition.

The second view is that rights have no independent reality. For some, this amounts to describing rights and duties as "fictitious entities." For example, Bentham argues that:

> An act is a real entity; a law is another. A duty or obligation is a fictitious entity conceived as resulting from the union of the two former. A law commanding or forbidding an act thereby creates a duty or obligation. A right is another fictitious entity, resulting out of a duty.[32]

For others, this amounts to describing rights as representations of the mind, purely psychological phenomena lacking objective reality. Talk of rights is not to be taken literally.

This second view is associated most often with the Scandinavian legal realists Hägerström, Olivecrona and Lundstedt. But sometimes it is associated with American legal realists, particularly with Holmes and Llewellyn. Their position that the notion of a right is analyzed in terms of facts and behavior sometimes is construed as a position which denies the independent reality of entities called "rights." If the entities cannot be analyzed in terms of facts and behavior, then "they" are not rights at all.

These two views, the "no definition view" and the "no such thing as rights" views, may have been maintained within the American legal tradition. Since if they have been, the views of those theorists who endorse them are represented adequately in terms of the six non-strictly natural law positions on legal rights already discussed, there is no need to treat them here as separate positions.

Theories of Legal Right-Holders

Two basic approaches in legal theory are used to analyze the notion of a legal right-holder. One is to analyze it in terms of one of the eight historical positions

on legal rights. The other is to analyze it in terms which, though compatible with some of those positions, do not presuppose any specific one.

Theories of legal right-holders based on the first approach unpack the notion of a legal right-holder by invoking one of the eight historical positions on legal rights. Where a position offers a definition of 'legal right,' this is done by substituting the definition or some equivalent expression for all occurrences of 'legal right' in statements of the form 'X has a legal right.' For instance, if the definition proposed is "a legally protected interest," then 'X has a legal right' is logically equivalent to 'X has a legally protected interest.' If 'legal right' is defined as "power," then to have a legal right is to have a power.

Where a position on legal rights is not a definitional position, or where the proposed analysis of 'legal right' does not substitute directly into statements of the form 'X has a legal right,' there is more leeway in rendering the notion of a legal right-holder in terms of the notion of a legal right. For example, on Feinberg's version of the Rules Position, to say that X has a legal right is to say that there is a governing legal rule or set of legal rules such that official recognition of X's claim as valid is called for by that rule or set of rules. On

Holmes's Prediction Position view, to say that X has a legal right is to predict that, if certain facts which the law defines transpire, then certain consequences (e.g., remedies, sanctions) determined by the courts which affect X will follow.

The second approach to unpacking the notion of a legal right-holder does not presuppose any particular historical position on legal rights. Typically it involves an independent set of necessary conditions for an entity, X, correctly to be said to have legal rights. The two most familiar of these are what I call the "Moral Person Position" and the "Moral Rights Position." According to the Moral Person Position, to have legal rights an entity must be a moral person, i.e., be subject to moral law, be rational, be capable of choice, or have a will. According to the Moral Rights Position, to have legal rights an entity must have moral rights. The first position emphasizes the nature of the right-holder; the second emphasizes the nature of the rights which legal right-holders have. Although sometimes the Moral Rights Position is assumed to be a version of the Moral Person Position, for our purposes they are treated as separate positions.

Other less frequently advanced positions cite as necessary conditions for X's having legal rights any of

the following: X is capable of possessing things; X is capable of movement; X is a member of a community; X has a soul; X is capable of being party to a lawsuit. Each of these views is a non-historical position on legal right-holders.

The Historical Positions on Legal Rights and Legal Right-Holders

In this section I offer comments and criticisms of the eight historical positions on legal rights and legal right-holders. The discussion attempts to clarify just what is asserted by each position and to identify those theses which generate reasonable objections to the main thesis, (T). Some positions (e.g., the Claim Position) are discussed in detail; others (e.g., the Moral Sense Position) are not. In general, the more detailed discussions are of those positions which are most widely accepted in American legal theory.

The strictly natural law theories.

The Moral Sense Position. The Moral Sense Position endorses the Rights Necessity Thesis, (4), by construing the connection between legal rights and non-legal rights as a conceptual one. Both are rights in a moral sense of 'rights.' It is a rock-bottom position, not accomodated

by any of the other historical positions on legal rights. It is the only distinctively natural law definitional position on legal rights.

The Moral Sense Position is an unpopular position. It has been the target of unwaivering criticism by both legal positivists and natural law theorists. Legal positivists criticize it for its failure to keep separate the factual and moral realms. Natural law theorists criticize it for its failure to recognize non-moral senses of 'right.' Both legal positivists and natural law theorists object to the suspicious metaphysics typically adduced to support arguments for a univocal, moral sense of 'right.' As a consequence, very few theorists would take seriously objections to (T) based on the Moral Sense Position, even if it could be shown that natural objects cannot meaningfully be said to have rights in any moral sense of the term.

In order to be clear about what counts as a Moral Sense Position Objection to (T), this position must be distinguished clearly from the Moral Person and Moral Rights Positions. The latter are not strictly natural law positions; nor do they provide an analysis of 'legal right.' While Moral Sense Position theorists may endorse both the Moral Person and the Moral Rights Positions, their view neither entails, nor is entailed by, those positions.

The Moral Validation Position. The Moral Validation Position is that all valid legal rights are based on natural or moral law. It is a "validation" position because it asserts that the mark, test, or justification for ascription of valid rights is given by natural law or moral principles. The distinctive feature of this position is that it is a view on the validity of rights, and not on the nature or analysis of rights per se. Unlike the other positions, it does not presuppose any particular theses about the analysis of 'legal right' or the conditions under which statements of the form 'X has a legal right' are true. It remains to be seen whether it generates any objection to the main thesis, (T).

The non-strictly natural law theories.

The Interest Position. Critics have argued persuasively that the Interest Position is unacceptable because it fails to distinguish between the means of securing a thing and the thing secured. Legal rights are not themselves interests, as Jhering and others have argued, but are among the devices of a legal order for securing interests.

Distinctions between different meanings of 'interest' or different kinds of interests have surfaced in attempts to salvage the Interest Position. Defenders

distinguish between "de facto interests," what an entity, X, actually desires, wants or likes, "prudential interests," what it is to X's advantage to have, and "de jure interests," advantages or concerns which, on moral grounds, X ought to have.

However, these distinctions fail to rescue the Interest Position from criticisms of it. If rights are not themselves interests, then they are neither a specific kind of interest, nor interests in any specific sense of 'interest.' This point is borne out by considering a few examples. In the case of "de facto interests," a person may want to rob a bank, though no corresponding legal right exists; and a person may have a legal right to sue a landlord, while lacking any desire to do so. Similarly for "prudential interests." It may be to an employer's advantage to hire female workers at lower salaries than their male counterparts, even though the employer has no legal right to do so; and a defendant may have a legal right to a court-appointed attorney, though it is to his/her disadvantage to be represented by such attorneys, especially if the courts and attorneys it appoints are corrupt. The case of "de jure interests" fares no better. It may be that a slave ought to have certain advantages, e.g., educational opportunities and social security, even though in

fact he/she lacks any such legal right; and someone may have a legal right to sue a destitute elderly person even though, on moral grounds, it is suspect whether this is an advantage or concern which he/she ought to have or pursue.[33] These examples show that attempts to define 'legal right' as an interest are not rejuvenated by invoking a three-fold distinction between senses of 'interest' or kinds of interests.

If the view of legal rights as interests fails, then so does the more refined view of legal rights as interests which the law recognizes, delimits and secures, whether the law secures them for themselves (as F. K. H. Maher contends) or for the purpose of protecting other interests (as J. Stone contends). The Interest Position view which <u>is</u> plausible is that legal rights are, or are among, the chief legal means for protecting, delimiting and securing interests.

The view of legal rights as the chief legal means for securing interests is not, however, a definitional view. Suppose that in a pre-industrial society, a bow and arrow constitutes the chief means for securing food. Or, suppose, as often is alleged, that hard work is the chief means to success. In neither case is a definitional view advanced. It may be that one way to identify a bow and

arrow is to test its effectiveness in procuring food, or that a mark of success is that it was bred of hard work. But it is quite odd, and I think, false to say that 'bow and arrow' and 'hard work' just mean "the chief means for securing food" or "the chief means of securing success," respectively. By analogy, it may be the mark of identification, or test, of a legal right that it secures some interest; or, it may be an explanation of why rights are "valuable commodities" that they are the chief legal instrument for protecting human interests. But this is quite different from saying that 'legal right' just means "interest" or "the chief legal means for securing interests."

The significance of the Interest Position is not as a definition of 'legal right.' Rather, its significance is that it provides a commonly accepted test for justifying ascription of legal rights, one which captures a familiar use of 'legal rights' by lawyers. In creating rights and resolving disputes involving rights, lawyers often ask "What interests are at stake here?" "What interests would be served, overlooked or compromised by taking this action?" The Interest Position does highlight the fact, so familiar to lawyers, that operationally significant differences result for subjects recognized as having legally relevant interests, or on whom legally relevant

advantages are conferred.

In fact, it is just these operational advantages which legal right-holders have and non-legal right-holders lack that lawyer Christopher Stone sought to isolate in his use of the terms 'legal right' and 'holder of legal rights.' In Should Trees Have Standing? Stone writes:

> First and most obviously, if the term [legal right] is to have any content at all, an entity cannot be said to hold a legal right unless and until some public authoritative body is prepared to give some amount of review to actions that are colorably inconsistent with that "right."
>
> ...But for a thing to be a holder of legal rights, something more is needed than that some authoritative body will review the actions and processes of those who threaten it. As I shall use the term, "holder of legal right," each of three additional criteria must be satisfied...They are, first, that the thing can institute legal action at its behest; second, that in determining the granting of relief, the court must take injury to it into account; and, third, that relief must run to the benefit of it.[34]

When Stone states that natural objects are not, but should be, legal right-holders, he means to emphasize these three specific legal advantages which the natural environment lacks but ought to have. To use Julius Stone's terminology, they are advantages which the law recognizes, delimits and secures for the purpose of protecting other interests or claims, which advantages natural objects do not (yet) have.

What is important here about C. Stone's account is not whether his analysis of 'legal right' is correct, but that he adopts an Advantages Position view of legal rights and legal right-holders to defend the view that natural objects can, and should, have legal rights. Since the Advantages Position is taken here to be a version of the Interest Position, if Stone is correct, then at least one version of the Interest Position accomodates thesis (T).

The Power Position. Like the Interest Position, the Power Position is unpopular as a definitional position. Critics have argued successfully that rights are not powers because one may have powers to do what one has no legal right to do, and one may have legal rights one is powerless to enforce. One may have the power to kill someone in the absence of any corresponding legal right; and, if the courts are corrupt, one may have the legal right to a fair trial but no power to obtain a trial or to ensure that it is "fair."

Advocates of the Power Position might counter that legal rights are hypothetical powers only, i.e., powers a person would have if the courts and authorities acted in accordance with law. But to this critics have a damaging reply. As S. I. Benn puts it:

> But this would be the same as saying that his rights are the powers he would have if he had

> his rights. Rights, in other words, may explain why persons have the powers they do, but they are not identical with powers.[35]

Even the distinction between "positive powers," powers actually possessed or available, and "normative powers," powers one ought to have or which one would be justified in asserting, is unhelpful in showing that rights are powers. A riparian may have the legal right to challenge a corporate polluter even though, in fact, he/she lacks the "positive powers" to exercise that right. Such might be the case if the riparian were financially destitute and unable to avail himself/herself of the legal machinery provided for initiating action against the polluter. In cases of civil disobedience, one may be morally justified in breaking a law, and, hence, be said to have certain "normative powers," even though one has no legal right to break a law. Thus, although legal rights may presuppose certain powers of legal right-holders, they neither are identical to, nor necessarily imply, powers.

The most promising recourse for the Power Position theorist is to withdraw the definitional claim and to assert instead the weaker claim that often legal rights secure, guarantee or create legal powers. The strength of this restatement is that it is a concession to critics that the relation between rights and powers is not a definitional one which, nonetheless, preserves the familiar,

lawyer's notion of the relation between legal rights and legal powers. In ordinary legal usage, legal powers are associated both with rights of representatives (e.g., agents, trustees, guardians, lawyers, public officials, public bodies) and with rights arising out of contractual agreements (e.g., the "right or power of attorney"). They are associated with rights conferred on persons because of their special legal status, function or circumstances. These powers sometimes are called "special rights" or "delegated rights." The powers of a trustee to act on behalf of the testator, of a landlord to evict a tenant, of a policeperson to make an arrest, of a court to issue warrants are examples lawyers use of these special or delegated rights. The restatement of the original Power Position view in terms of the weaker claim that often legal rights secure, guarantee or create legal powers captures this ordinary lawyer's view of the relation between legal rights and legal powers.

One weakness of this restatement is that it conflicts with the Hohfeldian view, widely accepted among legal positivists, that 'right' properly used does not refer to powers at all. These theorists would maintain that so-called "special" or "delegated" rights really are only powers. They are powers accorded individuals or public

bodies for creating, divesting or altering the legal relations and legal status of others, including the legal rights and legal right-holder status of others. While these powers presuppose the legal rights of those individuals and public bodies to exercise those powers, they are not legal rights, in any proper sense of 'rights.'

What is significant for our purposes about the restated Power Position view is that its plausibility does not rest on determining which, if either, view of legal powers is correct--the lawyer's view that legal powers are "special" or "delegated" rights, or the Hohfeldian view that legal powers are not legal rights at all. The restated Power Position merely claims that often legal rights secure, guarantee or create legal powers. Its plausibility is not affected by whether powers are described correctly as "special rights" or as "mere powers."

The Claim Position. The Claim Position is one of the most widely endorsed positions on legal rights. It is commonplace now to distinguish "claim-rights" from mere privileges (or, liberties), powers and immunities, also often called "rights." Feinberg states that "nearly all writers maintain that there is some connection between having a claim and having a right."[36] For a majority of theorists, then, the question is what that connection is

between rights and claims, and not whether there is one.

There is a second feature of the Claim Position which makes it an attractive position. It may be that many of the other historical positions on legal rights can be rendered adequately in terms of the Claim Position. For example, some of the views offered by Power Position theorists actually suggest a Claim Position on legal rights. Kocourek defines 'legal right' as "the capability to claim an act from another." But he also defines a claim as "a legal capability to require a positive or negative act from another."[37] Taken together, the suggestion is that rights are claims. Kocourek himself encourages this rendering of his view when he instructs that "it will be found convenient to substitute for 'right' the term 'claim.'"[38]

The two legal theorists Pound and Paton each suggest that the Interest Position is, or could be construed as, a version of the Claim Position. Pound argues that both the "senses of 'legal right'" as interest, and as the chief legal means of securing interests, can be defined in terms of "claim."[39] He also argues that:

> Interests are claims or demands or desires involved immediately in the individual life and asserted in title of that life.[40]

Paton, in his discussion of "the element of interest as an element of right," offers a similar statement about interests:

> An interest is a claim or want of an individual or group of individuals which that individual or group wishes to satisfy.[41]

Thus, Pound and Paton suppose that the Interest Position can be considered a version of the Claim Position.

It already has been shown that there are reasons for linking the Correlativity and Rules Positions with the Claim Position on legal rights. Even the Moral Sense Position views of Ryan and Boland invoke the notion of a claim for identifying the moral sense of 'right.' Thus, the Claim Position retains some of its attractiveness because it has the umbrella feature of capturing some of the main features of the other historical positions on legal rights.

Still, the Claim Position has been criticized on many fronts. It is important here to consider what some of these criticisms are, and to determine which, if any, construal of the Claim Position survives the criticisms.

In discussions of the Claim Position, critics and advocates alike typically distinguish between at least two senses of 'claim.' In one sense (call it "$claim_1$"), a claim is an actual demand; this is the sense of 'claim' in "to make a claim." In another sense (call it "$claim_2$"), a claim is a demand which, if made, would be valid, justified or at least defensible; this is the sense of 'claim' in "to have a claim." (A third sense of 'claim' is introduced later in this chapter.) On this two-sense

distinction, having a claim is contrasted with making a claim.

There is an important connection between having a claim and making a claim, between $claims_2$ and $claims_1$. To say that one has a claim ($claim_2$) is to say that, if an actual demand (a $claim_1$) were made, then it (the $claim_1$) would be valid, justified or at least defensible. Thus, having a claim may involve making a claim.

Critics ask whether rights are claims in either sense of 'claim.' S. I. Benn argues that they are not. Rights are not $claims_1$ because persons possess rights to things they never do or could demand as due. A creditor has a right to be paid a debt by his/her debtor, even though the creditor may never actually demand payment. Infants have rights, though they themselves are incapable of claiming (i.e., $claiming_1$) them. Nor are rights $claims_2$ according to Benn, since "this would locate the concept not in the language of description but in that of norms."[42]

But Benn's criticism is spurious. No major theorist holds that rights are $claims_1$. Although many hold that rights are $claims_2$, this need not locate the concept of a right in the language of norms, as Benn argues. One could maintain, as indeed Feinberg and other claim theorists do, that the characterization of rights as $claims_2$

links the notion of a right to a system of rules or principles. In this case, to say that a right is a $claim_2$ is to say that, if a $claim_1$ were made, it would be valid, justified or at least defensible within a system of governing rules or principles. Here the notions of validity, justification and defensibility are no more "in the language of norms" than when one validates, justifies or defends a specific line in a formal proof by citing the relevant rule of inference used on proceeding lines to enable the deduction. Thus, the $Claim_2$ Position withstands Benn's criticisms.

As we have seen, McCloskey offers a different criticism of claim views. He argues that rights are not claims because rights essentially are rights to, not rights against, and claims essentially are claims against. But why suppose, as McCloskey does, that rights essentially are rights to, or that claims essentially are claims against? Rights created by contractual agreement (e.g., a creditor's right to be paid a debt by his/her debtor) are "rights against" and many theorists argue that non-contractual rights to something (e.g., rights to social security) impose duties on others and, hence, are not simply "rights to." Why suppose that the defendant's claim to impartial treatment before the law, the landowner's claim to

noninterference by trespassers, the beneficiary's claim to an inheritance are not bona fide examples of "claims to"? McCloskey's criticism of claim views is untenable.

A. M. Honoré offers a third type of criticism of the Claim Position. Like McCloskey, Honoré grants that certain claims protect rights. But he denies that rights are identified with claims or with aggregates of claims. He argues:

> The right unifies the claims and, very often outlives them. It existed before some of the claims presently recognized were evolved; it will continue to be the same right, in an intelligible sense, when new modes of protection are evolved. There would be no right without some claims securing it, but the right to bodily security is no more identifiable with the claims now directed to securing people's bodies than my right to £100 under a contract is identifiable with my present claim against the debtor for £100.[43]

Honoré's criticism is unacceptable because it fails to heed the distinction between the two senses of 'claim': $claim_1$, an actual demand, and $claim_2$, a demand which, if made, would be at least defensible. It may be true that rights exist before $claims_1$, will outlive $claims_1$, will persist unchanged when the $claims_1$ change, and are not identified with $claims_1$. But it does not follow that rights are not $claims_2$. To establish that Honoré must show what it may not even be meaningful to assert, viz., that rights exist before $claims_2$, will outlive $claims_2$, will persist

unchanged when the $claims_2$ change.

Appeals to international law and modern manifestos on human rights provide a fourth type of argument against the Claim Position. Two lines of criticism are offered. The first line is that conditions of genuine human need generate "welfare rights" which are not mere claims; hence, legal rights are not claims. The second line is that, since people have claims to economic and social benefits which are not yet transformed into legal rights to those benefits, rights are not claims.

Neither line of criticism is effective against the $claim_2$ view. The first line construes genuine human needs in conditions of scarcity (e.g., the needs for a nutritious diet and adequate housing) as, or as providing grounds for, genuine rights ("welfare" or "human" rights) which are not mere claims. It establishes only that "welfare rights," if not claims at all, are not $claims_1$. It is consistent with this line to argue that these welfare rights are moral claims, i.e., $claims_2$, which, if they are not also $claims_1$, ought to be. That is, one could argue that welfare rights are demands which are valid, justified or defensible on moral grounds and which, if they are not already, ought to be valid, justified or defensible on legal grounds. The $claim_2$ view of rights is not undone by the first line of criticism.

The second line of criticism construes genuine human needs as, or as providing grounds for, claims ("welfare claims") which are not themselves recognized legal rights. But the view that welfare claims are not legal rights does not establish that rights are not $claims_2$. A $claim_2$ view defender has a legitimate counter: "Many demands which are valid, justified or defensible on moral grounds lack legal recognition and, hence, are not legal rights. Welfare claims are an example of such legal claims, i.e., $claims_2$. They are human or moral rights which are not yet legal rights."

Suppose the critic persists, arguing that, although genuine claims, welfare claims are not rights at all--neither legal nor moral rights--and, hence, they are not $claims_2$. At best, they are "permanent possibilities of rights." The $claim_2$ view defender now can offer a different counter: "If welfare claims are not rights at all, and, hence, are not $claims_2$, then they are claims in some other sense of 'claim.' Either they are $claims_1$, or, to invoke a third, "propositional sense of 'claim'" offered by Feinberg (call it "$claim_3$"), they are $claims_3$, i.e., demands that one has, or should have, certain rights.[44] But the existence of welfare claims (i.e., $claims_1$ or $claims_3$) which are not rights (i.e., $claims_2$) does not establish that rights are not $claims_2$." This

rebuttal successfully defends the $claim_2$ view of rights against the second line of criticism.

Thus, the popular view of rights as $claims_2$ withstands each of the four types of criticisms of the Claim Position--Benn's, McCloskey's, Honoré's, and the "human need" objections. For our purposes, then, the Claim Position on legal rights is taken to be the view that legal rights are $claims_2$; to have a legal right is to have a $claim_2$.

The Correlativity Position. The Correlativity Position rarely is construed as a definitional position on legal rights. Nearly all theorists who subscribe to some version of the doctrine that legal rights and legal duties are correlative define 'legal right' other than as "correlative of a legal duty." For example, although Austin endorses the view that legal rights and duties are correlative, he seems to mean by 'legal right' a power, capacity or advantage of extracting from another or others acts or forbearances.[45] In fact, Austin argues that some duties, so-called "absolute duties" (e.g., duties to oneself, to a sovereign, to animals) do not correlate with anyone's rights to their performance or forbearance. This position would be untenable for Austin if he assumed that 'legal right' just means "the correlative of a legal duty."

Hohfeld's version of the Correlativity Position also is a non-definitional view. He argues that 'right' is an undefinable, fundamental legal term which is best explained in terms of an equivalence relation or "correlativity" with legal duties. Although entailment relations hold between statements ascribing legal rights and statements ascribing legal duties, he seems to deny that the two notions are synonymous.

It is precisely for his failure to make the stronger definitional claim that Max Radin criticizes Hohfeld's correlativity position. Radin argues that Hohfeld incorrectly views rights and duties as correlatives, i.e., as two distinct notions intimately connected, when they really are synonyms.[46] Radin's own position is one of the few clear examples of a Correlativity Position advocate who construes that position as a definitional one. He writes:

> [Where B ought to do an act that A desires him to do] A's demand-right and B's duty are not correlatives because they are not separate, however closely connected, things at all. They are two absolutely equivalent statements of the same thing. B's duty does not follow from A's right. The two terms are identical in what they seek to describe as the active and passive form of indicating an act; "A was murdered by B"; or "B murdered A."[47]

Many tangled and difficult issues are raised by the Correlativity Position, especially ones concerning the plausibility of thesis (T). Since these require in-depth

consideration, further consideration of the Correlativity Position is reserved for Chapter VIII.

The Rules Position. Critics of the Rules Position argue that in general there are no entailment relations which hold between statements about legal rights and statements about legal rules. They argue that there can be legal rights in the absence of legal rules, and legal rules which bear no direct relation to legal rights. Where legal rules are related to legal rights, they argue that the nature of that relation is not fixed. Some rules deny rights; others confer or sustain rights. Typically, these critics concede that sometimes the word 'right' is used to state a rule of law, as is the case where 'right' in "the right of the accused to a speedy trial" is used both to name a right and to specify or suggest a rule concerning correct court procedure in criminal prosecutions. But they insist that it is quite incorrect to say that in general legal rights presuppose, or are presupposed by, legal rules or by any other formal principles of procedure. While legal rules may describe certain rights, give the conditions under which rights hold, or state the legal consequences which follow the infringement of rights, they are not coupled with rights by any entailment relations.

Some of the Rules Position theorists, e.g., Hart and Feinberg, would agree that 'legal right' is not defined

in terms of legal rules. But that concession is made, not on the grounds that there is no entailment relation which holds between legal rights and legal rules, but on the grounds that no formal definition of 'legal right' is possible or desirable. The Rules Position critic would insist, and the defender would deny, that no general entailment relations hold between legal rights and legal rules.

The Rules Position retains its popularity despite the critic's objections. First, it emphasizes the highly-favored positivist view that legal rights are civil, political rights only, that they presuppose a rule-governed legal system. Second, it provides a way of creating new rights, of justifying ascription of rights, and of testing the validity of rights. Third, it accomodates theorists who seek a generic identification of rights in terms of which both legal rights and moral rights are rights properly so-called. The Rules Position is attractive as a framework for analyzing rights, even if it has weaknesses as a position on the analysis of rights. For these reasons, critics who construe the Rules Position narrowly as a position on the meaning of 'legal right' overlook important features of the position.

The prediction position. The Prediction Position is that statements ascribing legal rights are predictive statements about what courts and other public officials

will do in a given case. Critics argue that this view is unacceptable as an analysis of 'legal right.' They point out that it is not absurd to suppose that someone has a legal right, e.g., to receive alimony, even though there is no likelihood or expectation that a court will award alimony. Nor is it absurd to suppose that a certain person can expect to receive special treatment by the courts even though the person has no legal right to that treatment, e.g., in cases where the courts are corrupt.

However, it is not clear that legal realists and sociological jurists intend the Prediction Position to be a definitional position. Certainly legal realism and sociological jurisprudence have been heralded for their rejection of abstract theorization about rights in favor of talk about concrete cases, discernible official behavior and predictable legal consequences. On a Prediction Position account, if lawyers ask "Has my client a right to her father's property?" they are asking, "According to the words used by the father in his will, made, dated and signed by him in such-and-such a place and in conformity with accepted legal procedure, may I demand from the trustee or judge that the property be transferred to my client? Is it likely that she will be awarded the property?" This may be all that Holmes and Llewellyn intend when they argue, respectively, that "every [legal] right is a certain

consequence attached by the law to one or more facts which the law defines,"[48] and that talk of behavior should be substituted for talk of legal rights because the latter "is a block to clear thinking about matters legal" while the former is not.[49]

Summary

Eight historical positions on legal rights have been discussed. They are two strictly natural law positions (the Moral Sense and Moral Validation Positions) and six non-strictly natural law positions (the Interest, Power, Claim, Correlativity, Rules and Prediction Positions. Except for the Moral Validation Position, each generates a position on legal right-holders. In addition, accounts of legal right-holders which do not presuppose any of the historical positions on legal rights have been discussed.

This discussion has made clear just what is asserted by each position, separating off the plausible from the non-plausible versions of each position. In addition, it provided the requisite information for determining, in succeeding Chapters, VII, VIII and IX, whether there are any successful objections to the main thesis, (T), based on the positions in American legal theory on legal rights and legal right-holders.

CHAPTER VII

THEORIES OF LEGAL RIGHTS AND LEGAL RIGHT-HOLDERS: THE HISTORICAL POSITION OBJECTIONS

In Chapter VI, the eight historical positions on legal rights and legal right-holders were discussed. In this chapter, plausible objections to the main thesis, (T), based on seven of these positions are stated and defeated. Objections to (T) based on the eighth position, the Correlativity Position, are discussed separately in Chapter VIII. Unless otherwise indicated, each objection is referred to by the name of the historical position on which it is based. The discussion begins with the non-strictly natural law position objection to (T).

Non-Strictly Natural Law Position Objections

The Interest Position Objection. It was shown in Chapter VI that the definition of 'legal right' as an interest or as the chief means for securing interests in implausible. Nonetheless, it is true and significant that legal rights often delimit, secure and protect interests. On a non-definitional construal of the Interest Position, then,

there is a reasonable objection to (T): "Legal rights delimit, secure and protect interests. Legal right-holders are carriers of interests. But natural objects such as trees, swamps and bugs are not carriers of interests; they have no interests to delimit, secure or protect. Hence, they cannot have legal rights."

To determine whether the Interest Position Objection is damaging to (T), three interrelated questions must be answered: What is an interest? What is meant by 'interest' when it is claimed that natural objects do not and cannot be said to have interests? Why suppose that natural objects cannot have interests? In the discussion which follows, the answers to these questions are those given by Benn and McCloskey. Their views are taken as representative of Interest Position views generally. Both are shown to be defective against (T).

What is an interest? Recall that Interest Position theorists invoke either a three-sense or a three-kind doctrine to describe interests. De facto interests (interests$_1$) are what an entity, X, actually desires, wants or likes. Prudential interests (interests$_2$) are what it is to X's advantage to have. De jure interests (interests$_3$) are advantages or concerns which, on moral grounds, X ought to have.

Benn's and McCloskey's views are variations on this three-sense doctrine. Benn offers a distinction between "at least two senses of 'interest'," roughly equivalent to the distinction offered above between de facto interests and prudential interests, respectively. He argues that in one sense, "an interest organizes or gives a consistent direction to otherwise diverse activity," the sense of 'interest' in "John is interested in music." In a second sense, an interest is something conducive to an entity's well-being, the sense of 'interest' in "Having one's teeth checked periodically is in a person's interest." McCloskey argues that the concept of interests includes not only what is for a person's welfare, but also what is, or ought to be, of concern to the person. His view is that interests are not prudential interests only; they are also de facto interests and de jure interests.

What is meant by 'interests' when it is claimed that natural objects cannot be carriers of interests, and why suppose that natural objects cannot have interests? Consider first Benn's view. Invoking his distinction between "at least two senses of 'interest'," what I have called de facto interests ($interest_1$) and prudential interests ($interests_2$), Benn's argument is that natural objects are not carriers of de facto interests. His argument is

straightforward: It is proper to ascribe rights only to subjects having interests which organize or give a consistent direction to activity, de facto interests or interests$_1$. But few, if any, natural objects are carriers of interests$_1$; certainly trees and rocks are not. Thus, it is improper to ascribe rights to at least most natural objects. If one concedes that doing certain things is conducive to the well-being of natural objects, then they may be carriers of prudential interests, interests$_2$. But this concession is unhelpful in showing that natural objects could be said to have rights.

Thus, Benn's argument is that natural objects cannot be right-holders because proper ascription of rights requires subjects who/which are interest$_1$-carriers, which natural objects are not. His reasons for denying interest$_1$-carrier status to natural objects involve the notion of a "chooser." Only entities having a capacity for choice, i.e., actual or potential choosers, properly are described as having rights. Persons are moral persons, i.e., bearers of moral rights, because of their speical status as choosers. They are capable of making decisions, selecting ends, and manipulating their social environment to achieve those ends. But "choosers" are interest$_1$-carriers. Hence, only carriers of interests$_1$ (de facto interests) are

right-holders. According to Benn, if one allows 'right' to range over non-choosers such as natural objects, "the term is being devalued, losing its specificity."[1]

Benn's account is not as forceful as it may seem. He does not deny that natural objects could be legal right-holders. In fact, he states explicitly:

> Now I see no insuperable obstacle to the extension of legal rights to natural objects. The status of right-bearer has already been extended in law from adult human beings to infants and business corporations.[2]

Rather, he argues that if one extends 'right' in law to include natural objects as legal right-holders, then the notion of a right undergoes an unwelcome conceptual shift from its characteristic ascription to moral personalities ("choosers," interest$_1$-carriers) to a new ascription to non-moral entities ("non-choosers," non-interest$_1$-carriers). An ascription of legal rights to natural objects which did not involve such a shift would amount to a characterization of natural objects as moral persons (choosers, interest$_1$-carriers), which they are not. Thus, if one ascribes legal rights to natural objects, one must abandon the view of a right-bearer as a moral person, a view which "is rooted very deeply in our mode of perceiving ourselves in the world, and is not to be lightly surrendered."[3]

Thus, Benn's argument is that in order to make

natural objects legal right-holders, there must be a conceptual shift in the notion of a right from that of "chooser" to that of "non-chooser." This shift would "make it difficult to identify a certain type of normative relation that exists between persons, but which cannot exist between person and thing."[4] He concludes that although ascription of legal rights to natural objects is possible, it requires surrendering our well-entrenched view that rights are ascribed to moral persons.

Suppose one concedes that natural objects are not interest$_1$-carriers; they are not moral agents, choosers, bearers of moral rights. It does not follow that (a) natural objects cannot be ascribed legal rights, or that (b) ascription of legal rights to natural objects requires surrendering a deeply rooted notion of ourselves as moral persons. Proposition (a) follows only if it is assumed that the capacity for choice or for having interests$_1$ is a necessary condition for proper ascription of rights. While this may be true for ascription of moral rights, it is not true, at least in any literal sense, for proper ascription of legal rights. The main feature of the doctrine of legal personality is that it allows for ascription of legal rights to entities acknowledged as non-moral persons (non-choosers, non-interest$_1$-carriers).

Suppose the view that legal right-holders are carriers of de facto interests (i.e., $interest_1$) is insisted upon at this point. Is there any sense in which it is or might be true that having de facto interests is a necessary condition of having legal rights? If so, then, since artificial persons such as trusts, funds, idols, ships and corporations have been recognized as legal right-holders, it is a condition which they satisfy. They would be said to have de facto interests, to be moral persons. What could this mean? Surely idols and ships are not moral persons; they do not make choices, have desires, or exercise a will. If they properly are said to have de facto interests or to exhibit moral personality, it is because the law treats them as if they had de facto interests or moral personality, when, in fact, they lack both. In some cases, for example where the artificial person is comprised of individual humans (e.g., corporations), talk of the $interests_1$ of the artificial person is a convenient shorthand for talk, however cumbersome, of the $interests_1$ of individual humans who comprise or represent it. In other cases, for example where the artificial person is not comprised of individual humans (e.g., trusts, ships, idols), talk of the $interests_1$ of the artificial person does not reduce to talk of the $interests_1$ of constituent human members. Thus, insofar as some legal representative is empowered to act on behalf

of the artificial person, the law attributes the acts and will of the representative to the artificial person, treating the latter as if it had a will or a capacity to act. In both cases, the result is the same. Although on a literal reading, it is false that all artificial persons themselves have de facto interests or moral personality, on a non-literal reading, it may be true that all artificial persons which are legal persons have de facto interests or moral personality. If it is true, it is true just insofar as the law attributes to artificial persons a capacity to act or de facto interests; it is true just insofar as the law treats artificial persons as if they had a capacity to act or de facto interests. And if it is true, then the condition that legal right-holders must be carriers of de facto interests is a condition which artificial persons could be said to satisfy.

The case of natural objects as artificial persons need be no different. Insofar as a legal representative may be empowered to act on behalf of a natural object, the natural object may be said to act. Similarly, the interests$_1$ of the legal representative, acting in his/her official capacity as representative of the natural object, may be imputed to the natural object itself. If a necessary condition of an entity's having legal rights is that

the entity has, or is capable of having, de facto interests, then, properly understood, it is a condition which natural objects, like other artificial powers, could be said to satisfy. Thus, even if one assumes that natural objects are not themselves carriers of $interests_1$, it does not follow that they cannot have legal rights, proposition (a).

Nor does proposition (b) follow. Humans may continue to perceive themselves correctly as moral persons without that view being jeopardized by the ascription of legal rights to natural objects. One thing appeal to the doctrine of legal personality suggests is that the expressions 'right' and 'person' do not have the same meaning in legal discourse that they have in moral discourse. Benn mistakenly supposes that because the expressions 'right' and 'right-holder' in moral discourse apply only to moral persons, in all discourse, including legal discourse, they apply only to moral persons. However, suppose, as many theorists do, that there is a generic sense of 'right' according to which moral rights and legal rights are two kinds of rights. Moral persons have moral rights; legal persons, some of whom also may be moral persons, have legal rights. Appeal to a generic sense of 'right' and to a distinction between two kinds of rights and two kinds of

persons not only preserves the view that 'right' has a common meaning when used in moral and in legal contexts. It also explains how the view that only humans are moral persons can be preserved if one extends legal rights to natural objects.

Benn would reject an appeal to the doctrine of legal representation as a way of explaining how natural objects, themselves incapable of making choices, nonetheless could be said to have legal rights. He argues that a move to empower a legal representative to make choices on behalf of subjects themselves incapable of "natural choice" has just the shortcoming of requiring the unwelcome conceptual shift in the notion of a right-holder from that of $interest_1$-carrier to that of $interest_2$-carrier. By allowing a guardian ad litem to make choices on behalf of natural objects, the powers of the agent are constrained by the condition that they be exercised only for the advantage of the natural objects, i.e., for what is in their interests (i.e., $interests_2$). Since there are not similar constraints on a principal's exercise of his/her own rights, appeal to the doctrine of legal representation requires giving up the view of right-holders as moral persons, choosers, $interest_1$-carriers.

Benn's view is unfounded, for reasons suggested

already. First, either it is false that a necessary condition of an entity's having legal rights is that it has, or is capable of having, interests$_I$, or, if true, it is a condition which natural objects could be said to satisfy. Second, one need not abandon the view that only humans are moral persons in order to show that non-humans could be legal right-holders. If one permits a distinction between either two different kinds of persons (viz., moral persons and legal persons) or two specific senses of 'person' (viz., a philosophical or moral sense and a legal sense), then one is able both to preserve the view that only humans are moral persons (moral right-holders, choosers, interest$_1$-carriers) and to explain how non-humans meaningfully can be said to be right-holders, viz., legal right-holders. Third, legal representatives may use their powers to secure either the interests$_1$ of the principal (e.g., in the case of "ordinary humans") or the interests$_2$ only of the principal (e.g., in the cases of some "non-ordinary humans," such as infants and mental incompetents, and of at least some "artificial persons," such as trusts and municipalities). Thus, no clue as to whether a principal's interests$_1$ or interests$_2$ are secured is gleamed from the fact that a legal representative makes claims and choices on behalf of the principal.

Thus, Benn's reason for rejecting an appeal to the doctrine of legal representation to explain how natural objects meaningfully could be said to have legal rights is unsatisfactory. Adoption of the doctrine of legal representation does not require abandoning the view that only humans are moral persons, choosers, $interest_1$-carriers, havers of moral rights.

A reasonable, alternative inference to both (a) and (b) is open to Benn. It is that (c) ascription of legal rights to an entity, unlike ascription of moral rights, does not presuppose that the entity is a moral person, a chooser, an $interest_1$-carrier. One who adopts (c) in effect concedes that the issue of the moral personality of plants, the soil and the like need not be resolved in order to defend (T).

Not only is Benn's view not damaging to the case for (T); it might even be harnessed in support of (T). Consider the case where the law protects landlords by permitting recovery for loss due to damage to apartment units by tenants. The assumption is that it is to a landlord's advantage to be so protected. The law protects what it takes to be in a landlord's interests, i.e., $interests_2$. Now suppose a particular landlord, a wealthy, humanitarian landlord, has no desire to be so protected or

to so protect herself. She collects no damage deposits from tenants, initiates no legal action against tenants who abuse apartment units, and absorbs whatever repair costs are incurred. The landlord has no interest_1 in being protected against damages to apartment units, even though the law provides for the protection of the landlord's interests_2. This is a plausible case where the law provides for the protection of interests_2, even though there are no corresponding interests_1.

Suppose it is objected both that the reason why we can speak truly of a landlord's having or lacking interests_2 is because he/she has, or is capable of having, interests_1, and that it is because the landlord has, or is capable of having, interests_1 that the law protects the landlord's interests_2. Basically, this two-part objection is that the law protects an entity's interests_2 only if that entity has, or is capable of having, interests_1.

This objection has no force. It is not true in general, and Benn would deny, that having or being capable of having interests_1 is a necessary condition of having interests_2. Furthermore, it is not true in this particular case that the landlord's interests_2 stem from her interests_1, since she has no relevant interests_1.[5] Benn provides no reason for supposing that, where the law protects

interests$_2$, it protects only those interests$_2$ of interest$_1$-carriers. What one has is a case where either there are no corresponding interests$_1$ or, if there are, the case for saying that the law protects this landlord's interests$_2$, is independent of a case for saying it protects some interests$_1$ of landlords.

In certain cases, then, legal rights in fact protect interests$_2$ only. By conceding that at least some natural objects are carriers of interests$_2$, as Benn does, one could argue that it is possible that some legal rights for at least some natural objects could be devised for protecting the interests$_2$ of those objects. Of course, unless one holds that having interests$_2$ qualifies an entity for having legal rights, this does not constitute an argument for ascribing legal rights to natural objects. It merely points out that legal rights often do protect interests$_2$, which interests at least some natural objects are purported to have. As such, it leaves open a move for connecting up the interests$_2$ of some natural objects with legal rights of those objects to delimit, secure and protect their interests$_2$.

McCloskey's position does not fare much better against (T). He offers two reasons for not talking of legal rights of "things," even where a trustee properly can be

said to oversee the legal affairs of things:

> First, things such as parks, buildings, paintings, etc., do not have interests in the strict sense of interests, such that we could literally speak of the trustees caring for the interests of the thing. Secondly, and partly for this reason, the trustee could hardly be said to be the representatives of the thing.[6] Here we might speak of them as custodians, etc.

(I am concerned here only with that part of McCloskey's argument which is appropriate to a discussion of natural objects specifically, not to paintings, buildings or other artifacts.) McCloskey's two reasons are that things do not have interests "in the strict sense," and, since they do not, trustees cannot be said to represent the things.

What is the meaning of 'interests' according to which legal right-holders have, but natural objects lack, interests? McCloskey writes:

> The concept of interests which is so important here is an obscure and elusive one. Interests are distinct from welfare, and are more inclusive in certain respects--usually what is dictated by concern for a man's welfare is in his interests. However, interests suggest much more than that which is indicated by the person's welfare. They suggest that which is or ought to be or would be of concern to the person/being. It is partly for this reason--because the concept of interests has this evaluative-prescriptive overtone--that we decline to speak of interests of animals, and speak rather of their welfare.[7]

Here the suggestions is that since natural objects do not and cannot have concerns, they cannot have interests.

Roughly, McCloskey's view is that natural objects lack the de facto interests (interests$_1$) and de jure interests (interests$_3$) necessary both for having rights and for having legal representatives. McCloskey grants that certain actions may be conducive to a thing's welfare and, hence, "in its interests," interests$_2$. But he prefers substituting talk of what is in the thing's welfare for talk of a thing's having interests because, properly speaking, to have interests an entity must be capable of having or possessing things, a capacity which "things" lack.

Two things are going on in McCloskey's argument against ascribing legal rights to "things." First, he holds that right-holders are carriers of interests$_1$ or interests$_3$. They are entities who/which have or ought to have concerns. Second, they are entities who/which can possess things. Since natural objects can neither be said to have concerns nor to possess anything, they cannot be said to have legal rights.

What about, e.g., mentally incompetent persons who do not have the concerns necessary for ascribing rights? Does McCloskey's account require saying that they, like natural objects, do not have rights? McCloskey does not think so. Since they are "possible potential possessors of interests," he grants that "we do attribute rights and

interests to infants, lunatics, and even to incurable lunatics." He writes:

> Part of the reason for this is the thought that such beings, unlike the congenital idiot, etc., are possibly potential possessors of interests. Hence, until it is clear that they can never really be said to have interests, we treat them as if they do.[8]

The reason why the case of natural objects is different is that they are not even possible potential possessors of anything.

McCloskey is firm on the point that the possibility of possessing something, particularly rights and interests, is a necessary condition of ascribing rights or interests. He states that,

> A right cannot not be possessed by someone; hence, only things which can possess things can possess rights.[9]

McCloskey thinks it is this feature of right-holders as possessors of things which decisively excludes lower animals from being right-holders. He asks, "Can a horse possess anything, e.g., its stable, its rug, in a literal sense of 'possess'?" (McCloskey does not say what sense that is.) It cannot. The case for natural objects is the same. Since they are not possible possessors of anything, and since interests and rights are possessed, natural objects cannot have either interests or rights.

Thus, McCloskey's view is that natural objects are

incapable of having the de facto interests or de jure interests necessary for having rights and for having legal representatives. The reasons why they cannot be said to have these interests is that they cannot be said either to have concerns or to possess anything. The reason why appeal to the doctrine of legal representation is unhelpful is that it is extended properly only to entities which are possible possessors of things, which natural objects are not.

Is McCloskey's view damaging to (T)? I do not think so. It was argued in connection with Benn's view that an entity's having de facto interests is not a necessary condition of its having legal rights. The same is true for de jure interests. Setting these issues aside, however, McCloskey's argument fails to provide adequate grounds for supposing that natural objects could not be said to possess anything, particularly rights. Although he does not provide anything like an analysis of the concept of possession, McCloskey does offer some examples of possessed things and of why we do not speak of "things" as possessing anything. To show that McCloskey's position fails to establish that natural objects are not possible possessors of anything, it is important to consider his examples.

McCloskey thinks rights are possessed. So are horses, stables and rugs. These are among one's possessions. Setting aside "category mistake" worries here, suppose McCloskey is correct so far. According to McCloskey, who or what can possess things, and in virtue of what do they possess things? He states:

> My right to life is mine; I possess it. It is as much mine as any of my possessions--indeed more so--for I possess them by virtue of my rights.[10]

The suggestion is that people possess things (e.g., horses, stables and rugs) <u>because</u> they possess rights. The rights to possess things are what entitle one to possess those things. Thus, only entities having rights can possess things.

But McCloskey's argument is confused. The initial reason given why natural objects could not be said to have rights was that they could not possess anything. Here the suggestion is that being able to possess things presupposes that one has rights. Since natural objects do not now have rights, obviously, on the latter account, they could not be described as possessing anything. Yet to be described as possessing things, they apparently must first be awarded rights. The circularity in McCloskey's account looms large. It will not do to argue, as McCloskey finally seems to do, that one cannot describe natural objects as

right-holders because they do not possess things, and then restrict the notion of a possessor to (present) right-holders.

McCloskey offers several other examples to show that, e.g., animals cannot possess things. Two of them purport to show "the grounds of our uneasiness" in speaking of the legal rights of animals in cases where legal claims made on behalf of animals are appropriate:

> Suppose that, as a result of deliberate legal enactment, the kangaroo came to be accorded something like the privileged position of the cow in India, the kangaroo having full rights of movement, on the roads, on private property, etc. I suggest that we should be reluctant to speak of the legal rights of kangaroos. This is clear from our manner of speaking of native birds and animals in sanctuaries today. We speak of our being obliged to leave them alone, not of them as having legal rights, not of them as being legally entitled to be left alone. The law confers duties on us, not rights in the animals.[11]

Of course, that animals presently do not have legal rights is a good reason for not speaking of them as having legal rights. But neither their current lack of legal right-holder status, nor our reluctance to speak of them as having legal rights, shows that they cannot have legal rights. What, then, is McCloskey's reason for supposing that our reluctance bears on whether or not animals can have legal rights?

The answer supposedly is found in the example about

the kangaroo. In speaking about kangaroos, just as in speaking about birds and animals in sanctuaries, we speak of our being obliged to leave them alone, not of their having rights, e.g., the right to be left alone. Although we are obliged to perform or forbear from performing certain actions regarding them, they do not have rights to this performance or forbearance. Stated in general terms, McCloskey assumes that, where X and Y are entities, not all duties of Y to X entail rights of X against Y.[12] However, even if this assumption is correct (a topic discussed in Chapter VIII), all it establishes is that an argument for ascribing rights to natural objects cannot be based on the view that all duties imply correlative rights. It does not show that natural objects cannot have rights. Thus, even if McCloskey's description of how we do and should talk of kangaroos and of birds and animals in sanctuaries is correct, this does not show that natural objects cannot be said to have legal rights.

One interesting feature of McCloskey's example is that it actually provides grounds for supposing what McCloskey intends to deny, viz., that it may be appropriate to speak of legal rights of kangaroos. These grounds are given by McCloskey's talk of "privileges." Hohfeld and others have argued that 'right' "strictu sensu" ought to

be distinguished from privileges and other "legal advantages." However, Hohfeld never actually states whether privileges are a species of rights, or not rights at all. Max Radin attributes to him the latter view, and criticizes Hohfeld for holding it. For Radin, Hohfeld's distinction between rights and privileges conflicts with accepted usage; privileges clearly are rights. Other theorists, e.g., Maher, argue that 'right' includes the meaning "privilege." Which view one holds bears on how one assesses McCloskey's example of the kangaroo. If privileges are a kind of right (Radin's view), or if a legitimate meaning of 'right' includes the notion of privileges (Maher's view), then by saying that kangaroos have certain legal privileges, one would be conceding that they have rights, in an acceptable sense or use of the term 'rights.' McCloskey's example, which construes kangaroos as having certain privileges awarded by deliberate legal enactment, provides grounds for describing them as right-holders.

McCloskey's second example concerns legal systems in which animals which kill men are tried and, if found guilty, executed:

> If an animal is given an unfair trial under such a system and its legal representative demands a new trial, he could perhaps say that the animal had not received its legal rights (lawyers seem inclined to speak in this way) but it seems more

> accurate and less misleading simply to say that the law had not been properly observed in the original trial. Compare with a trial of a man.[13]

McCloskey concludes that it is "more accurate and less misleading" to say in such cases that the law had not been properly observed than to say the animal had not received its legal rights. But has he shown this? Some theorists, e.g., Maher, argue that where there are two ways to describe a legal situation, one which is the way lawyers ordinarily speak and one which is not, one should opt for the description and terminology used by lawyers. On an "ordinary lawyer's language" view, then, it would be "more accurate and less misleading" to say that the animal had not received its legal rights, than to use some alternative description not used by lawyers.

Why does McCloskey think the proper description is that the law had not been properly observed? To state, simply, that entities are not described as having legal rights does not explain why they cannot have legal rights. Yet this is at least part of what McCloskey does say. He attempts to clarify why we do not speak of tried and convicted animals in such legal systems as having legal rights by considering the case of "things." But this is what he says about things:

> Things do not have legal rights in our system, but not because this is a peculiarity of our

> legal system. It is because anything which might seem to come close to a thing having legal rights is not so described.[14]

The question, of course, is whether things could be so described. Could natural objects meaningfully be described as having legal rights, even if they are not now so described?

Perhaps McCloskey's reason for saying that in such legal systems one would not describe the animals as having had their legal rights violated is embedded in his directive "Compare with a trial of a man." If so, it is not clear how the comparison helps McCloskey's case. In trials of humans, to say that a trial was unfair is to complain of injustice. It is a way of saying that a plaintiff's or a defendant's right to a fair trial was denied, overlooked, infringed or otherwise violated. In such cases, the party's legal right to a fair trial is not at issue. What is at issue is whether that right was violated. On this comparison of the case of a convicted animal with "a trial of a man," it would be fitting to say that the animal's rights were denied. Since this is just what McCloskey intends to deny, it is not clear what comparison McCloskey intends.

For these reasons, McCloskey's view that natural objects could not be said to have legal rights because they could not be said to possess things, and thus could not be

said to have interests, is not well-founded. McCloskey's version of the Interest Position Objection to (T) is implausible. Since the positions of Benn and McCloskey are taken as representative of the positions generating reasonable versions of the Interest Position Objection to (T), and neither poses a successful objection to (T), (T) withstands the Interest Position Objection to it.

The Power Position Objection. The restated, non-definitional Power Position view is that legal rights often create, guarantee or secure legal powers, and that those powers presuppose the legal rights of those who have them to have and to exercise them. This formulation of the Power Position seems to generate a reasonable objection to (T): "Legal rights create, guarantee and delimit legal powers. But natural objects cannot have legal powers. Therefore, they cannot have legal rights." However few, if any, Power Position theorists would offer this objection. This can be shown by reconsidering the "ordinary lawyer's view" and the Hohfeldian view of legal powers.

On the ordinary lawyer's view, legal powers are "special" or "delegated" rights. They are rights conferred on persons because of their special legal status, function or circumstances, or because of certain contractual agreements involving them. Legal powers are not

identified with the powers of ordinary humans in their non-legal capacities. Similarly, where the view is that having certain legal powers is a prerequisite for having or exercising legal rights, it is legal representatives and parties to contractual agreements who/which constitute the appropriate entities for having these legal powers. On this view, natural objects are not the sort of entity to which legal powers properly are ascribed, just as individuals in non-official capacities (i.e., when they are not acting as legal agents or in certain contractual positions) are not the appropriate bearers of legal powers. It is persons in official capacities, and not represented entities or individuals in non-official capacities, who properly are said to have legal powers.

Given the ordinary lawyer's view of legal powers and of who has them, extension of the doctrine of legal representation to natural objects is an extension to the appropriate sort of entity, viz., the legal representative, of the requisite legal powers for safeguarding the legal rights of natural objects. Even if it is only the legal representative who could be said to have legal powers, it is the legally represented entity who/which has or qualifies for the legal rights in question. Thus, the ordinary lawyer's view of legal powers does not preclude ascription

of legal rights to natural objects. It would not endorse the proposed Power Position Objection to (T).

The Hohfeldian view is that legal powers are not rights at all in any proper sense of 'rights'. They are powers accorded individuals and public bodies for the purpose of creating, divesting or altering the legal relations and legal status of entities, including their legal rights and legal right-holder status. The persons or groups having such powers are, e.g., lawyers, legal representatives, judges and legislatures. It is persons or groups acting in official capacities who/which are the appropriate entities to whom/which legal powers are ascribed. But, surely, some such groups (e.g., judges, legislatures) are empowered to alter the legal right-holder status of natural objects. Whether or not they elect to do so is a separate issue. The point is that they could, i.e., they have the legal power to do so. Since, on the Hohfeldian view of legal powers, it is these persons and official bodies who/which properly are said to have legal powers, it would not endorse the Power Position Objection to (T), either.

Thus, on both the ordinary lawyer's view and the Hohfeldian view of legal powers, the Power Position Objection to (T) never gets going. It incorrectly construes

legal powers as belonging to entities other than persons and groups acting in official capacities (e.g., other than to legal agents, judges, legislatures). Furthermore, if having certain legal powers is a prerequisite for entering into contractual agreements, it is a prerequisite which natural objects could be said to satisfy by virtue of their having duly-appointed legal representatives having the required legal powers. Even though it is the legal representative who has the legal powers associated with making contracts in the name of the represented entity, it is the represented entity (here, the natural object) who/which is said to have the legal rights in question. For these reasons, the Power Position Objection to (T) carries no weight.

The Claim Position Objection. The Claim Position poses one potentially serious objection to (T):[15] "Rights are $claims_2$, i.e., demands which, if made, would be valid, justified or at least defensible. To have a legal right is to have a legal $claim_2$. But natural objects cannot have or be said to have legal $claims_2$. Thus, they cannot have or be said to have legal rights."

Who or what can have, or be said to have, legal $claims_2$? Is it consistent with the $claim_2$ view of rights to describe natural objects as having legal $claims_2$? If

so, then the Claim Position Objection to (T) fails.

Who or what can claim? The commonly accepted view is that only humans can claim. When that view is not merely stipulated, two lines of argument typically are advanced. The first is that only entities who/which are moral agents, moral persons, rational or capable of choice can claim. On the assumption that only humans are moral agents, moral persons, etc., only humans can claim. The second line points to the manner in which claims are asserted. For example, Feinberg says this about claiming:[16] To make claim to something is to "petition or seek by virtue of supposed right; to demand as due;" "What is essential to claiming that is the manner of assertion;" "To claim that one has rights is to demand or insist that they be recognized." The suggestion here is that to engage in claiming activity is to utter sentences, issue demands, sign petitions, or otherwise engage in observable, public behavior in such a manner as to affirm or insist that what is claimed be recognized or granted. Where what is claimed is a right, claiming activity consists in demanding recognition of one's rights. On this line of reasoning, only humans can claim.

Whichever line is taken, the commonly accepted view is that only humans can claim. Suppose this is true.

Using the claim theorist's distinction between senses of 'claim,' in which sense(s) of 'claim' is it true? Clearly, in the first and third senses. Only humans can make claims ($claim_1$) and claim that ($claim_3$); only they can make demands or claim that a right, interest or whatever be recognized. If the family dog's persistent barking at the back door correctly is described as a demand or claim made by the dog to its owner that the door be opened and it be let outside, it is a demand or claim in some sense other than the performative and propositional senses of 'claim'. If the dog's barking is not described as "claiming activity," it is because dogs do not make claims or claim that. They cannot be said to claim in either of the two senses of 'claim' required for their behavior to constitute claiming activity. Stated simply, dogs do not $claim_1$ or $claim_3$.

Suppose, then, that only humans can claim, i.e., can make claims or claim that. It does not follow that non-humans cannot be said to have claims. To have a claim is to have a $claim_2$, and no claim theorist asserts that having a claim entails making a claim or claiming that. In fact, Feinberg explicitly states that one can have a claim without ever claiming that to which one is entitled.[17] Presumably he would also grant that, e.g., a landlord can

have a claim to have a tenant evicted even if the landlord never actually makes claim to that right. What claim theorists do assert is, in Feinberg's words, that "having a claim consists in being in a position to claim, that is, to make claim to or to claim that." The relevant question, then, is who or what can be said to be in a position to claim?

Undoubtedly most claim theorists would argue that since only humans can claim, only they can be said to be in a position to claim. Thus, natural objects could not be said to be in a position to claim. Suppose this is true, also. Does it follow that natural objects cannot have claims and, hence, cannot have legal rights? No, as a reconsideration of Feinberg's position makes clear.

Feinberg's view is that having a claim entails being in a position to claim, i.e., to engage in propositional and performative claiming. Which humans correctly can be construed as "in a position to claim"? Feinberg offers an explicit statement of who can make claims, and thus be in a position to claim. He states,

> Generally speaking, only the person who has a title or has qualified for it, or someone speaking in his name, can make claim to something as a matter of right.[18]

He even identifies "two kinds of cases" of making claims:

> In the one kind of case, to make claim is to exercise rights one already has by presenting title; in the other kind of case, it is to apply for the title itself, by showing that one has satisfied the conditions specified by a rule for the ownership of title and therefore that one can demand it as one's due.[19]

Thus, making claims (claiming$_1$) can consist of either exercising rights one has already, or making application for some rights. Either the entity who/which has or qualifies for the right, or someone speaking in the entity's name, can make claims. Thus, on Feinberg's account, an entity or its legal representative can engage in claiming activity. On the assumption that only those who can claim can be in a position to claim, Feinberg's position is that only humans who represent themselves or who are the legal representatives of other entities can be in a position to claim.

Once again we find the doctrine of legal representation invoked to explain which entities can be said to meet the necessary conditions for having legal rights. For claims theorists, appeal to the doctrine explains how an entity can have or qualify for legal rights when it itself is not able to engage in claiming activity. In the case of natural objects, it provides an explanation of how natural objects meaningfully can be said to have legal rights (i.e., legal claims$_2$) even though it is their legal

representatives who engage in claiming activity.

Surely the original Claim Position Objection to (T) would be insisted upon at this point: "To have a legal right is to have a legal claim. But having a claim consists in being in a position to claim. Natural objects cannot be said to be in such a position. Where a legal representative makes claims on behalf of the represented entity, it is the legal representative, and not the represented entity, who is in the position to claim. Since natural objects fail to satisfy a necessary condition of having a claim, viz., being in a position to claim, they cannot have claims. Hence, they cannot have legal rights. On a claim view of rights, (T) is false."

According to this objection, a necessary condition of an entity's having a claim is that the entity be in a position to claim. It is alleged that natural objects fail to satisfy this condition. But this is not what claim theorists do and feel they must hold. Claim theorists agree that it is the represented entity who/which has the legal right in question, even though it may be a legal agent who secures the right. Thus, claim theorists accept (8):

(8) For any entity, X, if X has a valid legal claim, then either X or X's legal representative is in a position to claim.

Yet the objection that natural objects cannot have legal rights because they fail to satisfy a necessary condition of having a claim, viz., being in a position to claim, assumes that claim theorists accept the stronger proposition, (9):

(9) For any entity, X, if X has a valid legal claim, then X is in a position to claim.

Since they do not, this objection fails.

It has been argued that claim theorists endorse (8) rather than (9). If one attributes (9) to them, then one is hard-pressed to account for their endorsement of the doctrine of legal representation. The only way to account for it would be to argue that by allowing X's legal representatives to make claims on behalf of X, X properly is described as being in a position to claim. This may require arguing that X and X's legal representatives are in different claiming positions, or that X is "in a position to claim" in a different sense than the sense in which X's legal representative is "in a position to claim." But it would allow one to account for a claim theorist's endorsement of (9).

If, so understood, (9) properly may be attributed to claim theorists, does the former objection against (T) work? That is, is it true that natural objects cannot have

legal rights because they themselves are not in a position to claim?

Consider when one might invoke (9), so interpreted. In ordinary language, sometimes we seem to describe persons as in a position to claim when they never actually claim anything. For example, before his death, the wealthy, self-exiled Howard Hughes might have been described as being in a position to make legal claims, conduct legal transactions, or otherwise engage in claiming activity, even though for years only the recluse's lawyers (his legal agents) actually engaged in the claiming activity. However, most claim theorists would deny that, e.g., infants and mental incompetents are in a position to claim. They are not like Howard Hughes. In fact, the doctrine of legal representation was designed to handle just such cases. In addition, even in the case of Howard Hughes, there is an alternative, simpler, equally plausible description of Hughes's position. It is to describe Hughes as having legal claims, which claims are made on his behalf, and in his name, by his legal representatives. It is they who actually are in the claiming position. But this description of Hughes, which captures what was assumed in attributing (9) to claim theorists, reduces to the description of X at (8). Thus, what is claimed at (9) is captured more perspicuously

and less awkwardly by (8).

Whether one accepts my argument that claim theorists accept (8) outright, or one attributes (9) to them, the outcome is the same. The objection that natural objects cannot have legal rights because they are not in a position to claim is not revived by attributing (9) to Claim Position theorists.

To review, four views have been defended here. First, even if one supposes that only humans can claim and can be in a position to claim, it does not follow that natural objects cannot have claims. Second, the standard argument for why natural objects cannot have legal claims fails. It fails because it assumes that a necessary condition of X's having a claim is that X be in a position to claim, a view which runs counter to the claim theorist's endorsement of the doctrine of legal representation. Third, since that argument fails, so does the Claim Position Objection to (T). Fourth, appeal to the doctrine of legal representation explains how natural objects, incapable of engaging in claiming activity themselves, nonetheless could be said to have claims.

The Claim Position is important to the defense of (T) in another way. It provides suggestions of some specific legal rights natural objects could be said to have.

For example, consider Feinberg's statement that

> ...having a claim to X is not (yet) the same as having a right to x, but is rather like having a case of at least minimum plausibility that one has a right, not to x, but to a fair hearing and consideration.[20]

Thus, on Feinberg's account, having a prima facie case of minimum plausibility that one has a right establishes the right to a fair hearing and consideration. Thus, on his account, even if natural objects have only a prima facie case for recognition of their claims as valid, they would have at least one right, viz., the right to a fair hearing and consideration.

Feinberg's account suggests another right natural objects could be said to have. He states that:

> For every right there is a further right to claim, in appropriate circumstances, that one has the right.[21]

What are "appropriate circumstances?" They include occasions when one is challenged, when one's rights explicitly are denied, when one must make application for rights, where one's rights are insufficiently acknowledged or appreciated. Thus, if natural objects have any rights at all, they have the right to claim they have a right.

Does McCloskey's Entitlement Position version of the Claim Position pose any objection to (T) other than the ones considered so far? McCloskey holds that legal rights are entitlements to have, do or receive something which

give rise to claims against others. But if, as Feinberg argues, "entitlements to" roughly are equivalent to "claims to," then entitlements are $claims_2$, i.e., demands which, if made, would be valid, justified or defensible. In this respect, McCloskey's view provides no new objections to (T).

Furthermore, McCloskey allows that entitlements need not be claimed by their possessors in order to be genuine:

> ...an entitlement does not have to admit of being demanded by its possessor any more than does a legitimate claim. Entitlements may be demanded (and claims made) by proxies on behalf of the holder of the entitlement. Logically we do not have to be able to say that we are entitled, to be entitled.[22]

Like Claim Position theorists generally, McCloskey assumes that use of the doctrine of legal representation provides an acceptable way to describe an entity who/which cannot make claims or claim entitlements as a legal right-holder. Use of the doctrine to explain how natural objects could be said to have entitlements, and, hence, legal rights, therefore is permissable.

McCloskey does state that there are limits to those who/which can be possessors of entitlements. He argues that natural objects are outside those limits. But it has been shown in connection with the Interest Position Objection that McCloskey's reasons for excluding natural objects

fall short. Thus, McCloskey's view, like those of claim theorists generally, provides no insurmountable objections to (T).

The Rules Position Objection. Different Rules Position theorists offer very different accounts of the nature of the connection between legal rights and legal rules. Nonetheless, one basic objection to (T) could be mounted by each of them: "Statements ascribing rights either imply, or are implied by, statements about the existence or nature of a legal rule or set of rules. But there is not and could not be any rules appeal to which would warrant describing natural objects as legal right-holders. Therefore, natural objects could not be legal right-holders." That this objection has no force against (T) can be shown by examining the Rules Position views of Feinberg, Hart, and Benn and Peters.

Feinberg's position is that an entity has a legal right when its claim is recognized as valid by the governing legal rules. Although Feinberg does not offer examples of "governing legal rules," it is not difficult to show that some legal rules could be fashioned such that appeal to them would warrant recognition as valid a natural object's legal claims. Suppose a legal rule specifies that if certain conditions are satisfied, an entity has a

prima facie case for having a legal right. Suppose further that an entity, X, has a duly-appointed legal representative, Y, and that Y makes claims in the name, and on behalf, of X in accordance with correct legal procedure for so making claims. Then, a sample rule schema covering such a case would be (RS1):

> (RS1) If an entity, X, properly is legally represented by an agent, Y, and Y uses correct legal procedure to petition in the name of and on behalf of X that X be recognized as having a legal claim to something, ϕ, and Y provides a case of at least minimum plausibility that X has a legal claim to ϕ, then, provided there are no countervailing reasons to override recognition of X's claim to ϕ as valid, X has a valid legal claim to ϕ.

Given the view that a legal right is just a valid legal claim, appeal to (RS1) attests to the plausibility of saying that natural objects could have legal rights.[23]

The steps for determining whether a natural object has a legal right are fairly straightforward. First, one determines whether the antecedent conditions are met (e.g., whether Y is a duly-appointed legal representative of X, whether Y used correct legal procedure to petition that X be recognized as having a legal claim to ϕ). If so, then the natural object has a prima facie case that it has a legal right. Second, one determines whether there are overriding reasons for not recognizing the natural object's

claim as valid. For example, are there competing rules which are relevant in deciding the case? Does a conflict of rights result if one recognizes the natural object's claim as valid? If there are countervailing reasons, do they warrant withholding recognition of the natural object's claim as valid? If not, then X has the legal right in question.

To illustrate how (RS1) could be used as a model for specific legal rules generating specific legal rights, consider rule (R1) and what Feinberg calls "a right to a fair hearing and consideration":

> (R1) Whenever an entity or its legal representative has or asserts a claim to something, and follows correct legal procedure for seeking legal recognition of that claim as valid, and provides a case of at least minimum plausibility for that claim, then the entity has a right to a fair hearing and consideration.

Whether or not (R1) is acceptable, it is stated in terms which capture the substance and form of Feinberg's statement of what it is to "have a claim to X." Thus, it is a rule which Feinberg ought to accept. But, according to Feinberg, an entity has a legal right when its claim is recognized as valid by the governing legal rules. Appeal to (R1), then, permits the construal of natural objects as having at least one legal right, viz., the right to a fair hearing and consideration. Here Feinberg's version of the

Rules Position not only poses no obstacles to the defense of (T); it helps that defense.

What about Hart's version of the Rules Position? Hart argues that an entity, X, has a legal right if, under the rules of the legal system and given the events which have transpired, some person Y is obliged to do or refrain from doing some action provided X or X's agent so chooses, or until X or X's agent choose otherwise. A statement of the form 'X has a legal right' is a conclusion of law in a particular case falling under those rules. Could there be some legal rules which oblige some person(s) to do or abstain from doing some action provided the legal representatives of natural objects choose that they should? If so, then Hart's sufficient condition account of 'having a legal right' permits one to describe natural objects as legal right-holders.

Consider a candidate rule, (R2):

> (R2) Where a duly appointed legal representative of a delimited forest area is legally empowered to maintain that area as a recognized "wilderness area," no humans may trespass on or use that area for recreational, industrial or other purposes without the express written consent of the forest's legal representative.

According to (R2), all humans except those whom the forest's legal representatives choose to exempt are obliged not to trespass on wilderness areas. On Hart's sufficient

condition account of 'X has a legal right,' a wilderness area which is legally represented by an agent so empowered would be said to have a legal right. Which legal right? Although Hart's account provides no clues, one could describe the legal right as a right to non-interference against any humans not specifically exempted.

Whether or not (R2) is acceptable as stated, and whether or not the legal right in question correctly is described as "the legal right to non-interference" is not what matters here. What matters is that (R2) is an example of a rule appeal to which substantiates the view that natural objects could be said to have legal rights, on Hart's account of 'X has a legal right.'

(R2) is an example of what Hart calls a "duty imposing rule" or a "primary rule of objection." It is a rule which requires humans to refrain from certain action, whether or not they want to. It might be stated more simply as (R3):

(R3) No humans may trespass on wilderness areas.

In addition, there could be companion rules to (R3), what Hart calls "power conferring rules" or "secondary rules." These are rules which confer powers on humans to introduce new primary rules, to extinguish or modify old ones, or to determine the duration or control of them. They concern not merely physical movements and changes, but the creation

or variation of duties. For example, (R4), (R5) and (R6) are examples of secondary rules which could be introduced in conjunction with (R3):

> (R4) Rule (R3) shall be recognized as a primary rule of the legal system which imposes on humans not specially exempted the obligation not to trespass on wilderness areas.
>
> (R5) The court has the power to appoint legal representatives for designated wilderness areas and to confer on those representatives the powers and privileges customarily bestowed on legal representatives.
>
> (R6) Where a legal representative of a designated wilderness area is legally empowered to speak for, and in the name of, the area it represents, the court has the power to recognize the wilderness area as having certain legal rights; specifically, it has the power to recognize the wilderness area as having a legal right to noninterference by trespassers against any humans not exempted by the wilderness area's legal representative.

(R4) identifies (R3) as a primary rule of the legal system, (R5) confers powers on courts to appoint legal representatives of wilderness areas, and (R6) confers powers on courts to create or recognize legal rights of wilderness areas.

Hart does not specify whether it follows directly from rules such as (R2) and (R3) that an entity has legal rights, or whether other rules must be taken together with rules such as (R2) and (R3) to generate that conclusion. Nor does Hart suggest which legal rights an entity might

be said to have in any particular case. Nonetheless, what is necessary to show that natural objects could be legal right-holders on Hart's view has been shown, viz., that rules such as (R2)-(R6) could be devised in accordance with which it is possible and meaningful to ascribe legal rights to natural objects.

Benn and Peters offer a necessary condition account of having a right. To say that X has a right is to imply that there is a rule which, when applied to the case of X and some person Y, imposes on Y a duty to X, if X chooses. An objection to giving natural objects legal rights on their view is that there is not and cannot be a rule which imposes on anyone a duty to natural objects.

This objection is not very promising. A legal rule such as (R2) which imposes on humans a duty not to trespass on wilderness areas could be devised and interpreted such that the duty is understood as a duty to the wilderness area, imposed on would-be trespassers unless the wilderness area specifies otherwise. In the next chapter, Chapter VIII, it is shown that talk of legal duties to natural objects is meaningful. Here it suffices to say that since Benn and Peters argue only that the existence of such a rule is a necessary condition of having legal rights, there is a prima facie case for supposing that

condition could be satisfied in the case of natural objects.

Suppose it is conceded that (R1)-(R6) could be legal rules of a legal system, but objected that, nonetheless, there are no existent legal rules which could be invoked to show that natural objects could have legal rights. That this objection is not threatening to the case for (T) can be shown by considering a sampling of accepted legal rules:

(R7) No human being may kill another human being.

(R8) Liability results from failure to employ due care under the circumstances.

(R9) Business and industry must maintain standards of fair competition and just and reasonable rates.

(R10) One must stop, look and listen where traffic is to be expected.

(R11) Use of vehicles in this park is prohibited.

(R12) Contracts must be kept.

(R13) Creditors have a right to be paid.

Rules (R7) and (R11)-(R13) are examples of existent legal rules which are clear-cut and highly specific. The meaning of (R7), for example, is fairly precise. Although there are exceptions to this rule, e.g., killing in self-defense, typically these exceptions are identifiable in relatively straightforward terms and are taken to be exceptions to the general rule against homocide. On the other hand, rules

(R8)-(R10), are highly elastic, stated in language which permits varying degrees of latitude as to what may or may not be included within the scope of the rule. (R8), the basic rule of negligence law, and (R9) are stated in very broad terms, employing the so-called "India Rubber concepts" of "due care," "fair standard," and "just and reasonable rates." Adjudicating agencies are allowed much leeway in determining whether or not to treat a certain case as falling within the scope of these rules. This point is put by saying that these rules have an "open texture" or "fringe of vagueness."

It is the open texture of rules which permits new cases to be handled deftly, and which explains how law gradually is built from precedent to precedent. Once the decision is made to include a case or a given set of facts as falling under a rule, the case is treated as a precedent, often establishing in effect a subordinate rule that, in the future, similar cases or facts of a similar kind will be included under the rule.[24] The "stop, look and listen" rule, (R10), which in some jurisdictions precludes recovery by one who failed to stop, look and listen before crossing a railroad track, is an example of a subordinate rule which evolved from cases falling under the general rule of "due care." In other situations, a rule is expressed in such broad terms that no subordinate rules emerge;

each case is left to be decided "on its own facts," i.e., "within the rationally possible outside limits of the rule," by the discretion of the adjudicating agency.[25]

In light of this discussion, why not suppose that several of the rules given above could be invoked and "widened" to cover the case of natural objects as possible legal right-holders? For example, by invoking rule (R8), industries located in areas known to be the habitat of animals which are members of endangered species could be made liable for failure to employ due care against endangering the lives of these animals. Where they are found liable for failure to use due care, one could construe the animals as having certain remedial rights against the industries concerned. Included among these might be the right to sue for damages. As Christopher Stone suggests, favorable monetary awards could be paid into a trust or fund set up in the animals' name, to be used solely for purposes which benefit the animals, e.g., providing then increased protection, perhaps even isolation, against humans.

While it does not follow from the fact that an industry is liable where members of endangered species are concerned that members of that species have legal rights against the industry, it is possible to construe the animals as having legal rights in such cases. Their eligibility for legal right-holder status could be insured by

invoking other legal rules, e.g., a primary rule such as (R14) and a set of secondary rules, including rule (R15):[26]

> (R14) No human being may kill an animal which is a member of the species officially designated an "endangered species."
>
> (R15) If a human kills an animal which is a member of an officially designated "endangered species," a court has the power to grant survivors of the species a legal representative and to empower that representative to make claims against the offending humans in the name, and on behalf, of the surviving members of the species.

If the claims made by the legal representatives are recognized as valid, the natural objects would be said to have certain legal rights.

Similarly, one could appeal to rule (R11) as the basis for ascribing certain remedial rights to forests against trespassers, e.g., rights to seek legal relief for damages incurred as a result of the activities of the trespassers. One legal effect of successfully invoking existent rule (R11) could be the conferral of legal rights on natural objects. In this respect, appeal to proposed legal rules (R2) - (R6) would be no different. Each provides a meaningful, reasonable basis for saying that natural objects could be legal right-holders.

I have argued that the idea of legal representatives for natural objects is plausible. If it is, then one function of a legal representative of, say, a pine forest

might be to make certain kinds of contracts on behalf of the forest with certain kinds of businesses or industries. For instance, suppose a specific lumber company wants to log a specific pine forest. Although other legal avenues might be available and even preferable,[27] for any number of reasons[28] an official body (e.g., a court) may choose to designate a legal representative for the forest and to recognize the representative as empowered to make contracts with the lumber company in the forest's name. A contract might specify that the lumber company is permitted to log the forest provided that, for every tree cut down, the company plants another pine tree in the logged area. In case of breech of contract, the terms of the contract specify that the company agrees to pay five times the current market value of a pine tree of specified dimensions, which money is to be deposited in a fund or trust established for that purpose. As a party to a contract, one could invoke rule (R12) as the basis for recognizing natural objects as holders of certain rights. Presumably, one right natural objects could be said to have is the right to sue the company for breach of contract by the company.

It is interesting to note that rules (R12) and (R13) have special significance in the account provided

by Benn and Peters. They claim that appeal to (Rl2) and (Rl3) illustrates two ways rights may be ascribed to an entity. There can be a particular ascription of rights which imply, but do not state, general rules, e.g., (Rl2); or, there can be general ascriptions of rights, stated by general rules, e.g., (Rl3). According to the account provided by Benn and Peters, the rules that contracts must be kept, (Rl2), and that breach of contract by one party to a contract gives the other party (parties) certain rights (a rule like (Rl3)), are the appropriate sort of rules for ascribing rights to an entity. On their account, then, appeal to a rule such as (Rl2) for ascribing rights to natural objects would be totally appropriate.

This discussion suffices to show that the different versions of the Rules Position offered by Feinberg, Hart, and Benn and Peters fail to generate a reasonable objection to (T). In fact, the Rules Position on legal rights can be harnessed effectively in support of (T).

The Prediction Position Objection. The Prediction Position generates one basic objection to (T): "Statements ascribing legal rights are predictive statements that, given certain facts, certain legal consequences will follow. To say that an entity has a legal right is to say that if certain circumstances prevail, certain court action is likely.

But with natural objects there is not and could not be any likelihood that situations would arise where legal consequences (e.g., remedies, benefits, compensation) for natural objects themselves would follow. Hence, natural objects cannot be said to have legal rights." Is this objection to (T) threatening?

Of course, in present cases involving natural objects it is unlikely that natural objects will be singled out as proper recipients of "legal remedies." But this only points out the obvious, viz., that natural objects presently lack legal rights. Previous discussions have shown that the "facts" could be otherwise. For example, legal rules could be devised according to which a duly represented forest area is recognized as entitled to compensation for damages against persons unauthorized to trespass in the forest area; and seals could be recognized as having legal claims against fur-seeking seal hunters who violate legal restrictions against tracking and killing seals for their fur. If the existence of certain legal rules is included in the set of relevant "facts" governing a case, then clearly court action directed at giving natural objects themselves certain legal remedies is possible. On the Prediction Position view of legal rights, the possibility that such court action is forthcoming attests to the possibility of granting legal rights

to natural objects.

Whether or not it is likely that natural objects will be legal right-holders depends on whether or not courts so construe the facts. But that they could so construe the facts ensures that ascription of legal rights to natural objects is possible. Thus, the Prediction Position Objection to (T) fails. To use Holmes's terminology, it is possible that "the antecedent facts which the law defines" and the consequent legal rights attached by law to these facts could be such that natural objects are genuine legal right-holders.

Strictly Natural Law Position Objections

The Moral Sense Position Objection. The Moral Sense Position defines 'legal right' in terms of a moral sense of 'right.' There is one basic objection to (T) based on this position:[29] "Natural objects cannot have legal rights because legal rights are rights in a moral sense of the term 'rights,' and natural objects cannot meaningfully be said to have rights in any moral sense." The defense of (T) against this objection is to show that it is compatible with the meanings of 'right' in a moral sense given by theorists Grotius, Pufendorf, and Ryan and Boland to describe natural objects as havers of rights in a moral

sense, and, hence, as legal right-holders.

As we have seen, the views of Grotius and Pufendorf on the meaning of 'right' are strikingly similar. They define rights as the moral qualities (Grotius) or moral powers (Pufendorf) of persons which enable them to have, do or receive something lawfully or properly. On their views, to say that legal rights are rights in a moral sense is to say that the quality or power which enables entities to have, do or receive something has been lawfully or properly acquired and held; it is recognized and secured by a politically organized society.[30]

One could dismiss straightway an objection to (T) based on the views of Grotius and Pufendorf, since the cirticism given in Chapter VI of the Power Position shows unacceptable any view of legal rights as powers, capabilities or capacities. However, there is a plausible recasting of the Grotius-Pufendorf view which does generate a reasonable objection to (T). Suppose their view is that a legal right is a lawful (or, proper) authority or means to have, do or receive something from another. Legal right-holders, then, are entities who/which have this authority or means. The recast Grotius-Pufendorf objection to (T) is that natural objects cannot be said to have this lawful authority or means and, hence, cannot be said

to have legal rights. Is this objection damaging to (T)?

I think this objection fails, as appeal to the doctrine of legal representation again shows. By appointing legal representatives for natural objects one provides a meaningful way of saying that natural objects have the lawful (or, proper) authority or means to have, do or receive something, and, hence, to have rights in a moral sense. Where the legal representative acts on behalf of the natural object it represents, one can describe either the legal agent or the natural object as having the lawful authority to have, do or receive something. In either case, it is the natural object which would be said to have the legal rights in question.[31] The added condition that this authority be recognized and secured by a politically organized society could be satisfied, for example, by appeal to a set of legal rules or principles specifying the conditions for appointing legal representatives for natural objects and the scope of the legal authority ascribed to those representatives. Thus, by extending the accepted doctrine of legal representation to the case of natural objects, a meaningful way is provided for describing them as genuine legal right-holders on the recast Grotius-Pufendorf view of legal rights.

What about the Ryan-Boland version of the Moral

Sense Position? Does it pose any formidable obstacles to establishing (T)?

Recall that on the Ryan-Boland view a right is "an inviolable moral claim to some personal good." When this claim is "created by civil society," the right (moral claim) is a legal right; when it is "derived from man's rational nature," it is a moral right. In addition, Ryan and Boland argue that rights are the moral means whereby the possessor is enabled to reach some end. Could natural objects be said to have moral claims to some personal good, and to have the moral means to reach some end through the possession of rights? If so, the Ryan-Boland version of the Moral Sense Position poses no successful objection to (T).

There is no significant problem in describing natural objects as enabled to reach certain ends through the possession of rights. For example, if the end sought is to procure a legal injunction against certain pollution activity by a specific industry, the possession of a right to be party to injunctive settlements could enable natural objects to reach that end. If there is a problem, it lies with the notion of rights as moral claims to some personal good, and with the description of right-holders as entities who/which possess the moral means to reach certain ends.

Recall that the philosophical view of persons is that only humans are "persons;" only they can set goals, make choices, have de facto interests, be moral agents. The notions of a "personal good" and of the attainment of ends, like other notions involving the philosophical view of personality, apply properly only to humans. Thus, on the philosophical view of who/what is able to use moral means to achieve some personal good or attain some end, natural objects are not the appropriate sort of entity.

But we have seen that the legal view of persons is quite different. On the legal view, the notion of a person can apply to what is non-human. The cognate notion of a "chooser," an entity having a will or a capacity to act, applies to non-humans just insofar as there is some natural person empowered to act on behalf of the non-human, legal person. Whether the non-human is a municipality, church, corporation, trust, fund, ship or idol, the treatment of them as entities having certain legal capacities is the same. The non-human is said to act through its legal agent, even though it is only the legal representative who engages in claiming activity, makes choices, selects goals, attains ends.

If the Ryan-Boland view of legal rights has any plausibility at all, it must accomodate the related doctrines of legal personality and legal representation. To

do so and yet retain the definition of 'legal right' as a "moral claim to some personal good" they must allow talk of some "personal good" for non-humans. Once such talk is permitted, however, the conceptual barriers to describing natural objects as having rights in a moral sense break down.

This does not end the matter, however. The Ryan-Boland position could be revised to accomodate the two doctrines of legal personality and legal representation by dropping references to "some personal good" achieved through "moral means," yet retaining the view of legal rights as moral claims. Then their view generates a reasonable objection to (T): "Legal rights are rights in a moral sense, i.e., moral claims. In particular, they are moral claims created by civil society. But natural objects cannot have moral claims; hence, they cannot have legal rights." Is this objection successful against (T)?

To answer this one must examine what Ryan and Boland say about moral claims. Unfortunately, their view is not very clear. For one thing, they hold that, although all rights are rights in a moral sense (i.e., moral claims), there are different kinds of moral claims. There are those created by civil society (i.e., legal rights), and those "derived from man's rational nature" (i.e., moral rights). Since they hold this two-kind doctrine of moral

claims, it is not essential to the notion of a moral claim that it be "derived from man's rational nature." In particular, moral claims which are legal rights need not be. As such, the Ryan-Boland version of the Moral Sense Position, taken by itself, does not produce the objection that natural objects cannot have legal rights because they are not rational beings. All that is required for an entity to have legal rights is that it have moral claims "created by civil society," not that it have moral claims derived from its nature as a rational entity.

For another thing, it is not clear whether their account is a necessary or a sufficient condition account. Sometimes it seems to be merely a sufficient condition account: An entity, X, has a legal right to something, ϕ, if the civil society creates a moral claim to ϕ and recognizes X as having that claim. But if this is their view, it is impotent against (T). Even if natural objects could not be said to have such claims, it would not follow that they could not be said to have legal rights. At other times, their account seems to be a necessary condition or definitional account. If it is, they must allow that such legal rights as a creditor's right to be paid, a contractor's right to goods and services contracted for, a plaintiff's right to sue for damages incurred by another's acts are genuine examples of moral claims, viz.,

those created by civil society. But if these are moral claims, there is no special problem describing natural objects as having moral claims.

For these reasons, The Ryan-Boland position is not problematic for the defense of (T). Having defined 'right' as "moral claim," their distinction between legal rights and moral rights as two kinds of moral claims is given in terms of the source, rather than the nature, of a moral claim. A moral claim created by civil society is a legal right. This makes the central issue in determining whether natural objects could be said to have legal rights that of determining whether they could be said to have state-created moral claims, or, alternatively, whether the state could be said to create moral claims for them. Whether or not natural objects could be said to have moral claims beforehand, so to speak, is not at issue. Insofar as, e.g., a plaintiff's right to sue, is an acknowledged legal right, it must count as a state-created moral claim. But natural objects could be said to be recipients of such claims. Thus the Ryan-Boland version of the Moral Sense Position Objection fails.

The Moral Validation Position Objection. The Moral Validation Position is the view that natural law or moral principles provide the mark, test, or justification for ascription of valid legal rights. The distinctive feature of

this position is that it is a view on the validity of legal rights, and not a view on the nature of legal rights *per se*. It does not presuppose any particular thesis about the meaning of 'legal right' or about the conditions under which statements of the form 'X has a legal right' are true. It is open for advocates of this position to concede the possibility of ascribing legal rights to natural objects. What they might deny is that the legal rights one could ascribe to natural objects are valid, that their ascription is justified on natural law or moral grounds. Properly speaking, then, any objection generated by the Moral Validation Position would be directed at the view that natural objects could be said to have valid legal rights, not to the view that they could have legal rights.

The Moral Validation Position is a good example of a position which generates which I call "objections concerning (T)," rather than "objections to (T)." If an objection challenges the truth of (T), it is an objection *to* (T). If an objection challenges the significance of establishing (T), and not the plausibility or truth of (T), it is an objection *concerning* (T). Since the Moral Validation Position is a position on the validity of rights, it does not address the issue whether ascription of legal rights to natural objects is possible. Hence, it is not the basis of any objection to (T). What objection

concerning (T) does it suggest?

The most promising Moral Validation Position objection concerning (T) turns on the notion of a moral law or principle: "A valid legal right is a positive right which is recognized as binding, de jure legitimate, in accordance with natural law or moral principles. But there are no such principles which could be used to justify recognition of natural objects as legal right-holders. Hence, natural objects could not be said to have any valid legal rights. Any rights they might be said to have would be at best invalid, imperfect, unenforceable rights."

The threat of this objection is more apparent than real. A moral or natural law principle specifies what actions or kinds of actions are right, wrong or obligatory.[32] The following are two paradigm examples of moral principles:

(MP1) Killing humans is wrong.

(MP2) Acts which injure humans are wrong.

Although both (MP1) and (MP2) may be unacceptable as stated, requiring modification or clarification, each is a moral principle. Appeals to them constitute the grounds for justifying an individual's claim against being killed, an instance of a more general claim to personal freedom and security. Claim Position theorists often suggest that if a human has a claim against being killed or a claim to

freedom from bodily or other injury, the recognition of these claims as valid is called for by these (and perhaps other) moral principles. They are examples of moral principles, appeal to which validates a right.

Could moral principles concerning natural objects, analogous to (MP1) and (MP2), be framed such that appeal to them provides grounds for recognition of a natural object's claim to certain rights as valid? Suppose it is meaningful to speak of harm or injury to natural objects, e.g., to seals and to wilderness areas. Then the following would be meaningful moral principles:

(MP3) Killing seals for their fur is wrong.

(MP4) Acts which cause irreparable injury (harm) to wilderness areas are wrong.

Like principles (MP1) and (MP2), principles (MP3) and (MP4) may require modification or clarification to be acceptable. Still, they are genuine moral principles. Furthermore, as in the case with (MP1) and (MP2), appeal to them could establish a <u>prima facie</u> case for saying that ascription of legal rights to natural objects is justified on moral grounds and, hence, that they could be said to have some valid legal rights. These could be construed as rights against being killed or rights to freedom from certain kinds of damage or injury.

Certainly there are details to work out in order

to show that appeal to (MP3) and (MP4) validates a claim made on behalf of seals and wilderness areas, respectively, just as there are details to work out to show that appeal to (MP1) and (MP2) justifies a human's claim against being killed and to freedom from bodily injury, respectively. Still, on two popular views of legal rights, viz., the Claim and Rules Positions, appeals to (MP3) and (MP4) provide the basis for such a case. Suppose seals and wilderness areas are regarded for purposes of the law as having claims to non-interference against fur-hunting seal killers and trespassers, respectively. On Feinberg's view, these would be claims of seals and wilderness areas against physical injury, the recognition of which as valid might be called for, at least in part, by appeal to (MP3) and (MP4), respectively. Appeal to (MP3) and (MP4) attests to the possibility of construing natural objects as having valid legal rights.

This account is sketchy. Just what is the connection between a moral principle and a legal right such that the former "calls for" recognition of the latter as valid? Is it sufficient that appeal to moral principles provides some justification for ascription of rights? What counts as acceptable justification and how specific must the statement of a moral principle be? Ryan and Boland do not

say. The important point here is that the sketchiness of this account befalls accounts of rights for humans as well. If appeal to (MP1) and (MP2) provides a case for ascribing valid legal rights to humans, then, on the Ryan-Boland account, appeal to (MP3) and (MP4) provides a similar case for ascribing valid legal rights to natural objects. Whatever difficulties there are in clarifying the relation between a legal right and a governing moral principle, these difficulties arise in the case of humans as well.

Summary

Plausible objections to thesis (T) based on seven of the eight historical positions on legal rights and legal right-holders have been stated, discussed and defeated. As such, a strong case for (T) already has been made. What remains to be shown is that there are no successful objections to (T) based on the eighth historical position, the Correlativity Position, or on non-historical position views about legal right-holders. This is the task in the succeeding two chapters of the dissertation, Chapters VIII and IX.

C H A P T E R V I I I

THE CORRELATIVITY POSITION

In Chapter VII, objections to (T) based on seven of the eight historical positions on legal rights were defeated. In this chapter, the Correlativity Position Objection to (T), based on the eighth historical position, is defeated. In addition, an objection to (T) based on the view that all legal right-holders are legal duty-bearers is defeated. By refuting these two objections, it is shown that appeals to the notion of what a legal duty or legal duty-bearer is, and to the relations presumed to hold between legal rights and legal duties, fail to undermine the plausibility of (T).

The Correlativity Doctrines

It often is said that rights and duties are correlative. However, it is not always clear just what this claim means. In this section, I identify three separate doctrines of the correlativity of rights and duties, what I call the logical, moral and legal correlativity doctrines. Each doctrine advances distinct theses about what it means to say that rights and duties are correlative.

By separating off correlativity theses accepted by Correlativity Position theorists from other correlativity theses, one can pinpoint just what is meant by saying that legal rights and legal duties are correlative.

The logical and moral correlativity doctrines. In The Right and The Good, W. D. Ross offers a helpful framework for identifying various claims about the meaning of the statement that rights and duties are correlative.[1] Ross claims that the statement may stand for any one, or any combination, of four logically independent statements. Using Ross's schema, we get the following four statements:

(10) If A has a right against B, then B has a duty to A.

(11) If B has a duty to A, then A has a right against B.

(12) If A has a right against B, then A has a duty to B.

(13) If A has a duty to B, then A has a right against B.

What is asserted at (10) is that if an entity, A, has a right to receive something from another entity, B, then B has a duty to A to provide that something; the converse is asserted at (11). What is asserted at (12) is that if A has a right to receive something from B, then A also has a duty to provide something else to B; the converse is asserted at (13).

Nearly all, if not all, theorists who accept some thesis about the correlativity of rights and duties accept (10). Ross claims that (10) "appears unquestionably true."[2] Feinberg claims that where 'right' means "claim-right," (10) is "logically unassailable."[3] Markby's view that no right can exist unless there is a duty exactly correlative to it, and Korkunov's view that every right necessarily presupposes a corresponding obligation are endorsements of (10).[4] If the statement that rights and duties are correlative meant simply (10), then not only would there be no disagreement among theorists about the truth-value of that statement; there would not be any confusion about the interpretation of that statement.

However, many theorists mean something more by the statement that rights and duties are correlative than the interpretation given at (10). For example, Marcus Singer interprets the statement to mean both (10) and (11). He writes:

> If A has a right against B, then B has a duty to A, and if B has a duty to A, then A has a right against B. This is a pattern of correlativity that seems unassailable.[5]

Legal theorist Salmond takes the same position:

> There can be no right without a corresponding duty, or duty without a corresponding right, any more than there could be a husband without a wife, or a father without a child.[6]

Following Feinberg, Benn and Peters,[7] I refer to "the logical correlativity doctrine" as the doctrine which endorses (10) and (11). Theorists who hold either (10) or (11) but not both hold a specific version of the logical correlativity doctrine.

Some theorists subscribe to the quite different correlativity theses given at (12) and (13). For example, T. P. Neill holds that an entity's rights are conditional upon its bearing a duty, (12). He writes:

> Each of these rights [rights man enjoys as a member of political society], of course, involves an obligation on the part of all others to respect it. But each of these rights, it should be remembered, is also founded on a corresponding duty on the part of its possessor. The right to freedom of religion, for example, is based on the duty to worship God, just as the right to work is based on the duty of self-preservation and self-perfection.[8]

Feinberg disagrees with Neill. Feinberg argues that it is conceivable that an entity has a genuine right to something, X, but no corresponding duty to respect the X's of anyone else.[9] If what Feinberg calls "dutyless rights" are conceivable, then (10) is true even though (12) is false.

Again following Feinberg, Benn and Peters, I refer to "the moral correlativity doctrine" as the doctrine which endorses both (12) and (13). Theorists who hold only (12) or only (13) are said to hold a specific version of the

moral correlativity doctrine. If there are "dutyless rights," then the logical correlativity doctrine may be true even though the moral correlativity doctrine is false.

Whether or not a theorist concedes "dutyless rights" and, hence, affirms or denies (12), turns on whether or not the theorist grants that non-ordinary humans (e.g., infants, mental incompetents) or non-humans (e.g., animals) have rights. Defenders of (12) argue that an entity's ability and willingness to shoulder responsibilities is a prior condition for recognizing or ascribing rights to it. The rationale in support of (12) is that acceptance of duties is the price an entity must pay to have rights. Entities without moral natures, then, do not qualify as right-holders. Thus, appeal to (12) often is the grounds for supposing that animals cannot be said to have rights. However, if one holds that infants and animals have rights though, lacking a moral constitution, they have no duties, then one denies (12). A concession of "dutyless rights" in certain cases is an admission that ascription or recognition of rights may be appropriate even if the entity in question fails to satisfy certain moral conditions.

The non-controversial proposition, then, is (10). Part of the task involved in assessing various correlativity

theses about rights and duties is determining which of (11)-(13) also are true. This is no easy matter. It involves resolving some fairly knotty issues. Ross's discussion of propositions (10)-(13) provides an instructive case in point. Ross assumes (10) is true. He also assumes that we have duties to animals, though they have no duties to us. If Ross's assumptions are correct, then propositions (10) and (13) cannot both be true, since together they imply that our duty to animals involves a duty of animals to us. Given Ross's assumptions, (13) must be false. For similar reasons, given Ross's assumptions, propositions (11) and (12) cannot both be true. Together they imply that our duty to animals involves a duty of animals to us, contrary to the initial assumption. Deciding which of (11) and (12) is true is not so easy, however. Should we say that although we have duties to animals they have no rights against us, in which case (11) is false? Or, should we say that animals have rights against us but no duties to us, in which case (12) is false? If one denies (11), then one eliminates not only the possibility that animals have rights, but the added possibility that so-called "duties of beneficence" generate rights to beneficent treatment. If one denies (12), then one concedes that there may be "dutyless rights." Which is the correct view?

Theorists disagree. Austin denies (11), arguing that there are duties to which no rights correspond, viz., "absolute duties" or "duties of imperfect obligation" (e.g., duties to God and to animals). Benn and Peters affirm (11) but deny (12). They argue:

> Though it [proposition (12)] may be true in most cases, there are certainly some cases in which it is not. We attribute rights to infants, idiots, and even animals, to whom it would be absurd to attribute duties.[10]

Ross's solution has it both ways. Arguing that animals have neither rights nor duties, but that duties of beneficence do generate rights to beneficent treatment, Ross concludes that (11) is false when A is not a moral agent and true otherwise. Since his doubt about (12) turned on whether or not animals have rights, and since he resolves that they do not, Ross concludes that (12) is true. Thus, (12) is true and (11) sometimes is true.

Clearly, then, part of the task involved in discussing correlativity theses is to determine which of (10)-(13) are, or are thought to be, true. A separate task is to determine which of (10)-(13) is advocated when it is claimed that rights and duties are correlative. For example, which pair of propositions is intended when it is claimed that rights and duties are "opposite sides of the same coin," "the same relation viewed from different

perspectives"? Which is intended when it is claimed that "rights and duties cannot exist without the other"?

The problem of identifying which correlativity theses claims are intended often arises because correlativity theses are asserted in conjunction with other theses. For instance, Korkunov argues that since duties cannot exist without corresponding rights in a definite person, "it is impossible to derive all legal relations from the assertion of a right."[11] Claims about the derivation, the logical priority, or the justification of rights or of duties frequently are asserted as part of correlativity packages. This often makes it difficult to determine just which proposition of (10)-(13) is intended.

Propositions (10)-(13) provide a general schema for identifying different correlativity theses. So far, two logically independent correlativity doctrines have been discussed, the logical and the moral correlativity doctrines. Consider a different correlativity doctrine, one for the specific case of legal rights and legal duties.

The legal correlativity doctrine. The Correlativity Position on legal rights asserts that legal rights and legal duties are correlative. Just what does this mean? By adapting propositions (10)-(13) to the case of legal rights and legal duties specifically, one gets an account of what

might be meant by saying legal rights and legal duties are correlative, analogous to the account given of rights and duties generally:

(10') If A has a legal right against B, then B has a legal duty to A.

(11') If B has a legal duty to A, then A has a legal right against B.

(12') If A has a legal right against B, then A has a legal duty to B.

(13') If A has a legal duty to B, then A has a legal right against B.

All theorists who hold that legal rights and legal duties are correlative hold (10'). They agree with Austin that every legal right presupposes a legal duty incumbent on a party other than the party entitled.[12] Although some theorists (e.g., Hohfeld, Feinberg) hold that (10') is true only when 'right' is used in its proper sense, they agree that when 'right' is used correctly, (10') is true. Thus, all Correlativity Position advocates hold (10').

However, some Correlativity Position theorists argue that (11') also is true, and that (10') and (11') taken together capture what is meant by saying that legal rights and legal duties are correlative. This is Hohfeld's position. Of his proposal to describe a right in terms of "its correlative," duty, Hohfeld writes:

> In other words if X has a right against Y that he shall stay off the former's land, the correlative

> (and equivalent) is that Y is under a duty toward X to say off the place.[13]

Where 'right' is used in the proper sense of "claim-right," Hohfeld states that:

> ...the right of J is but one phase of the total relation between J and K, and the duty of K is another phase of the same relation,--that is, the whole "right-duty" relation may be viewed from different angles.[14]

Hohfeld's position is adopted by legal theorist Holland, who argues that the pair of correlative terms 'legal right' and 'legal duty' express, in each case, "the same state of facts viewed from opposite sides."[15] Both Hohfeld and Holland accept the conjunction of (10') and (11') as what is meant by the claim that legal rights and legal duties are correlative.

Julius Stone grants that bilaterality, or the endorsement of (10') and (11'), generally is regarded as a mark of a legal system.[16] However, Stone's own view is that it is conceivable that a legal order could be framed so as to impose only duties on members of society. (Similar views are advanced by Kelsen and Feinberg.) Stone concludes that the issue whether or not a particular duty has a right in some other person correlative to it, i.e., whether or not (11') is true, cannot be decided on conceptual grounds alone. It "turns on interpretation or policy or both."[17]

Other theorists argue against (11') on the grounds that, in fact, there are legal duties which do not correlate with any rights of determinate persons. For example, C. K. Allen argues that duties imposed by criminal law often have no corresponding legal right:

> It is pertinent to bear in mind the preponderance of public over private crimes when we are told, as we are constantly told, that all legal duties are relative to rights. It would seem, on the contrary, that our criminal law swarms with duties which are not correlated to legal rights, but are 'absolute' duties in Austin's sense, imposed by the organized power of the State in the general interests of society.[18]

The legal duty not to possess certain sorts of objects (e.g., counterfeiting and burglary equipment) and the duty to hang a condemned criminal frequently are cited as examples of legal duties for which there is no correlative legal right vested in any determinate person(s).

Markby advances a view similar to Allen's. Citing the examples of the legal duties to abstain from cruelty to animals and from certain acts of immorality, Markby contends that "there are, in fact, many duties to which there are no corresponding rights," even though "no right can exist unless there is a duty correlative to it."[19] Like Allen and Markby, theorists Gray, Holmes and Kelsen also affirm (10') but deny (11').[20]

What about propositions (12') and (13')? Many legal theorists hold that legal right-holders also are legal

duty-bearers, and vice versa. They accept the view that entities having legal rights also have at least one legal duty, and entities having legal duties also have at least one legal right. But notice that neither view is what is asserted at (12') and (13'). What is asserted at (12') is that if an entity, A, has a legal right to something against another entity, B, then A also has some legal duty to B; the converse is asserted at (13'). Thus, it is open for theorists who accept the view that all legal right-holders are legal duty-bearers, and vice versa, to deny (12') or (13').

Furthermore, neither (12') nor (13') is what Correlativity Position theorists mean by the statement that legal rights and legal duties are correlative. As the quotes cited indicate, what is meant by that statement is either simply (10'), or (10') and (11') taken together. Correlativity Position theorists would distinguish between claims which they accept as true about legal right-holders and legal duty-bearers, and claims which they offer as interpretations of the statement that legal rights and legal duties are correlative. Thus, even if (12') and (13') are true and accepted as true by Correlativity Position theorists, the Correlativity Position on legal rights is not identified in terms of them.

All Correlativity Position theorists endorse (10');

some, but not all, endorse (11') as well. For our purposes, then, the Correlativity Position is characterized in terms of (10'): A given position on legal rights is the Correlativity Position if, and only if, it endorses (10'). I refer to "the legal correlativity doctrine" as the doctrine which endorses (10') and (11'); theorists who subscribe to only (10') endorse a specific version of the legal correlativity doctrine. Thus, while the Correlativity Position on legal rights is characterized in terms of the specific legal correlativity thesis given at (10'), some Correlativity Position theorists subscribe to the stronger, general legal correlativity doctrine given as the conjunction of theses (10') and (11').

To review, there are three separate doctrines of the correlation of rights and duties: the logical, the moral, and the legal correlativity doctrines. Theorists who claim that rights and duties are correlative may mean by that claim any one, or any combination, of the six statements given at (10)-(13), (10') and (11'). Some theorists accept specific versions of all three doctrines; other accept only versions of the logical or legal doctrines; still others, viz., theorists who deny the meaningfulness of 'non-legal right', may accept only a version of the legal correlativity doctrine.

A discussion of all three doctrines, and not just

of the legal correlativity doctrine, is important to the defense of (T). It enables one to isolate correlativity theses about legal rights and legal duties from other correlativity theses. It also enables one to clarify just what is, and what is not, endemic to the Correlativity Position on legal rights.

Two Objections to (T)

There are two basic objections to (T) which involve the notion of a legal duty. The first, what I call "the Correlativity Position Objection," assumes the legal correlativity thesis given at (10'): "Natural objects cannot have legal rights because we do not and cannot have legal duties to them." The second, what I call "the Legal Duty Objection," assumes a connection between being a legal right-holder and being a legal duty-bearer not given by any of the correlativity theses (10')-(13'): "Natural objects cannot have legal rights because they cannot have legal duties." Both are plausible objections to (T).

The remainder of the chapter is a defense of (T) against both objections. The discussions of the first three sections help to set up the arguments against the Correlativity and the Legal Duty Objections, advanced in the last two sections, respectively. Even though

the discussions of all three sections are relevant to both objections, the discussion of the first section ("duties to" versus "duties concerning") is of particular importance to assessing the Correlativity Position Objection. It focuses on a familiar distinction which is invoked in arguments designed to show that humans cannot have duties to non-humans, and that non-humans can have neither rights against, nor duties to, humans.

"Duties to" versus "duties concerning." Theorists often distinguish between "duties to" (or, toward) and "duties concerning" (or, regarding, involving, relating to, in respect of) in discussions of the correlation of rights and duties. Only duties which are "duties to" correlate with another person's rights; statements of "duties concerning" others neither entail, nor are entailed by, statements of the other's rights. So, for example, Bernard Mayo argues that the doctrine of the correlativity of rights and duties does not extend to all duties the discharge of which involves a specific persons or persons. There must be a duty to that person in order for the person concerned to have a right.[21]

Quite naturally, the distinction between "duties to" and "duties concerning" also features in arguments for the rightlessness of non-humans. It is argued that since

we do not have any duties to non-humans, even though we may be said to have duties concerning them, they have no rights against us. For example, Kant argues that we cannot be said to have duties to animals distinct from whatever duties we have regarding them:

> To judge by mere reason, man has no duties except to men (himself or others),...[Man, therefore,] can have no duty to any being other than man. And if he supposes that he has such another duty, then this happens through an amphiboly of the concepts of reflection; and so his supposed duties to other beings is merely his duty to himself. He is led to this misunderstanding because he confuses his duty <u>regarding</u> other beings with a duty <u>toward</u> these beings.[22]

For Kant, "duties to animals" actually are just "duties to humans."

Some theorists suppose that even the expression "duty to" is ambiguous; only some "duties to" correlate with rights of others. Feinberg, for instance, argues that 'to' in '<u>B</u> has a duty to <u>A</u>' is ambiguous and obscures a crucial distinction between two distinct offices <u>A</u> could be said to occupy, the office of claimant (creditor, promisee) or the office of mere beneficiary (i.e., a party who/which stands to benefit from performance of an owed act but who/which is not a claimant).[23] A duty is something owed another. When it is said that <u>B</u> owes <u>A</u> something, whether or not <u>A</u> has a right to what is owed depends on which office <u>A</u> occupies. When <u>A</u> occupies the office of

claimant, then B's duty to A generates a right of A's to the owed act. However, when A occupies the office of mere beneficiary, then A has no rights to the owed act. Thus, while it always follows from the fact that a party is a claimant that it has a right to what is owed, it does not always follow from the fact that a party is an intended beneficiary that it has a right to what is owed. Only beneficiaries who/which also are claimants have rights to promised acts.

Hart offers a similar line of reasoning about the ambiguity of the preposition 'to' to show that we should not extend to animals and babies whom it is wrong to ill-treat the notion of a right to proper treatment. While animals and babies are affected by our ill-treatment of them, and may stand to benefit by the performance of any duties we have not to ill-treat them, the office they occupy in such cases is that of the mere beneficiary.[24] Like Feinberg, Hart suggests that it is only where 'to' in 'B has a duty to A' indicates that A occupies the office of claimant that A correctly can be said to have a right.

The view which emerges, then, is that rights are correlative with duties only where duties are "duties to claimants," and not where they are "duties to mere beneficiaries" or "duties concerning." Since what sometimes is expressed as "duties to" natural objects really are only

"duties to mere beneficiaries" or "duties concerning natural objects," natural objects cannot have rights against us.

The question here is whether humans could be said to have legal duties to natural objects. One way to put this is to ask whether natural objects ever could be said to occupy the office of claimant. If so, then the suggestion is that they could have rights to owed acts. What has been said already in connection with the Claim Position on legal rights suggests that they could be so described, i.e., they could be said to have claims against us. Is there another way of showing that humans could be said to have legal duties to natural objects? In order to answer this question, in the next two sections I consider the kinds of duties commonly accepted as instances of genuine "duties to" and the notion of a legal duty.

Kinds of duties. In his essay "Duties, Rights, and Claims," Feinberg identifies ten kinds of duties.[25] He argues that only seven of these necessarily are correlated with rights of others. Since Feinberg's account is as complete and representative as any offered, the discussion of kinds of duties which follows is limited to the account he gives.

The ten kinds of duties identified by Feinberg are what he calls duties "of indebtedness," "of commitment,"

"of reparation," "of need-fulfillment," "of reciprocation," "of respect," "of community membership," "of compelling appropriateness," and "of obedience." He argues that the first five necessarily are correlated with other people's *in personam* rights (i.e., rights against some specific, nameable person(s) requiring performance of some act). The duties of respect and of community membership necessarily are correlated with other people's *in rem* rights (i.e., rights which bold, not against some specific, nameable person(s), but against "the world at large"). The remaining three kinds of duties are not necessarily correlated with other people's rights. Each of the first seven kinds of duties permits talk of one party owing something to another.[26] If one accepts Feinberg's account of which kinds of duties are, and which are not, necessarily correlated with rights of others, then only a discussion of the first seven kinds of duties is relevant here.

"Duties of indebtedness" are duties arising out of contracts and are the most familiar case of one party's owing something to another. In the relation between debtor and creditor, the debtor is said to owe something to the creditor, who has a right to what is owed.

"Duties of commitment," being based on promises, provide another case of owing. A promisor is said to be obligated to a promisee, who has a right to the services

or goods promised. Where duties of commitment are obligations to mere beneficiaries, the intended beneficiaries have no rights against the promisor.

The third kind of duties, "duties of reparation," are duties to repair harm done or to otherwise make good a loss caused by "negligence, recklessness, carelessness, dishonesty, malevolence, or the like." The duty-bearer is said to owe reparation to the claimant.

"Duties of need-fulfillment" are less obvious cases of owing. Feinberg describes them as "duties abundance owes to need." His example is from an advertisement for a set of recordings by Winston Churchill. According to the advertisement, Churchill "feels that he owes this legacy to the world." Feinberg construes this as a duty of need-fulfillment Churchill has, giving rise to in personam rights in others.

"Duties of reciprocation" are related to duties of gratitude except that reciprocation does, while gratitude may not, require action. If a benefactor once freely gave his/her services to a beneficiary in need whose circumstances now put the beneficiary in a position to help the former benefactor, then the beneficiary is said now to owe the former benefactor his/her services. According to Feinberg, the ex-benefactor has right to receive help now from the former beneficiary, who has a duty to proffer such

help.

According to Feinberg, "duties of respect" and "duties of community membership" necessarily are correlated with other people's *in rem* rights. Duties of respect typically are correlated with "negative rights," i.e., rights to other people's abstentions, forbearances, or noninterference. Duties of respect are duties to refrain from obtruding upon or interfering with the person or property (including the privacy) of others. They are typified by the duty we all have to stay off a landowner's property. "Duties of community membership" typically are correlated with "positive rights," i.e., rights to another's performance of some act, rather than to mere omissions. Duties of community membership include the "duty of care that every citizen is said to owe to any and every person in a position to be injured by his negligence" and the duty to come to the aid of accident victims. Feinberg calls these duties, and the rights correlative to them, duties and rights of community membership because "it is their recognition, more than anything else, that molds a society into a cohesive community."[27]

On Feinberg's account, where a duty is an instance of one of these seven kinds of duties, statements of duties entail statements of other person's rights, and statement of rights (i.e., rights of indebtedness, of commitment, of

reparation, of respect, and of community membership) entail statements of other people's duties. Thus, to say they "are necessarily correlated with rights of others" is to endorse the logical correlativity doctrine, the conjunction of (10) and (11).

Feinberg is among the many theorists who accept both the logical and the legal correlativity doctrines. Where 'right' refers to "claim-rights" and 'duty' refers to something one party owes another, Feinberg endorses both sets of propositions (10) and (11), and (10') and (11'). It is reasonable to suppose, therefore, that Feinberg's description of the kinds of duties which necessarily are correlated with rights of others can be extended to cover legal contexts. Do examples of genuine legal rights and legal duties bear this out?

Legally binding contracts or promises generate legal rights and legal duties which fit Feinberg's description of rights and duties "of indebtedness" and "of commitment." Negligence law permits legal reparation for harm and injury due to another's carelessness, generating legal rights and legal duties falling under Feinberg's classification of rights and duties "of reparation." Legal rights of landowners against trespassers, and legal duties of trespassers to stay off another's land, provide examples of

what Feinberg calls right and duties "of respect." Attractive nuissance doctrine imposes legal duties on parties for failure to use due care against injured other parties, generating remedial rights of injured parties. These rights and duties fit Feinberg's description of rights and duties "of community membership." The only questionable cases are whether there are legal rights and legal duties fitting Feinberg's description of rights and duties "of need-fulfillment" and "of reciprocation." However, whether or not there are these other kinds of legal rights and duties, it is clear that legal contexts provide examples of at least five kinds of duties which, according to Feinberg, necessarily are correlated with rights.

The notion of a legal duty. There is not the variation in accounts of legal duties that we have seen in accounts of legal rights. The pattern has been to focus on analyses of 'legal right' and to characterize a legal duty as what one party owes another, viz., a right-holder. Despite differences among theorists on the meaning of 'legal right', they all agree that a legal duty is what one party is required (compelled, commanded, obligated, bound) by positive law to do or forbear from doing. This is illustrated by considering a sampling of views on legal duties offered by different rights position theorists.

Austin's view is that to have a legal duty is to be liable to a legal sanction in the event of disobeying a command.[28] Parties who/which are commanded to do or forbear from doing acts covered by the sanction are said to "lie under a duty."

Power theorist Gray offers virtually the same view:

> The acts and forebearances which an organized society will enforce are the legal duties of the persons whose acts and forbearances are enforced.[29]

Power theorist Holland argues that whenever one is entitled to have others act or forbear, and the other's performance is enforced by the power of the State, then these acts and forbearances are the other's legal duties.[30] Holland argues that it does not matter whether one describes these compelled acts or forbearances as one party's legal duties, or as another party's legal rights:

> ...when the State will compel B to carry out, either by act or forbearance, the wishes of A, we may indifferently say that A has a legal right, or that B is under a legal duty.[31]

Thus, Gray's and Holland's views are that legal duties are those acts or forbearances which an organized society will require and enforce.

Salmond's version of the Interest Position is that a right is "any interest, respect for which is a duty, and the disregard of which is a wrong." A legal duty is "an

act the opposite of which should be a legal wrong."[32] To say an entity has a legal duty is to say it is legally wrong for the entity not to act in certain ways.

Consider two more examples. Rules Position theorists Benn and Peters describe a legal duty as what a legal rule requires a party to do to some other party, viz., the right-holder. They write:

> If we say that Y has a duty to act in a certain way, we mean that there is a rule that leaves him no choice in the matter, that 'requires' it of him.[33]

An entity is said to have a legal duty insofar as there is a legal rule which requires that it do some act to some other party.

On Feinberg's claim view of rights, a legal right-holder is a claimant, one who has a $claim_2$ against some other party to something owed. A legal duty is what is owed to a claimant, and a legal duty-bearer is the party who/which owes something to a claimant. Since ascription of legal rights and legal duties is governed by legal rules, an entity has a legal duty when, according to the governing legal rules, it owes something to others (i.e., claimants).

These examples suffice to show that the notion of a legal duty as what an entity is required by positive law to do or forbear from doing is accepted by theorists of

different historical positions on legal rights. A legal duty-bearer is the entity who/which is so required.

Two questions arise. First, could humans be said to have legal duties to natural objects? Second, could natural objects be said to have legal duties to humans? If the answer to both questions is "yes," then both the Correlativity Position and the Legal Duty Objections to (T) fail.

The Correlativity Position Objection. Legal duties are cases of one party owing another party something. Entities have legal duties when positive law requires that they act or forbear in certain ways. Are there plausible examples of legal situations where persons could be described as owing something to natural objects, or as required by positive law to act or forbear in certain ways? That is, could humans be said to have legal duties to natural objects? If so, then the Correlatively Position Objection to (T) has no force.

In Chapter VII it was argued that one could modify existent legal rules, or fashion new rules, according to which natural objects could be construed as legal right-holders. Some of those rules also provide a basis for

arguing that humans could be said to have legal duties to natural objects. For instance, reconsider candidate legal rule (R3) and accepted legal rule (R8):

(R3) No humans may trespass on wilderness areas.

(R8) Liability results from failure to use due care under the circumstances.

One way to interpret (R3) is as a duty-imposing rule, a rule which requires humans to act or forbear so as not to trespass on wilderness areas. The duties imposed could be described as duties of noninterference owed by humans not specially exempted to wilderness areas. These are duties which fit Feinberg's description of "duties of respect." Appeal to (R3), then, could provide the basis for construing humans as having certain legal duties to wilderness areas, viz, a legal duty not to trespass on wilderness areas.

This example shows that one could speak meaningfully of "duties to natural objects" and do so while leaving open the question whether natural objects can have legal rights. Of course, if (11') is true, as many theorists hold, then the example does also show that natural objects could be said to have (legal) rights. But neither the Correlativity Position nor the Correlativity Position Objection assumes (11'). Each assumes (10') only. Hence, where the view is that (10') is true and that

natural objects cannot have rights because we cannot have any duties to them, the example shows this view incorrect. It is incorrect because talk of duties to natural objects is meaningful and plausible in at least the case where the ascription of legal duties is justified by appeal to governing legal rules.

Take another case. Suppose a particular forest contains a stand of a rare species of tree and that, in the area where these trees grow, it is clearly marked that all humans should use exceeding care in trespassing in the area. Suppose further, that a particular group of hikers, through "negligence, recklessness, carelessness," and the like intentionally destroy large portions of the stand of trees. By appeal to the basic rule of negligence law, (R8), a proper authority (e.g., an administrative agency, a court) may find them liable for failure to use due care under the circumstances. In particular, they could be construed as having what Feinberg calls "duties of reparation" and as owing this reparation to the forest to repair damages done. Of course, this is not how the legal situation presently would construe the facts; but it could so construe them. Humans could be construed as having "duties of reparation" to natural objects.

Two objections might be advanced at this point.

The first is that the argument for saying humans could be described as having legal duties to natural objects fails because it simply assumes that natural objects have legal rights and that is the question at issue. This objection misses the mark, however. Of course, it is true that by providing an account of why humans could be said to have legal duties to natural objects one also thereby provides reasons for supposing natural objects could have legal rights. This is true, but not because the question of rights for natural objects is begged. It is true because there is an important connection between the notions of a legal right and a legal duty. That is what the Correlativity Position is all about. Some theorists (e.g., Salmond) put this by saying that the relation between 'right' and 'duty' is like the relation between 'husband' and 'wife.' By providing reasons for supposing a woman is a wife one also provides reasons for supposing someone else is a husband. But it does not follow that an argument for saying that a particular woman is a wife merely assumes that someone else is a, perhaps her, husband. Appeal to the meaning of 'wife,' to tests for identifying women as wives, to particular facts about the woman in question together provide reasons for saying a particular woman is a wife. By analogy, by providing reasons for supposing

that we could be said to have legal duties to natural objects one also provides reasons for supposing that natural objects could have legal rights. But it does not follow that the argument given here for why we could be said to have legal duties to natural objects merely assumes that they could have legal rights. Appeal to the meaning of 'legal duty,' to examples of legal duties, and to legal situations where the legal relation properly is described as a case of one party's owing something to another together provide reasons for saying that humans could be said to have legal duties to natural objects.

The second objection is that the proper description of the relation between natural objects and individual humans in the examples given is not that of one party owing something to another, as I have maintained. Rather, it is of one party being obliged to act in certain ways with regard to natural objects. But such statements about being obliged do not entail statements about having duties. Thus, the objection goes, we may be obliged to act in certain ways where natural objects are concerned, but we have no duties to act in those ways towards natural objects.

The second objection involves a distinction between being obliged and having a duty. What is it to be obliged? Some theorists suggest a distinction between different

senses of 'oblige.'[34] In one sense (call it "oblige$_1$"), to be obliged is to be ordered or threatened. To say a party is obliged$_1$ is to say that the party is given an order backed by threats. A person forced at gunpoint to hand over his/her wallet is obliged$_1$ to do so. In a second sense (call it "oblige$_2$"), to be obliged is to have a moral duty, to be morally bound. To say a party is obliged$_2$ is to say the party has a moral duty. Being obliged$_2$ to keep one's promises is having a moral duty to do so. Statements that someone is obliged$_1$ do not, though statements that one is obliged$_2$ do, entail statements about one's duties. It is only where 'oblige' is "oblige$_2$" that persons have duties to act or forbear.

Using this distinction, the objection is that although we may be obliged$_1$ to act or forbear in certain ways where natural objects are concerned, we are not obliged$_2$ to do so, i.e., we are not morally bound to do so. Thus, we have no duties to natural objects.

The second objection also fails, and it fails for an important reason. The distinction between the two senses of 'oblige' is a distinction between being ordered or threatened to do something and having a moral duty to do something. The sense of 'oblige' according to which statements about being obliged entail statements about having a duty is the second sense, oblige$_2$. As such, the

duties referred to are moral duties. But the Correlativity Position and the argument given here against its objection to (T) make no claims about whether humans have moral duties to natural objects. Even if we have no moral duties to them, and, hence, are not obliged$_2$ to treat them in certain ways, it is still open whether we could have legal duties to them.

This rebuttal raises a crucial issue. Certainly it is suspect whether we have moral duties to natural objects, and whether they have moral rights against us. But arguments intended to show that we have no moral duties to them do not show, as so many theorists mistakenly have assumed, that we could not be said to have legal duties to them. This would be the case only if it were assumed in law that a person's having legal duties to another presupposes that the person has moral duties to the other, i.e., (14):

(14) If B has a legal duty to A, then B has a moral duty to A.

Proposition (14), taken together with the claim that we have no moral duties to natural objects, does yield the conclusion that we have no legal duties to them. But few, if any, legal theorists hold (14). This is because all theorists who hold some correlativity thesis about legal rights and legal duties hold (10'). But (10') and (14)

taken together imply (15):

(15) If A has a legal right against B, then B has a moral duty to A.

And few, if any, legal theorists hold (15). Thus, they do not, and would not want to, hold (14).

Similarly, the claim that natural objects have no moral rights supports the Correlativity Position Objection that humans cannot have legal duties to natural objects only if proposition (16) is assumed:

(16) If B has a legal duty to A, then A has a moral right against B.

Proposition (16), taken together with the claim that natural objects do not have moral rights, does yield the conclusion that we have no legal duties to them. But few, if any, legal theorists hold (16). This is because they hold (10'), and (10') and (16) taken together imply (17), which few, if any, of them hold:

(17) If A has a legal right against B, then A has a moral right against B.

Thus, they do or would reject (16).

What this points out is that, in discussions of correlativity theses and duties to non-humans, one must keep separate the moral positions and the legal positions. While it may be significant and true that humans and natural objects cannot be parties to a moral right-duty relationship, this does not show that they cannot be

parties to a legal right-duty relationship. If what I said so far is plausible, it is possible that they could be parties to legal right-duty relationships.

The Legal Duty Objection. The Legal Duty Objection to (T) is that natural objects cannot have legal rights because they cannot have legal duties.[35] Could natural objects be said to have legal duties? That is, could they be required by positive law to act or forbear in certain ways?

Consider again the view that appeal to legal rules provides a justification for ascription of legal duties to an entity, and the legal rule that contracts must be kept, (Rl2). (Rl2) is an example of what Hart calls a "primary rule of objection" or a "duty imposing rule." In effect it stipulates that parties to contracts are obligated by law to keep the terms of contracts into which they enter. By introducing "secondary rules" or "power conferring rules," one can make explicit the content of primary rules such as (Rl2). Secondary rules (Rl6), (Rl7) and (Rl8), for example, might be introduced in connection with rule (Rl2):

(Rl6) Rule (Rl2) is recognized as a primary rule of obligation of the legal system which imposes on parties to contracts the obligation to act or forbear in the ways specified in the contract.

(Rl7) The courts and legislatures have the powers to recognize natural objects as parties to

contracts.

(R18) Natural objects which are recognized as parties to contracts have the obligation to act or forbear in the ways specified in the contract.

(R16) identifies (R12) as a primary rule of the legal system, (R17) confers powers on courts and legislatures to create legal duties for natural objects, and (R18) specifies that natural objects which are parties to contracts have certain legal duties. However, by appeal to rules (R12) and (R16)-(R18), a means is provided for recognizing natural objects as genuine legal duty-bearers.[36] As parties to contracts, they could be required by positive law to act or forbear in certain ways.

Perhaps it will be objected that this argument fails because natural objects cannot act or forbear, that "acts" properly understood are what philosophers call "actions," i.e., willed events, and that only humans can perform actions. Since legal duties are described as acts or forbearances required by law, natural objects cannot have legal duties.

This objection has no punch. When it is said that a condition of an entity's having a legal duty is that it be able to act or forbear, it is assumed that all legal persons satisfy that condition. Either they themselves have that capacity, or their legal representatives have it.

In either case, as Markby says of corporations, "so far as it is possible that acts should be done through a representative it will be presumed that a corporation may do these acts."[37] Thus, if one extends the doctrine of legal representation to cover natural objects, the condition that legal duty-bearers have the capacity to act or forbear is a condition which natural objects could be said to satisfy. The Legal Duty Objection is not saved by any argument which supposes otherwise.

Summary

Two objections to (T) have been stated and defeated, the Correlativity Position Objection and the Legal Duty Objection. It has been shown that humans could be said to have legal duties to natural objects, and that natural objects could be said to have legal duties to humans. The discussion of this chapter completes the first of the two moves in defense of (T), viz., the move to defend it against reasonable objections based on the historical positions on legal rights and legal right-holders. The task in the next chapter, Chapter IX, is to complete the second move in defense of (T), viz., the move to defend it against non-historical position objections.

CHAPTER IX

REMAINING OBJECTIONS

In this chapter plausible objections to and concerning (T) which do not presuppose any particular historical position on legal rights and legal right-holders are stated and defeated. These are objections which could be advanced by theorists of any of the eight historical positions. By defeating them, the case for (T) is complete.

Non-Historical Positions on Legal Right-Holders

The Moral Person and the Moral Rights Positions. The Moral Person Position is the position which affirms any of the following as necessary conditions of an entity, X, having legal rights: X is a moral person, a moral agent, subject to moral law; X is rational, capable of choice, has a will. Typically, then, the Moral Person Position, is construed as an endorsement of (18):

(18) For any entity, if X has legal rights, then X is a moral person.

The Moral Person Position is related closely to another position, what I call "the Moral Rights Position" on legal right-holders. Typically, it is construed as an endorsement of (19):

(19) For any entity, X, if X has legal rights, then X has moral rights.

On the assumption that all and only moral persons have moral rights, (18) and (19) are logically equivalent. However, it is possible that a theorist might deny the existence of non-legal, "moral" rights, yet affirm that there are moral persons, i.e., persons capable of choice, of acting, of willing. For this reason, whatever connections do hold between them, the two positions are treated separately here.

The Moral Person and the Moral Rights Positions seem to generate the following two objections to (T), respectively: "Natural objects cannot have legal rights because they are not moral persons"; "Natural objects cannot have legal rights because they cannot be said to have moral rights." According to the Moral Person Objection, natural objects are not the appropriate sort of entity to have legal rights; they are not moral persons. According to the Moral Rights Position Objection, moral rights are not the sort of rights natural objects could be said to have. Is either objection damaging to (T)?

The Moral Person Position Objection. The Moral Person Objection is that natural objects cannot have legal rights because they are not moral persons. It assumes that the moral personality of non-humans must be established if a

move to give natural objects legal rights is to be taken seriously. Even Christopher Stone seems to make this assumption when he defends the natural object more, NOM, by arguing that natural objects have wants and needs. He writes, "natural objects can communicate their wants (needs) to us"; we can say, for example, that the smog-endangered stand of pines wants the smog stopped, or that "the lawn wants water."[1]

But all such arguments are misguided. They incorrectly assume that in order to show that non-humans could be legal right-holders one must show that they are moral persons. Indeed, if non-humans were moral persons that would be good reason to extend legal rights to them. And, surely, our reluctance to extend legal rights to non-humans may be explained in part by our association of rights with moral persons. But, as the doctrines of legal personality and legal representation make clear, neither the non-moral person status of non-humans, nor our reluctance to ascribe rights to non-humans, establishes that non-humans cannot have legal rights. Trusts, funds, idols, ships and municipalities are not moral persons, though they have been treated as legal persons, bearers of legal rights and duties. In order to accomodate these two doctrines, then, the Moral Person Position, like other positions on legal rights and legal right-holders, must abandon (18) in favor

of (20):

(20) For any entity, X, if X has legal rights, then X or X's legal representative is a moral person.

As long as there is some moral person (e.g., a legal representative) in a position to act on behalf of natural objects, natural objects could be said to have legal rights.

Thus, insofar as the Moral Person Position adopts (18) rather than (20) it affirms something about legal right-holders which is false; hence, it fails to generate a plausible objection to (T). If the position is revised to accomodate the doctrines of legal personality and legal representation, abandoning (18) in favor of (20), it poses no objection to (T). In either case, the argument for (T) is secure against the Moral Person Position.

The Moral Rights Position Objection. The Moral Rights Position Objection is that natural objects cannot have legal rights because they cannot be said to have moral rights. It fails for the same reason the Moral Person Position Objection fails. To accomodate the accepted doctrines of legal personality and legal representation, it must adopt (21) in lieu of (19):

(21) For any entity, X, if X has legal rights, then X or X's legal representative has moral rights.

That is, if it is at all plausible that a moral rights condition must be satisfied for proper recognition or ascription of legal rights, then it is the condition given at (21), and not the condition given at (19), which is plausible. As such, the Moral Rights Position, like the Moral Person Position, does not pose a damaging objection to (T).

Other positions. Other less frequently asserted views on the necessary conditions for an entity, X, to have legal rights are that X is a member of a community, X is capable of self-movement, X has a soul, X is subject to natural law, and X is capable of being party to a lawsuit. Clearly, the latter poses no serious problems for (T). The argument that natural objects could be said to have legal rights on each of the eight historical positions on legal rights provides a basis for saying that they could be parties to lawsuits. But what about the other four positions? Are they problematic for a defense of (T)?

Each of the remaining four views is a variant on the Moral Person Position. As such, objections to (T) based on them are defeated by defeating the Moral Person Position Objection. The assumption underlying the view that only entities which are members of communities can have legal rights is that the existence of rights requires

mutual recognition. Since such recognition is possible only among rational beings, only they can be "members of communities." Hence, only they can have rights. Natural objects, non-rational beings, cannot be members of communities and, hence, cannot have legal rights. As John Passmore puts it,

> Ecologically, no doubt, men form a community with plants, animals, soil, in the sense that a particular life-cycle involves all four of them. But if it is essential to a community that the members of it have common interests and recognize mutual obligations, then men, plants, animals and soil do not form a community.[2]

Since this view assumes that 'community' means "moral community" or "community of moral, rational beings," it is a version of the Moral Person Position.

The view that legal right-holders must be capable of self-movement also is a Moral Person Position view. It has been stated in various ways: Only entities "capable of exercising their own motion," "capable of rational self-determination," or "capable of initiating action" can be legal right-holders. It is not a view about sentient beings, or about any entities who/which exhibit behavior. It is the view that only agents capable of choice or action can have legal rights. Only they can will movements, choose ends, initiate actions. As such, it is a Moral Person Position view.

The case is the same for the related views of legal right-holders as "havers of souls" or "subjects of natural law." Entities having souls and subject to natural law are rational entities, moral agents, i.e., moral persons. Like the other two views, theses two views reduce to the Moral Person Position stance that only moral persons can have legal rights. They generate no new or damaging objections to (T).

Thus, none of the non-historical positions on legal right-holders subscribed to in the American legal tradition poses a successful objection to (T). On all the major views in American legal theory on legal right-holders, natural objects could be described as legal right-holders.

Remaining Objections Concerning (T)

The distinction between "objections to" and objections concerning" (T) was introduced in connection with the Moral Law Validation Position Objection, in Chapter VII. If an objection raises reasonable doubt about the significance of establishing (T), it is an objection concerning (T). If it questions the truth or plausibility of the case for (T), it is an objection to (T). In the remainder of this chapter I consider three objections

concerning (T). In the order in which they are discussed, they are the Conflict of Legal Rights Objection, the "Which Rights?" Objection, and the Social Value Objection.

The Conflict of Legal Rights Objection. Often legal rights conflict in a given situation. On a claim view of rights, X's and Y's rights to something, ϕ, conflict when X's and Y's claims to ϕ cannot both be recognized. On a rules view of rights, X's and Y's rights to ϕ conflict when the rule(s) governing recognition of X's right as valid and the rule governing recognition of Y's right as valid cannot both be realized.

The fact that legal rights often conflict is the basis of a reasonable objection concerning (T): "If one gives natural objects legal rights, situations will arise where rights of natural objects and rights of humans will conflict. Some of these conflicts will involve some basic, inalienable rights of humans, e.g., the rights of liberty and of property. Recognition as valid rights or claims of natural objects would require that humans give up some of their basic rights and that basic human liberties be restricted. But these rights and liberties are absolute and nonsacrificeable; there is no reasonable justification for restricting them. Thus, in the only really important cases where talk of rights matters--cases where rights conflict--

there is no reasonable ground for recognizing a right or claim of a natural object as having priority over a basic right or liberty of humans."

The Conflict of Legal Rights Objection raises two related issues: First, in cases where rights of natural objects and rights of humans conflict, would recognition as valid rights or claims of natural objects require that we abandon the well-entrenched view that certain rights of humans are absolute and inalienable? Second, are there any reasonable grounds for restricting the rights or liberties of humans and, thereby, for giving rights or claims of natural objects priority over rights or claims of humans? Both issues must be addressed in order to defeat the Conflict of Legal Rights Objection concerning (T).

In what follows I argue that, first, the view that some rights of humans are basic, absolute, or inalienable, properly understood, is not sacrificed by recognition of some rights or claims of natural objects as having priority over some rights or claims of humans; second, the justification for restricting the rights and liberties of humans where natural objects are concerned need be no different than the justification for restricting the rights and liberties of humans where other humans are concerned. For these two reasons, the Conflict of Legal Rights Objection does not undermine the significance of showing that

natural objects could have legal rights, (T).

Certainly the ascription of legal rights to natural objects will involve limitations on the exercise of many rights and liberties of humans. But such restrictions are a feature of any legal system in which rights are ascribed, and not a peculiar feature of a system in which rights are ascribed to natural objects. Furthermore, no rights are "absolute" in the sense that they always have priority against any competing claims and never involve any restrictions. All rights are limited by rights of others or by duties imposed on right-holders. For example, A's right to use and enjoy his/her property does not permit A to dispose of the property in any way A chooses, or to build any structures which fit A's fancy on the property. Fire, health, building and zoning regulations, to cite a few, all restrict ones "right to obtain and enjoy property." Even traditional natural rights theorists admit these limitations on alleged basic, inalienable rights of humans. Although they maintain that all humans have certain absolute, inalienable rights, they qualify this by saying that there are restrictions on the exercise of those rights. These are restrictions "necessary to ensure each other man the free exercise of the same right."[3]

Thus, the accepted view is that no right always has

priority over competing claims, that the exercise of any right is subject to limitations. This point often is put by saying that "the right to ϕ" always is understood as a "prima facie right," i.e., a right to ϕ unless a stronger, competing claim (right) is recognized as valid. Typically, theorists who persist in describing an actual right as "absolute" mean by that, that in the situation at hand, there is no competing claim which overrides recognition of the right as valid. Thus, whether one calls actual rights "prima facie rights" or "absolute rights," the accepted view is that all rights are such that they may be overriden by competing claims (rights), or their exercise may be restricted.

Since it always is possible that basic rights of humans may be restricted or overridden by competing claims (rights), the view that some rights are "absolute" or "inalienable," when properly understood, need not be sacrificed by recognition of some claims (rights) of natural objects as having priority over some claims (rights) of humans. The case of natural objects would be just another example of what already is acknowledged about "absolute" or "inalienable" rights, viz., they can be restricted or overridden. The pertinent question, then, is whether there are grounds for restricting or overriding claims (rights) of humans in order to recognize as valid competing

claims (rights) of natural objects. Is there any justification for restricting the rights and liberties of humans where natural objects are concerned?

Consider two principles which frequently are offered as justifications for restricting the freedom or liberty of humans. These are what Feinberg calls "the Private Harm Principle" and "the Welfare Principle,"[4] (22) and (23), respectively:

(22) Restriction of a person's liberties is justified to prevent harm (injury) to others.
(The Private Harm Principle)

(23) Restriction of a person's liberties is justified to benefit others.
(The Welfare Principle)

According to Feinberg, these two liberty-limiting principles specify "kinds of reasons that are always relevant or acceptable in support of proposed coercion, even though in a given case they may not be conclusive."[5]

Although endorsement of one principle does not commit one to endorsing the other, often the Private Harm and Welfare Principles are endorsed together. The reason for this has to do with the notion of a harm. Typically a harm is considered to be an invasion of an interest. Human-inflicted harms are considered injuries to a person's interest, to "something in which he has a genuine stake."[6] One way to harm persons is to deprive them of what they

need. According to Feinberg, to claim that persons need certain things is to claim that they cannot get along very well in the end without them.[7] One way to prevent or remedy a harm, then, is to provide people with what they need, i.e., to benefit them. Thus, interference with the liberties of some has been justified often both in order to prevent harm (injury) to others and to benefit others.

The related concepts of harm and benefit have been invoked in support of the move to give natural objects legal rights. Some theorists (e.g., Benn) argue that natural objects could be said to have prudential interests ($interests_2$). Certain human activities affecting natural objects could be considered conducive to their well-being ("in their interests") and others harmful to their well-being ("not in their interests"). That is, certain human activities could prevent or remedy harm (injury) to the $interests_2$ of natural objects. Other theorists (e.g., C. Stone) put this by saying that natural objects themselves are harmed (injured) or benefited by certain kinds of human activities. Rivers are harmed (injured) by the presence of toxic pollutants, and benefit from efforts to remove or stop the discharge of toxic pollutants. Evidence of this harm and benefit, respectively, might be the river's loss of fish and plant life when the pollutants are present and their return when the pollutants are

treated or removed. The view which emerges is that certain kinds of human activity directly harm (injure) either the interests$_2$ of natural objects or the natural objects themselves and that certain kinds of human activity benefit natural objects.

Some theorists (e.g., C. Stone, Douglas) take the argument one step further. They argue that there are moral grounds for recognizing natural objects as legal right-holders, grounds based on the view that the natural environment ought to be valued for its own sake, and not merely for its use-value to humans. They include moral reasons among the reasons for conferring on natural objects certain legal-operational advantages, e.g., the right to initiate court action. Given the notion of an interest as an advantage which, on moral grounds, an entity ought to have (i.e., interest$_3$ or de jure interest), their view amounts to a construal of natural objects as entities which have, or ought to be recognized as having, such interests.

Harms clearly are invasions of de facto interests (interests$_1$). But many theorists would argue that they also may be invasions of prudential interests (interests$_2$) and de jure interests (interests$_3$). One can harm an entity by depriving it of certain things which are to its

advantage to have (i.e., by doing injury to its $interest_2$), or by depriving it of certain advantages which, on moral grounds, it ought to have (i.e., by doing injury to its $interests_3$). If this is so, then at least some theorists would argue that certain kinds of humans activities do or prevent harm to natural objects by doing or preventing injury to their $interests_2$ and $interests_3$.

If talk of harm (injury) or benefits to natural objects is plausible, then a reasonable case can be made for restricting the rights or liberties of humans by appeal to extended versions of the Private Harm and Welfare Principles, (24) and (25), respectively:

(24) Restriction of a person's liberties toward natural objects is justified to prevent irreparable harm (injury) to them. (The Extended Harm Principle)

(25) Restriction of a person's liberties toward natural objects is justified to benefit them. (The Extended Welfare Principle)

To use Feinberg's language, appeals to principles (24) and (25) would "always be relevant or acceptable in support of proposed coercion, even though in a given case they may not be conclusive."

Consider a case where a river is or could be said to have a claim to be free from irreparable damage incurred by human pollution activity, or to have a claim to seek

redress for damages so incurred. The river's exercise of that claim may interfere with some liberties or rights of humans. To justify, or at least provide a prima facie case for, that interference, one could appeal to the Extended Harm and Welfare Principles. Not only do they provide reasonable grounds for justified restriction of the liberties and rights of humans where natural objects are concerned; they provide the sort of justification which theorists accept as appropriate for restricting the liberties of humans generally.

The argument advanced here is not that evidence of harmful (beneficial) human activity towards natural objects establishes that they have rights. It is that, if one allows that talk of harm (benefit) to natural objects is meaningful, appeal to the Extended Harm and Welfare Principles provides a plausible justification for restricting the liberties and rights of humans. Furthermore, it is reasonable to suppose that some claims of natural objects (e.g., a river's claim to be free from irraparable damage due to the presence of toxic pollutants) could be given priority over some claims of humans (e.g., an industrial polluter's claim to have the right to pollute). This would not interfere with the claim, properly understood, that some rights of humans are "absolute." For these reasons,

the Conflict of Legal Rights Objection concerning (T) is unsuccessful in undermining the significance of establishing (T).

The "Which Rights?" Objection. What I call the "Which Rights?" Objection challenges the significance of establishing (T) from a different angle: "Suppose natural objects meaningfully could be said to have legal rights. Which legal rights could they be said to have? They could only be said to have inconsequential procedural rights; there are no substantive legal rights which could be conferred on them. Consequently, natural objects could not be said to have any rights which matter. This makes establishing (T) rather unexciting." Is there any force to this objection?

The "Which Rights?" Objection appeals to a distinction often used in classifying rights, viz., the distinction between "substantive" ("primary," "antecedent") rights and "procedural" ("secondary," "remedial") rights. In the case of humans, "substantive rights" are associated with personal freedoms (e.g., rights to express oneself, to associate and assemble) and with privacy and security (e.g., rights to be let alone, to have one's body unharmed, to have one's reputation undamaged). So-called "rights to equal treatment and consideration" (e.g., rights

to vote, to be free of racial and sexual discrimination) often are classified as substantive rights. "Procedural rights" are associated with the legal means for vindicating substantive rights. They include rights associated with "due process of law" (e.g., rights to counsel, to a trial, of appeal) and with legal remedies (e.g., rights to be parties to injunctive settlements, to sue for damages). The main issue raised by the "Which Rights?" Objection is whether natural objects could be said to have substantive rights or to have procedural rights of any consequence. Could natural objects be said to have any rights "which makes a difference"?

That they could be said to have rights which matter seems evident from previous discussions. There are many procedural rights natural objects could be said to have. These include "due process" rights, such as the rights to initiate court action, and to appeal agency and judicial decisions affecting them; rights to seek redress for damages, to be parties to injunctive settlements and to receive relief which benefits them; the rights to be parties to contracts, to a fair hearing and consideration. But surely these are rights which matter. For one thing, if natural objects have the rights to initiate court proceedings and to receive legal awards in favorable judgments, then they have access to the legal machinery necessary for

ensuring legal and non-legal remedies for injury to them. For another thing, whether or not they have such rights matters to how we treat them. Our behavior toward them would be subject to legal sanction, rather than to public censure or moral sanction alone.

The case is the same for substantive rights. So-called "rights to non interference" by others are standard examples of substantive rights which humans have. They are construed either as "active rights," rights to do or not to do something, or as "passive rights," rights to have something done or not done by others. For humans, rights to non interference include the general rights to privacy ("to be let alone") and to physical security. But it was argued previously (in Chapter VII, in connection with the Claim and Rules Positions) that natural objects could be described as having rights to non interference. These rights could be construed as prima facie rights of natural objects to be let alone, or to be physically unharmed.

There are other "rights" natural objects could be said to have. Some of them are called "rights" by lawyers, though they are called "privileges," "powers," or "immunities" by many legal theorists. Whichever expression one adopts, their conferral on natural objects would have tangible significance. For example, natural objects could

be accorded immunity from prosecution for damages due to the occurrence of "natural disasters," e.g., floods, earthquakes, droughts. Like humans, they could be accorded freedoms from "bills of attainder" and from "ex post facto laws."

One might give natural objects a right for which there is no analogue yet among rights of humans, a "right to freedom from ecocide." This would be a non-interference right where relief for injury is sought along lines used in traditional negligence law. Certain natural objects could be construed as having a "right to freedeom from ecocide," imposing on humans a duty to use care against endangering the lives of those natural objects. For failure to use due care, offending persons could be liable. The natural objects, in turn, would have certain remedial rights against the offending persons.

The terminology "right to freedom from ecocide" is borrowed from traditional negligence law. "Failure to use due care" often is cited as the grounds for making a person, B, liable for some action performed against another person, A. Roughly stated, when B takes action against A, it is a case of "assault." If B strikes against A, it is "battery." If A dies as a result, it is "homocide." Now suppose A is a natural object, e.g.,a member of an endangered species. One could argue that when persons perform

certain actions against certain natural objects such that they, or some of them, die as a result, the action is "ecocide." The offending persons could be made liable for having committed acts of ecocide, where recovery is sought on grounds of the offending person's failure to use due care. The antecedent ("substantive") right of the natural objects would be the "right to freedom from ecocide."

Thus, both subtantive and procedural rights "which make a difference" could be ascribed to natural objects. As such, the "Which Rights?" Objection concerning (T) fails.

The Social Value Objection. Many theorists emphasize the "social value of rights." What I call the Social Value Position generates a plausible objection concerning (T): "Legal rights are not ascribed indiscriminately. It is appropriate to grant legal rights to entities only where there is some social value or end served by doing so. But there are no social values served by awarding natural objects legal rights. Hence, ascription of legal rights to them is at best inappropriate." Is the Social Value Objection threatening? Is there any social value or goal served by giving natural objects legal rights?

That reasonable social values or goals are served by conferring legal rights on natural objects can be shown

by defending two claims: first, social values or goals are served by providing a legal means for protecting natural objects against certain types of behavior. Second, the conferral of legal rights on legally rightless entities provides a legal means for protecting those entities against certain types of behavior.

How can one establish the first claim? The evidence is voluminous that there is an "environmental problem." Most people view this problem as a type of social problem, the control of which is presumed to be desirable for the society as a whole. Generally it is agreed that, although there are fuzzy cases, there are clear-cut cases of avoidable, unacceptable behavior affecting natural objects, e.g., the wholesale destruction of swamp lands, the discharge of toxic materials into the air and water, the indiscriminate slaughter of seals, wolves and moose. It also is agreed that efforts to control adverse human activities towards natural objects are ineffectual without supportive legal principles and regulation. Behavior which threatens the survival of natural objects, and the lack of legal protection of natural objects against such behavior, are viewed as socially undesirable; the converse behavior, and provisions for legal protection of that behavior, are viewed as socially

desirable. On the assumption that what is socially desirable (or, is desirable for the society as a whole) has social value or serves social goals, it is agreed that providing such legal protection of natural objects has social value or serves social goals. The first claim, then, is widely accepted.

Of course, this is not to say that there are no difficulties in specifying what counts as behavior adversely affecting natural objects, in identifying and assessing such behavior, or in specifying and evaluating the social values or goals at issue in any given case. Human ignorance accounts for some of the difficulties. Often our activities destroy species we know nothing about, or are harmful to natural objects in ways of which we are unaware. But much of the difficulty is because there are viable, alternative and sometimes incompatible perspectives for describing and valuing both natural objects and behavior acknowledged as affecting natural objects. For example, from an industry's perspective, a forest may be described and valued as a replenishable resource for the production of lumber and paper products, for human consumption. So conceived, one might describe and assess behavior affecting forests according to whether it increased, decreased or had no effect upon the productivity of forests. From a recreational perspective,

a forest may be described and valued as a space providing opportunities for various sorts of sporting activities, e.g., hiking, camping, picnicing. So conceived, behavior affecting forests might be described and assessed according to whether it enhances, obstructs or has no effect upon the recreational possibilities of forests. From an aesthetic perspective, a forest might be described and assessed to a "work of art," invoking feelings of awe and wonder in those who view it. So conceived, behavior affecting forests might be described and assessed according to whether it increased, reduced or left unaltered the "natural beauty" of the forest. The pattern is clear. Depending on the perspective from which natural objects and behavior affecting them is described and valued, one may get different, even incompatible, views about whether the behavior itself, or the legal protection of or against that behavior, has social value or serves social goals.

Similarly, there are difficulties associated with clarifying what a social value or goal is, and with choosing social values and goals. For example, the economic (social) goals of maintaining levels of unemployment no higher than 4% and of making housing available and affordable for all Americans may conflict with the social value or goal of protecting more "green areas" from industrial development, or with the goal of reducing all forms

of pollution activity. Still, in spite of such disagreements about social goals and which behavior serves or disserves these goals, it is agreed that providing legal protection of natural objects against behavior adversely affecting them does serve some social values and goals. As such, the first claim stands.

What about the second claim, viz., that the conferral of legal rights on an entity provides a means of legally protecting the entity from certain types of behavior? The truth of this claim can be shown by reconsidering what some of the historical positions on legal rights say about legal rights. According to the Moral Sense Position, legal rights enable entities to do or receive something from another lawfully. According to the Interest Position, legal rights protect interests, both what an entity actually wants or needs, and what it is to an entity's advantage to have. The Power Position maintains that legal rights create and secure powers, allowing properly empowered individuals or bodies to create or alter the legal relations of other entities. According to the Correlativity Position, legal rights impose duties on others to act or forbear in certain ways. The combined Claim and Rules Positions describe legal rights as claims validated by appeal to governing legal rules, which

rules also oblige others to do or abstain from doing certain actions. On the Prediction Position view, statements ascribing legal rights are predictive statements that if certain circumstances transpire, certain court action will follow. Each of these positions construes legal rights as legal instruments for safeguarding legal right-holders against various types of behavior affecting them. Each acknowledges that the conferral of legal rights on an entity is one way to provide that entity with the legal means for protecting itself against certain kinds of behavior. As such, the second claim also stands.

This discussion establishes that the conferral of legal rights on natural objects could serve some social values or goals. The conferral of legal rights on hitherto legally rightless entities is, in an important respect, a mechanical way of providing those entities with a means for gaining access to certain legal protections. This is true because of the nature of legal rights, and not because of the nature or individual characteristics of right-holders. By giving natural objects legal rights, one provides them with a means for gaining access to certain legal protections, protections which have or could have social value. Thus, the Social Value Objection concerning (T) is not damaging.

Summary

No non-historical position on legal right-holders poses any insurmountable objection to (T). Furthermore, the significance of establishing (T) is not damaged by the Conflict of Legal Rights, the "Which Rights?" or the Social Value Objections concerning (T). Having established the significance of defending (T), and having defeated all reasonable objections to (T), the only task which remains is to bring together the argument for (T). That is done in the remaining section, the Conclusion.

C H A P T E R X

CONCLUSION

The main thesis of this dissertation was that ascription of legal rights to natural objects such as forests, rivers and seals is compatible with American legal theory on legal rights and legal right-holders, thesis (T). No attempt was made to defend the stronger, normative claim that natural objects should have legal rights, thesis (S). As such, no effort was made to consider the disadvantages of giving natural objects legal rights, or to provide a full-scale account of how that move might be accomplished. Thus, many practical details and important normative considerations, so vital to an adequate defense of (S), were not addressed. What the argument did establish was that objections to giving natural objects legal rights based on theories of what a legal right is and on who or what meaningfully can be said to have legal rights were unfounded. In this respect, the argument provided clears the way for any argument designed to establish thesis (S).

The defense of (T) involved two basic moves. One move was to defend (T) against objections to it based on the prima facie exhaustive historical positions in

American legal theory on legal rights and legal right-holders. These were two strictly natural law positions (the Moral Sense and Moral Validation Positions) and six non-strictly natural law positions (the Interest, Power, Claim, Correlativity, Rules and Prediction Positions). The other move was to defend (T) against objections which did not presuppose any particular historical position, objections which could have been advanced by theorists of any of the historical positions. These were objections based on proposed necessary condition accounts of 'X has a legal right' and included the Moral Person and Moral Rights Position Objections.

In addition, (T) was defended against objections which called into question the significance of establishing (T), rather than the truth of (T). These so-called objections "concerning" (T) included the Conflict of Legal Rights Objection, the "Which Rights?" Cbjection, and the Social Value Objection.

It may be helpful to review the development of the argument for (T) according to chapters. In Chapter I the main thesis of the dissertation, (T), was stated and the two-move strategy for defending (T) was outlined. In Chapter II, "Why Give Natural Objects Legal Rights?," concerns which motivate the move to make natural objects legal right-holders were discussed. This discussion

showed how the issue "rights for natural objects" arises and set the stage for the argument, offered in subsequent chapters, that natural objects meaningfully could be said to have legal rights.

The notions of a legal person and a legal representative were discussed in Chapter III. This discussion laid the groundwork for the argument, made repeatedly throughout the dissertation, that theorists cannot hold the positions they do, and feel they must, hold regarding the doctrines of legal personality and legal representation and deny the possibility of ascribing legal rights to natural objects.

In Chapter IV, "Legal Fictions," it was argued that it is compatible with accepted legal theory on the nature, purposes and justification for proper use of a legal fiction to suppose that the notion of environmental personality is, or involves, a legal fiction. Thus, if ascription of legal rights to natural objects is, or involves, a legal fiction, the argument for (T) is not damaged by it.

In Chapters V and VI, the various positions in American legal theory on legal rights and legal right-holders were discussed. In Chapter V it was argued that theories of legal rights can be divided into two camps, "strictly natural law theories" and "non-strictly natural

law theories." Strictly natural law theories affirm what non-strictly natural law theories deny, viz., that there is a necessary connection between legal and non-legal rights, the nature of which is given by appeal to natural law or moral principles. In Chapter VI the eight historical positions on legal rights and legal right-holders--two strictly natural law positions and six non-strictly natural law positions--were discussed.

The discussions of Chapters V and VI furnished the background material necessary for the main thrust of the argument for (T), advanced in Chapters VII and VIII. In these chapters it was shown that none of the eight historical positions poses a successful objection to (T). In addition, it was shown that several of the positions, including the favored Claim and Rules Positions, provide suggestions of specific legal rights natural objects could be said to have.

Remaining objections were stated and defeated in Chapter IX. These were non-historical position objections to (T), as well as objections concerning the significance of establishing (T).

In conclusion, the defense of (T) against the different kinds of objections to it, and against various objections concerning it, establishes that ascription of legal rights to natural objects within the American legal

framework is neither absurd nor impossible. Furthermore, that defense shows that several of the positions provide not only positive grounds for supposing that natural objects could have legal rights, but suggestions of rights which might be ascribed to them. Thus, having removed the basic kinds of objections to (T), secured the significance of establishing (T), and offered additional reasons for supposing that natural objects meaningfully could be described as legal right-holders, the case for (T) is complete. The move to give natural objects legal rights ought not be delayed because of any intuitive feeling that it is absurd, impossible or unreasonable to speak of natural objects as legal right-holders. That feeling this dissertation should lay to rest.

F O O T N O T E S

CHAPTER I

[1]Christopher D. Stone, Should Trees Have Standing? Towards Legal Rights for Natural Objects (Los Altos, Calif.: William Kaufmann, Inc., 1974).

[2]By 'natural object' I mean non-human, non-human made objects. Animals, mammals, reptiles, plants and non-organic objects (e.g., rocks) are natural objects; computers, statues, paintings and other human "artifacts" are not natural objects.

Problems arise in any attempt to specify precisely just what counts as a natural object. For one thing, the expression 'natural object' sometimes is used to designate a class of objects (e.g., a species of animals) and sometimes is used to designate members of a class of objects (e.g., individual animals). Basically I use the expression to refer to a class of objects, allowing that in a given case the class referred to may have only one member (i.e., be a singleton set).

For another thing, even though there are clear cases of objects which are natural objects, there are unclear cases. Is Mount Rushmore a natural object? Is it a natural object under one description but an artifact under another? Or, is part of Mount Rushmore a natural object and part of it artifact? In general, is a rock foundation which is formed as a result of human dynamiting activity a natural object? Is a park a natural object? Are plants created by grafting techniques natural objects? A house is human-made, but trees are not. Is the house in any respects a natural object?

Third, even in the case of clear examples of natural objects, there may be problems associated with specifying the boundaries of those objects. In some cases one may choose to speak of a portion of a river as a natural object; in other cases, one may choose to speak of the entire river, or of the river proper plus tributaries, portages, and adjoining land as a natural object.

Nonetheless, these problems are not foreign to either the philosopher or the lawyer. Wittgenstein, for example, argued for the futility of trying to define 'game', even though we all have fairly clear ideas about

what games are and can provide numerous examples of activities which properly are called "games." Several contemporary philosophers (e.g., Chisholm, Wiggins, Strawson) have discussed some of the problems in defining the concept of a person and in providing principles of individuation for persons. Lawyers disagree about whether, for example, a fetus is a person. In these respects, the case of natural objects is similar. I assume that case-by-case courts will offer tests for identifying natural objects, just as they have done in cases where the status of an entity as a person is called into question.

[3]Stone does provide a stipulative definition of 'legal right' (Should Trees Have Standing? p. 11) and offers many examples of legal right-holders. However, he does not, and does not attempt to, provide any comprehensive, thoroughgoing account of the notions of a legal right, legal duty, legal person, or a legal fiction. In this respect our accounts differ.

[4]Presumably there are numerous particular objections to (T) other than those given in this dissertation. However, since my survey of the literature leads me to believe that the account of the various positions in American legal theory on legal rights and legal right-holders provided here is exhaustive, and since I state and attempt to defeat the basic kinds of objections to (T) based on each of them, I assume that the survey of the basic kinds of objections to (T) provided here also is exhaustive. Consequently, I assume that any new, particular objection to (T) which arises can be handled by any one or any combination of the arguments offered here against the basic kinds of objections to (T).

[5]Stone does consider briefly one objection to (S) which is also an objection to (T), viz., that natural objects cannot have legal rights or legal representatives because either they cannot be said to have needs (in any literal sense) or, if they can, a guardian could not judge their needs (Should Trees Have Standing?, p. 24). However, his treatment of objections is not, and is not intended to be, exhaustive of the kinds of objections which might be advanced against (T).

[6]John Passmore, Man's Responsibility for Nature: Ecological Problems and Western Traditions (New York: Charles Scribner's Sons, 1974), p. 187.

[7]W. E. Hearn, The Theory of Legal Duties and Rights (London: Trübner and Co., 1883), p. 94.

[8]Nikolai M. Korkunov, General Theory of Law, trans. W. G. Hastings (Boston: The Boston Book Company, 1909), p. 204.

[9]Arthur L. Corbin, "Rights and Duties," Yale Law Journal 33 (1924): 510, n. 11.

CHAPTER II

[1]Stone, Should Trees Have Standing?, p. 45.

[2]For example, René Dubos argues that "the cult of wilderness" is necessary for the preservation of mental health ("Franciscan Conservation versus Benedictine Stewardship," in Ecology and Religion in History, eds. David and Elieen Spring (New York: Harper and Row, 1974), p. 129).

[3]Sidney Wolinsky, "Conservation Law- The Next Step," San Francisco, August 1972, p. 26.

[4]Immanuel Kant, Lectures on Ethics, trans. Louis Infield (New York: Harper and Row, 1963), pp. 239-240.

[5]Jeremy Bentham, Introduction to the Principles of Morals and Legislation (Oxford: Basil Blackwell, 1948), chaps. IV and XVII.

[6]John Stuart Mill, Principles of Political Economy with Some of Their Applications to Social Philosophy, ed. D. Winch (Baltimore: Penguin Books, 1970), bk. 4, chap. 6, sec. 2.

[7]Justice William O. Douglas, dissenting opinion in Sierra Club v. Morton, 92 Sup. Ct. 1361, quoted in Stone, Should Trees Have Standing?, p. 82.

[8]Stone, Should Trees Have Standing?, pp. 42-54.

[9]Arne Naess, "The Shallow and the Deep, Long-Range Ecology Movement: A Summary," Inquiry 16 (1973): 99.

[10]The National Environmental Policy Act of 1969, PL 91-190 (1970), sec. 2.

[11]Douglas, quoted in Stone, Should Trees Have Standing?, p. 93.

[12]Ibid., pp. 81-2, n. 8.

[13]Naess, "The Shallow and the Deep," p. 96.

[14]Clarence Morris, "The Rights and Duties of Beasts and Trees: A Law Teacher's Essay for Landscape Architects," Journal of Legal Education 17 (1964): 190.

[15]Wolinsky, "Conservation Law," p. 25.

[16]Stone, Should Trees Have Standing?, p. 11.

[17]Ibid.

[18]See Justice Blackmun, dissenting opinion in Sierra Club v. Morton, 92 Sup. Ct. 1361, quoted in Stone, Should Trees Have Standing?, p. 92.

[19]Associated Industries of New York State, Inc. v. Iches, 134 F. 2d. 694, 700 (1943).

[20]Association of Data Processing Science Organization v. Camp, 90 S. Ct., 827 (1970).

[21]Justice Blackmun, quoted in Stone, Should Trees Have Standing?, p. 91.

[22]Ibid., p. 92.

[23]Stone, Should Trees Have Standing?, p. 15.

[24]Ibid., p. 18, n. 83.

CHAPTER III

[1]F. K. von Savigny, cited in Thomas E. Holland, The Elements of Jurisprudence, 12th ed. (New York: Oxford University Press, 1917), p. 92.

[2]Albert Kocourek, Jural Relations, 2nd ed. (Indianapolis: The Bobbs-Merrill Co., 1928), p. 228, n. 2.

[3]Holland, Elements of Jurisprudence, p. 96.

[4]Frederick Pollock, Jurisprudence and Legal Essays (London: Macmillan and Co., 1961), p. 62.

[5]For example, see John Chipman Gray, The Nature and Sources of the Law, 2nd ed. (New York: Macmillan Co., 1921), pp. 27-28.

[6]Pollock, Jurisprudence, p. 62.

[7]Hans Kelsen, General Theory of Law and State, trans. Anders Wedberg (New York: Russell and Russell, 1961), p. 96.

[8]G. W. Paton, A Text-Book of Jurisprudence, 3rd ed. (Oxford: D. P. Derham, 1964), pp. 315-316.

[9]For example, see William Markby, Elements of Law: Considered with Reference to Principles of Jurisprudence (Oxford: Clarendon Press, 1905), pp. 86-87; Holland, Elements of Jurisprudence, p. 252.

[10]Paton, Jurisprudence, p. 331.

[11]Holland, Elements of Jurisprudence, p. 347.

[12]Markby, Elements of Law, p. 80.

[13]Paton, Jurisprudence, p. 252.

[14]Ibid., p. 253.

[15]Hasseltine Byrd Taylor, The Law of Guardian and Ward (Chicago: University of Chicago Press, 1935), p. 3.

[16]Cal. Prob. Code, sec. 1460 (West Supp. 1971), cited in Stone, Should Trees Have Standing?, p. 18, n. 50.

[17]Taylor, Guardian and Ward, p. 3.

[18]Gray, The Nature and Sources of the Law, p. 52.

[19]Markby, Elements of Law, p. 89.

[20]Paton, Jurisprudence, pp. 315-316.

[21]For a brief but helpful discussion of some statutes which might provide grounds for awarding legal guardians for natural objects, see Stone, Should Trees Have Standing?, pp. 17-20, particularly n.s 48-51.

[22]Douglas, quoted in Stone, Should Trees Have Standing?, p. 81, n. 8.

[23]It might be argued that at least some natural objects and corporations are moral persons or have moral personality. Often we do seem to ascribe moral properties to them. We say that plants like sunshine, that certain animals want to be fed, that a corporation chooses or wants to take a certain course of action. But such talk, even if it does amount to ascribing moral properties to non-individual humans, does not by itself show that natural objects and corporations are moral persons. At least in the case of corporations, insofar as such talk has legal effect, it is treated as saying that, for certain purposes, we treat corporations as if they were natural persons when, in fact, they are not. It is figurative, metaphorical or fictional talk. Now we may choose to extend the notion of moral personality to include at least some natural objects and corporations as moral persons, literally speaking. But it seems clear that neither legal theorists nor moral theorists generally have done so. Furthermore, a case for (T) is a case for what is compatible with American legal theory. Since American legal theorists have not assumed that corporations and natural objects are moral persons, the issue whether they are, in fact, moral persons, or whether they could be construed as moral persons, need not be resolved in order to establish (T).

[24]Whether or not a theorist thinks that is true may depend in part on which theory of corporate personality one accepts. There are three basic theories of corporate personality, the Fiction, Bracket and Realist theories. The Fiction theory is that a corporation is a person for legal purposes only; the personality of corporations is a mere legal fiction. Corporations have no real will or capacity to act; they have only fictitious wills and capacities to act. The Bracket theory regards the members of a corporation as the actual bearers of legal rights and legal duties, which, for reasons of convenience only, are attributed to "the corporation." It is as though brackets or parentheses are placed around the members of a corporation to which a name, the name of the corporation, is

given. When properly describing a corporation one must remove the brackets, referring always and only to the members of the corporation. On the Bracket view, a corporation is an aggregate of humans and has no identity separate from the identity of the humans which comprise it. The Realist theory regards a corporation as an entity having a real existence, an actual will, independent of the existence and will of its members. This theory often compares a corporation to an organism, and assumes the so-called "emergent personality of groups." It is the view that an artificial person is "not merely the sum total of its component members, but something superadded to them." (Holland, Elements of Jurisprudence, p. 338).

[25]George T. Deiser, "The Juristic Person- I," University of Pennsylvania Law Review, n.s., 48 (1908): 177-178.

[26]Ibid., p. 138.

[27]Paton, Jurisprudence, p. 317.

[28]Gray, The Nature and Sources of the Law, pp. 42-43.

[29]Oliver Wendell Holmes, Jr., The Common Law, ed. Mark DeWolfe Howe (Boston: Little Brown and Co., 1963), p. 299.

[30]John Austin, quoted in Holmes, The Common Law, pp. 298-299.

CHAPTER IV

[1]Lon L. Fuller, Legal Fictions (Stanford: Stanford University Press, 1967).

[2]For example, no attempt is made to assess Fuller's views that the truth of a statement is a question of degree and of its adequacy (Ibid., p. 10) or that the fiction of the personality of ships is an "abbreviatory fiction" (Ibid., pp. 81-82).

[3]Ibid., p. 3.

[4]Ibid., p. 12.

[5]Ibid., p. 66.

[6]Ibid., p. 33.

[7]Ibid., p. 51.

[8]Ibid., p. 53.

[9]The other three motives are: "the motives of policy," whereby a judge, fully conscious of changing or making law, chooses, for reasons of policy, to deceive others into believing that he/she merely is applying existent law (Ibid., p. 57); "the motive of emotional conservatism," whereby a judge states new law in the guise of old, not for the purpose of deceiving others, but because this form satisfied his/her longing for a feeling of conservatism and certainty (Ibid., p. 58); and "the motive of convenience," whereby a judge employs a fiction to avoid discommoding current notions (Ibid., p. 62). I argue (below, pp. 74-75) that if the statement that natural objects are, or could be, legal persons is a legal fiction, it is one which arises from an acceptable motive, viz., the motive of intellectual considerations. This does not preclude any argument designed to show that the fiction of "environmental personality" might arise from any of the other three motives discussed by Fuller.

[10]Ibid., p. 66.

[11]Ibid., p. 81.

[12]Chief Justice Marshall, opinion in United States v. Schooner Little Charles, 26 F Cas. 979 (no. 15, 612) (C.C.D. Va. 1818), cited in Stone, Should Trees Have Standing?, p. 5, n. 3.

[13]Oliver Wendell Holmes, Tyler v. Judges of the Court of Registration (1900) 175 Mass. 71, 77, cited in Fuller, Legal Fictions, p. 81. For a discussion of the liability of ships in maritime law, see also, Holmes, The Common Law, pp. 24-31.

[14]Fuller's view is not clear here. He says, "To avoid an inconvenient periphrasis it is frequently provided that for certain purposes Situation A shall be treated as if it were Situation B. This dispenses with the need for a lengthy repetition of the legal consequences of Situation B" (Fuller, Legal Fictions, p. 81).

I assume that "natural objects committing torts" is substitutable throughout for 'Situation B'.

[15]See Ibid., pp. 81-82. There Fuller describes corporate personality as an abbreviatory fiction which once was an historical fiction; it is retained for its expository power. Since this identification of corporate personality as an "expository fiction" immediately follows the discussion of the example of the ship, I assume that the fiction of the personality of ships also is a fiction retained for its expository power.

[16]Ibid., p. 14.

[17]Ibid., p. 15.

[18]Ibid., p. 17.

[19]Ibid., p. 24.

[20]Ibid., p. 10.

[21]Ibid., p. 21.

[22]Ibid., pp. 21-22.

[23]Jhering, quoted in Fuller, Legal Fictions, p. 62.

[24]Ibid., p. 3.

[25]Fuller, Legal Fictions, p. 71

[26]Ibid., p. 117.

[27]Ibid., p. 70.

[28]For example, see Stone, Should Trees Have Standing?, pp. 5-6, n.s 14-16.

[29]Fuller, Legal Fictions, p. 19.

[30]The etymology of the word 'person' is interesting in this regard. The word 'person' derives from the word 'persona,' a word originally used to describe the mask through which an actor's voice was sounded in classical Greek drama. Gradually, for example in Roman law, it came to have the meaning associated with 'legal persona,' bearer of legal rights and legal duties. According

to Fuller (Ibid., p. 19), its extension to humans was at first metaphorical. If the statement that humans are persons was ever a live fiction, it is no longer. It is not inconceivable that future changes in the meaning of 'person' could occur such that, if only in a technical legal sense, natural objects are persons. It is questionable whether the step of extending the notion of a legal person to natural objects is any more difficult than the step was to extend the notion of a legal person to corporations or other "artificial entities."

[31]Gray, The Nature and Sources of the Law, pp. 52-53.

[32]Martin Wolff, "On the Nature of Legal Persons," Law Quarterly Review 54 (1938): 510-511.

CHAPTER V

[1]For selected bibliographies on natural law and legal positivism see Appendix A.

[2]For example, legal positivist H. L. A. Hart describes classical natural law theory in terms of the Law Validation Thesis, (2). He writes,

> [Theories of Natural Law posit] that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid. (The Concept of Law (Oxford: Clarendon Press, 1971), p. 182.

Natural law theorist Lon Fuller describes natural law in terms of the Law Non-Separation Thesis, (3). He writes,

> Natural law...is the view which denies the possibility of a rigid separation of the is and the ought,.... (The Law in Quest of Itself (Boston: Beacon Press, 1966), p. 5.)

Their discussions suggest that Hart offers (2) and Fuller offers (3) as a necessary condition of a natural law theory. In addition, Fuller explicitly denies that (2) is a necessary condition of a natural law theory. He argues that a natural law theorist might concede the validity of "bad law." What the theorist will not concede is that there is "a hard and fast line between natural law and ethics" (Ibid., p. 6); i.e., the theorist will not deny (3). Thus, neither Fuller nor Hart would accept in

total the other's account of what constitutes a natural law theory. By leaving open the status of (2) and of (3) as necessary conditions of a natural law theory, the characterization of natural law theories provided in this dissertation excludes what is controversial about the meaning of 'natural law.' Theses (2) and (3) are assumed to give only sufficient conditions of a natural law theory.

[3]The restriction "most" is needed since the characterization of natural law theories provided here leaves open the question whether (2) is a necessary condition of a natural law theory. Only natural law theorists who hold (2) would hold that Nazi law was not law, not even "bad law."

[4]Some have argued that the United States legal system provides a case in point. For example, see the discussion in The Encyclopedia of Philosophy, 1972 ed., s. v. "Natural Rights," by Richard Wollheim.

[5]A. P. d'Entrèves, "The Case for Natural Law Re-Examined," Natural Law Forum 1 (1956), quoted in The Nature of Law: Readings in Legal Philosophy, ed. Martin P. Golding (New York: Random House, 1966), p. 38.

[6]A. P. d'Entrèves, Natural Law (London: Hutchinson and Co., 1970), pp. 110-111.

[7]Ibid., p. 111.

[8]John Stuart Mill, "Essay on Nature," in Three Essays on Religion (New York: Henry Holt and Co., 1974), particularly pp. 14-21.

[9]Thomas Aquinas, Basic Writings of St. Thomas Aquinas, ed. Anton C. Pegis, vol. II, Summa Theologica, I-II, q. 95 (New York: Random House, 1954), p. 784.

[10]Fuller, The Law In Quest of Itself, p. 5.

[11]John Austin, The Province of Jurisprudence Determined (New York: The Noonday Press, 1954), p. 184.

[12]Kelsen, General Theory of Law and State, p. xv.

[13]Ibid., pp. xxv-xv.

[14]Ibid., pp. 5, 115, 124.

[15]Hermann Kantorowicz, "Some Rationalizations about Realism," Yale Law Journal, 43 (1934): 1246. Kantorowicz claims that there are two fundamental postulates agreed upon by all legal realists--this, a formal one, and a substantive postulate concerning the nature of law, viz., "law is not a body of rules but of facts." He then discusses the sociological school of law as a theory of legal realism. For a discussion of legal realism and sociological jurisprudence as empirical sciences, see N. S. Timasheff, An Introduction to the Sociology of Law (Cambridge, Mass.: Harvard University Committee on Research in the Social Sciences, 1939), pp. 28 (pt. (1)) and 56 (pt. (2)), and N. S. Timasheff, "What is "Sociology of Law"?" American Journal of Sociology 43 (1937):226-227.

[16]Oliver Wendell Holmes, Jr., "The Path of the Law," Harvard Law Review 10 (1897):457.

[17]Walter Wheeler Cook, "Scientific Method and the Law," American Bar Association Journal 13 (1927): 303.

[18]Karl N. Llewellyn, The Bramble Bush (Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1973), p. 12.

[19]The Encyclopedia of Philosophy, 1972 ed., s.v. "Sociology of Law," by Philip Selznick. N. S. Timasheff offers a similar statement in a commentary on H. Kantorowicz's definition of the sociology of law. Timasheff writes,

> H. U. Kantorowicz gives a correct, but too narrow, definition of the sociology of law: it is to be an investigation of social life in its relation to law, especially the investigation of correlations between law and other social domains-- economics, politics, techniques, art, religion, etc. ("What is "Sociology of Law'?" p. 225).

[20]Encyclopedia of Philosophy, s.v. "Sociology of Law," p. 479.

[21]Fuller, The Law in Quest of Itself, p. 118.

[22]Roscoe Pound, Jurisprudence (St. Paul: West Publishing Co., 1959), 4:328. On the notion of social control, see Pound, Social Control Through Law (Hamden,

Conn.: Archon Books, 1968), and Pound, An Introduction to the Philosophy of Law (New Haven: Yale University Press, 1972). Pounds's view is sometimes referred to as "social engineering."

[23]Benjamin Nathan Cardozo, The Nature of the Judicial Process (New Haven: Yale University Press, 1970), p. 81.

[24]Jacques Maritain, The Rights of Man and Natural Law (London: Geoffrey Bles, 1958), p. 37. Note that most scholars identify the beginning of natural rights theories with Hobbes and Locke, although they disagree about the correct interpretation of each of their natural rights doctrines. If one holds that for Hobbes, though not for Locke, some natural rights can be divested or transferred upon entering civil society, then this classical formulation of natural rights theories is attributable to Locke only.

For a selected bibliography on theories of natural, human and moral rights, as well as on legal rights, see Appendix A.

[25]Fuller, The Law in Quest of Itself, p. 100.

CHAPTER IV

[1]One obstacle to presenting an historically accurate account of strictly natural law definitions of 'legal right' should be mentioned at the outset. Until the seventeenth century, the literature on political and legal philosophy focused on problems of duties rather than problems of rights-- duties owed by individuals to a landlord, king, church or God. Not until the seventeenth and eighteenth centuries did the notion of rights, particularly of birthrights or "natural rights," gain attention. Modern analyses of the expressions 'legal right' and 'legal right-holder' are just that-- modern analyses. The advent of legal positivism with Bentham and Austin in the late eighteenth and early nineteenth centuries is the beginning of any sustained attempt to clarify legal terminology. Thus, in formulating definitions from pre-nineteenth century natural law doctrine, especially definitions of 'legal right,' one is imposing on that tradition an approach unaffiliated with, though not inapplicable to, it.

[2]Hugo Grotius, De Jure Belli et Paci, Libri Tres, ed. Classics of International Law, trans. F. W. Kelsey (Oxford: Clarendon Press, 1925), p. 66. Roscoe Pound offers "justly" instead of "lawfully" (Jurisprudence, 4: 63). Accordingly, 'justly' is inserted here.

[3]Samuel von Pufendorf, De Jure Naturae et Gentium, Libri Tres, ed. Classics of International Law, trans. F. G. Moore (Oxford: Clarendon Press, 1934), p. 66.

[4]John A. Ryan and Francis J. Boland, Catholic Principles of Politics (New York: Macmillan Co., 1940), p. 13.

[5]Thomas P. Neill, Weapons for Peace (Milwaukee: The Bruce Publishing Co., 1945), cited in Heinrich A. Rommen, The Natural Law, trans. T. R. Hanley (St. Louis: B. Herder Book Co., 1957), p. 243, n. 50. Rommen endorses the view advanced by Neill.

[6]George H. Smith, "Of the Nature of Jurisprudence and of the Law," American Law Review 38 (1904):82-83.

[7]F. K. H. Maher, "The Kinds of Legal Rights," Melbourne University Law Review 5 (1965):53-54.

[8]Julius Stone, Legal System and Lawyers' Reasoning (Stanford: Stanford University Press, 1968), pp. 140-141.

[9]Gray, The Nature and Sources of the Law, p. 18.

[10]Carleton Kemp Allen, "Legal Duties," in Legal Duties and Other Essays in Jurisprudence (Oxford: Clarendon Press, 1931), p. 182.

[11]Ibid.

[12]Thomas Hill Green, Lectures on the Principles of Political Obligation (Ann Arbor: The University of Michigan Press, 1967), p. 110.

[13]Ibid., pp. 44, 143.

[14]George W. Goble, "A Redefinition of Basic Legal Terms," Columbia Law Review 35 (1935):540.

[15]Kocourek, Jural Relations, pp. 3-4.

[16]Holland, Elements of Jurisprudence, pp. 3-4.

[17]Joel Feinberg, "The Nature and Value of Rights," The Journal of Value Inquiry 4 (1970):225.

[18]H. J. McCloskey, "Rights," Philosophical Quarterly 15 (1965):118.

[19]Feinberg, "The Nature and Value of Rights," pp. 256-257.

[20]McCloskey, "Rights," p. 116.

[21]Wesley Newcomb Hohfeld, Fundamental Legal Conceptions, ed. Walter Wheeler Cook (New Haven: Yale University Press, 1964), p. 38.

[22]John Austin, Lectures on Jurisprudence, or The Philosophy of Positive Law (London: John Murrary, 1863), p. 410.

[23]Austin, The Province of Jurisprudence Determined, p. 158.

[24]Feinberg, "The Nature and Value of Rights," p. 225.

[25]Stanley I. Benn and Richard S. Peters, Social Principles and the Democratic State (London: George Allen and Unwin, Ltd., 1959), p. 96.

[26]Ibid., pp. 90, 96.

[27]Herbert Lionel Adolphus Hart, "Definition and Theory in Jurisprudence," Law Quarterly Review 70 (1954), p. 60.

[28]Ibid., pp. 37-38.

[29]Holmes, "The Path of the Law," p. 458.

[30]Holmes, The Common Law, p. 169.

[31]Karl N. Llewellyn, "A Realistic Jurisprudence-The Next Step," Columbia Law Review 30 (1930), quoted in The Nature of Law, ed. Martin P. Golding, p. 233.

[32]Jeremy Bentham, The Limits of Jurisprudence Defined (New York: Columbia University Press, 1945), quoted in Karl Olivecrona, Law as Fact, 2nd ed. (London: Stevens and Sons, 1971), pp. 169-170.

[33]De jure interests often are identified as "moral rights." When they are, the point is that one may have moral rights (i.e., de jure interests) which are not also legal rights, and legal rights which are not also moral rights (i.e., de jure interests).

[34]Stone, Should Trees Have Standing?, p. 11.

[35]Encyclopedia of Philosophy, 1972 ed., s.v. "Rights," by Stanley I. Benn, p. 195.

[36]Feinberg, "The Nature and Value of Rights," p. 253.

[37]Kocourek, Jural Relations, p. 7.

[38]Ibid., p. 3.

[39]Roscoe Pound, "Legal Rights," Ethics 26 (1915-16):93.

[40]Roscoe Pound, "A Survey of Social Interests," Harvard Law Review 57 (1943-44):1.

[41]Paton, Jurisprudence, p. 224.

[42]Encyclopedia of Philosophy, s.v. "Rights," p. 196.

[43]A. M. Honorè, "Rights of Exclusion and Immunities Against Divesting," Tulane Law Review 34 (1959-60): 457.

[44]Feinberg, "The Nature and Value of Rights," pp. 251-253.

[45]Austin, Lectures on Jurisprudence, p. 410. Julius Stone, for example, attributes this view to Austin (Legal System and Lawyers' Reasoning, p. 140).

[46]Max Radin, "A Restatement of Hohfeld," Harvard Law Review 51 (1937-38):1149.

[47]Ibid., p. 1150.

CHAPTER VII

[1]Stanley I. Benn, "Personal Freedom and Environmental Ethics: The Moral Inequality of Species," paper submitted to the World Congress on Philosophy of Law and Social Philosophy, 1974, p. 7.

[2]Ibid., p. 6.

[3]Ibid., p. 7.

[4]Ibid.

[5]It might be objected that the landlord does have $interests_1$, viz., a desire not to be so protected. However, this is too strong for the case presented. The landlord is indifferent between being legally protected and not being legally protected. She has neither a desire to be protected, nor a desire not to be protected. Hence, she has no relevant, actual $interests_1$.

[6]McCloskey, "Rights," p. 126.

[7]Ibid.

[8]Ibid., p. 127.

[9]Ibid., p. 126.

[10]Ibid.

[11]Ibid., p. 125.

[12]I am assuming that McCloskey uses the notions of being obliged and having a duty interchangeably. I assume this because McCloskey says we speak of being obliged to leave birds and animals in sanctuaries alone and of having legal duties (presumably, to leave them alone), though not of their having rights or of their being legally entitled to be left alone. However, perhaps McCloskey's view is that we are obliged to leave them alone, though we have no duties to do so; hence, they have no rights against us. So interpreted, McCloskey's view involves a

distinction between being obliged and having a duty such that statements about being obliged do not, though statements about having a duty do, entail statements about rights of others. (I discuss this distinction in Chapter VIII.) So interpreted, McCloskey's view is not a rejection of the proposition that all duties of Y to X entail rights of X against Y. Rather, it is the view that, properly construed, our so-called duties to birds and animals in sanctuaries really are only cases of our being obliged to act in certain ways regarding them. Such cases of being obliged do not generate any rights of birds and animals against us.

Even if this alternative interpretation of McCloskey's view is correct, my argument against it basically is the same, viz., that all it establishes is that an argument for ascribing legal rights to natural objects cannot be based on the view that our being obliged to act in certain ways regarding natural objects generates rights of natural objects against us. It does not show that natural objects cannot have rights. Since it is possible both that we are obliged to act in certain ways regarding natural objects and that, on independent grounds, they could be said to have legal rights against us, that we are so obliged does not establish that they cannot have legal rights.

[13]McCloskey, "Rights," p. 125.

[14]Ibid., p. 126.

[15]Note that some Claim Position theorists hold that if an entity, X, has a claim-right to something, ϕ, then another entity, Y, has a duty to X to do or forbear with regard to ϕ. Since this view amounts to a view about the correlativity of rights and duties, it is discussed in Chapter VIII, "The Correlativity Position," rather than here.

[16]Feinberg, "The Nature and Value of Rights," pp. 252, 252, and 251, respectively.

[17]Ibid., p. 253.

[18]Ibid., p. 251.

[19]Ibid.

[20]Ibid., p. 254.

[21]Joel Feinberg, "Duties, Rights, and Claims," American Philosophical Quarterly 3 (April, 1966):153.

[22]McCloskey, "Rights," p. 125.

[23]On the Claim Position view, to say that X has a valid legal claim is to say that X has a legal right. The qualification "valid" is important because not all Claim Position theorists assume that an equivalence relation holds between having a legal right and having a legal claim. Although they all suppose that having legal rights entails having legal claims, some deny the converse. For those who affirm the converse, the qualification is unnecessary. For them, in cases where X has a legal claim which is overridden, X is described, nonetheless, as having a legal right, which right was violated, denied or otherwise overridden. But the qualification is necessary to accomodate the views of those theorists who hold that in cases where X has a legal claim which is overridden, X is not described properly as having a legal right. Thus, the qualification "valid" in (RS1) would be insisted upon by any Claim Position theorist who holds that one can have a legal claim which is not a legal right.

[24]John Dickenson, "Legal Rules: Their Function in the Process of Decision," University of Pennsylvania Law Review 79 (May, 1931):854.

[25]Ibid.

[26]If (R14) is not already a legal rule of the system, it easily could be, since what it says is consistent with current and proposed regulations governing actions concerning members of "endangered species." Furthermore, the structure and language of (R14) is like that of (R7), an acknowledged rule of the system.

[27]Since I am arguing only for thesis (T), and not for the very different thesis (S), I do not discuss whether or not situations could arise where one should make natural objects parties to contracts.

[28]For a discussion of some reasons motivating NOM, the natural object move, see above, Chapter II.

[29]Perhaps it will be objected that there really is a second Moral Sense Position Objection to (T), viz., that natural objects cannot have legal rights because legal

rights are just moral rights and natural objects cannot have moral rights. The position that natural objects cannot have moral rights may generate a plausible objection to (T) (which position and objection are discussed in Chapter IX). But the position that legal rights are just moral rights, in any case, is not a separate, second Moral Sense Position objection to (T). To show that, consider the meaning of "moral right" in the claim that legal rights are just moral rights. Either the expressions 'moral right' and 'legal right' are taken to be equivalent, or they are not taken to be equivalent. If they are taken to be equivalent, then the proposed objection just amounts to the stated Moral Sense Position Objection, and we have one, not two, Moral Sense Position Objection to (T). If they are not taken to be equivalent, then either of two interpretations is possible. On one interpretation, the popular view of moral rights, 'moral right' designates a kind of right, distinct from another kind of right, viz., legal rights. Here, the expression "moral sense of 'right'" designates a generic sense of 'right,' according to which both moral rights and legal rights are "rights." On this interpretation, while all rights are rights in a moral sense, not all rights in a moral sense are moral rights. In particular, legal rights are not. On this interpretation, then, the proposed objection is not a Moral Sense Position objection.

On the other interpretation of 'moral rights', all "rights in a moral sense" are "moral rights." Since legal rights are rights in a moral sense, legal rights are moral rights. But, on this interpretation, the proposed objection is not a separate Moral Sense Position Objection, since it is defeated by defeating the stated Moral Sense Position Objection. The claim that natural objects cannot have moral rights entails the claim that natural objects cannot have rights in a moral sense. By showing that natural objects could be said to have "rights in a moral sense," then, however counterintuitive or odd that claim may seem, one shows that they could be said to have "moral rights."

Thus, the proposed, second objection either is not a Moral Sense Position Objection or, if it is, it is defeated by defeating the stated Moral Sense Position Objection. The upshot is that only the Moral Sense Position Objection given initially warrants consideration here.

[30]Here, and throughout the dissertation, 'entity' is substituted for 'person' or 'human' where, by not so

substituting the former for the latter expressions, the question whether non-humans could be said to have legal rights is begged.

[31]Pound's construal of Grotius's position is that a right is a moral quality of a person making it possible to have or do something justly (Jurisprudence, 4:63). If one interprets Grotius's view about what it is to receive something justly as a view which requires appeal to natural law or moral principles, then appeal to the doctrine of legal representation is insufficient by itself to defeat the Grotius-Pufendorf version of the Moral Sense Position Objection to (T). There must be, in addition, natural law or moral principles, appeal to which could justify recognition of natural objects as entities having the capacity to have or do something. That there are or could be such principles is shown in connection with the discussion of the Moral Validation Position Objection, below, pp. 204-207.

[32]Some theorists (e.g., Hobbes) seem to construe a "natural law principle" as a descriptive statement about what in fact occurs. So construed, the view that valid legal rights are identified or justified by appeal to natural law principles would not be a Moral Validation Position view; it would not be a view which endorses the Rights Necessity Thesis, (4). Accordingly, the designation of 'natural law principle' used by Moral Validation Position theorists construes natural law principles as, or as implying, moral principles.

CHAPTER VIII

[1]W. D. Ross, The Right and the Good (Oxford, Clarendon Press, 1967), p. 48.

[2]Ibid.

[3]Joel Feinberg, Social Philosophy (Englewood Cliffs, N. J.: Prentice-Hall, Inc., 1973), p. 62.

[4]Markby, Elements of Law, p. 92; Korkunov, General Theory of Law, p. 211.

[5]Marcus G. Singer, "The Basis of Rights and Duties," Philosophical Studies 2 (1972):50.

[6]John W. Salmond, Jurisprudence, 11th ed. (London: Sweet and Maxwell, 1957), p. 240.

[7]Feinberg, Social Philosophy, pp. 61-63; Benn and Peters, Social Principles and the Democratic State, p. 89. Feinberg credits Benn and Peters with the distinction between the logical and the moral correlativity doctrines.

[8]Neill, Weapons for Peace, p. 155.

[9]Feinberg, Social Philosophy, p. 61. One of the clearest rejections of (12) is given by Hobbes. Hobbes argues that we have unlimited rights, though we have no duties, in the state of nature; the creation of duties requires a civil society. Our rights to everything in the state of nature do not presuppose any obligations on us to respect the rights of others. Thus, they are "dutyless rights." (see Thomas Hobbes, Leviathan, ed. Michael Oakeshott (Oxford: Basil Blackwell, 1960), cha. XIV.)

[10]Benn and Peters, Social Principles and the Democratic State, p. 89.

[11]Korkunov, General Theory of Law, p. 197.

[12]Austin, The Province of Jurisprudence Determined, p. 158.

[13]Hohfeld, Fundamental Legal Conceptions, p. 38.

[14]Ibid., p. 73.

[15]Holland, Elements of Jurisprudence, p. 88.

[16]Stone, Legal System and Lawyers' Reasoning, p. 197.

[17]Ibid., p. 170, n. 76.

[18]Carleton Kemp Allen, "The Nature of a Crime," in Legal Duties and Other Essays in Jurisprudence (Oxford: Clarendon Press, 1931), p. 252.

[19]Markby, Elements of Law, pp. 92-93.

[20]Gray, The Nature and Sources of the Law, pp. 8-9; Holmes, The Common Law, p. 173; Kelsen, General Theory of Law and State, p. 85.

[21]Bernard Mayo, "What are Human Rights?" in Political Theory and the Rights of Man, ed. D. D. Raphael (London: Macmillan Co., 1967), p. 73.

[22]Immanuel Kant, The Metaphysical Principles of Virtue: Part II of the Metaphysics of Morals, trans. J. Ellington (Indianapolis: The Bobbs-Merrill Co., 1964), p. 105.

[23]Feinberg, "Duties, Rights, and Claims," p 138.

[24]H. L. A. Hart, "Are There Any Natural Rights?" The Philosophical Review 64 (1953): 180-182. In Hart's language, it is only where 'to' indicates "the person to whom the person morally bound is morally bound," and not "the person affected by the action" that the expression 'right' has a specific force and cannot be replaced by expressions such as "it is wrong or we ought not to ill-treat them." With animals and babies, such moral expressions are substitutable for 'Animals and babies have rights to proper treatment'; hence, it is improper to speak of rights of animals and of babies.

[25]Feinberg, "Duties, Rights, and Claims," pp. 137-142.

[26]According to Feinberg, what distinguishes the first seven kinds of duties mentioned from the remaining three is that the former do, and the latter do not, permit talk of one party owing something to another. Although he concedes that, for example, we often speak of a duty to a commanding authority (e.g., a policeman or parent) as owed, Feinberg argues that the authority here, the party to whom one "owes" obedience, is not a claimant. It is simply one who may command performance of a duty and apply a sanction in case of failure. Feinberg argues that the last three kinds of duties either are not owed to anyone at all, or are "owed" to parties who are not claimants "in the manner (say) of a creditor." Thus, they are not necessarily correlated with rights of others.

In the case of the first seven kinds of duties, Feinberg cautions that some duties are more naturally spoken of as "owed" than others. For example, he says of the duty to stay off another's land (a "duty of respect"), "I don't think we would naturally speak of this duty as something "owed" to the landlord, although I admit the law doesn't hesitate to speak that way" (Ibid., p. 139). He also says that some duties (e.g., duties of need-fulfillment) are "two steps away from the example of indebtedness,"

the clearest case of owing. Still, he claims that each of the first seven kinds of duties permits talk of one party owing something to another.

[27]Ibid., p. 140.

[28]Austin, The Province of Jurisprudence Determined, p. 14.

[29]Gray, The Nature and Sources of the Law, p. 12.

[30]Holland, Elements of Jurisprudence, p. 86.

[31]Ibid., p. 87.

[32]Salmond, Jurisprudence, pp. 237, 236, respectively.

[33]Benn and Peters, Social Principles and the Democratic State, p. 88.

[34]See, for example, Hart, The Concept of Law, pp. 80-81.

[35]Note that the Legal Duty Objection is not an endorsement of (12'):

(12') If A has a legal right against B, then A has a legal duty to B.

Proposition (12') says that every legal right an entity, A, has against another specific entity, B, presupposes some legal duty of A to that entity B. The Legal Duty Objection to (T) states that all legal right-holders are legal duty bearers, i.e., if an entity, A, has a legal right, then A also has at least one legal duty.

[36]Of course, it could be argued that if natural objects are recognized as parties to contracts, then they are recognized as legal right-holders, as well as legal duty-bearers. Yet, even if this is true, it does not show that appeal to rules (R12) and (R16)-(R18) fails to establish that natural objects could be legal duty-bearers. The example provided does not assume that natural objects are legal right-holders. Nor does it assume that (11') is true; it does not presume that because natural objects can be said to have at least one duty, they can be said to have legal rights. It merely provides a case where talk of "duties of natural objects" makes sense, and, hence, renders implausible the Legal Duty Objection to (T).

[37]Markby, Elements of Law, p. 347.

CHAPTER IX

[1]Stone, Should Trees Have Standing?, p. 24.

[2]Passmore, Man's Responsibility for Nature, p. 116. Passmore goes on to say,

> Bacteria and men do not recognize mutual obligations nor do they have common interests. In the only sense in which belonging to a community generates ethical obligation, they do not belong to the same community. To suggest, then,..., that animals, plants, landscapes have a 'right to exist', is to create confusion. The idea of 'rights' is simply not applicable to what is non-human.

Passmore's point is that where 'community' means "moral community," natural objects are not members of moral communities, we have no moral obligations to them, and they have no moral rights against us. Now suppose this is true. The question of concern here is whether it follows that they cannot be said to have legal rights, be members of a legal community of right-holders, and whether we could be said to have legal duties to them.

[3]The French Declaration of the Rights of Man and of the Citizen, cited in David G. Ritchie, Natural Rights: A Critique of Some Political and Ethical Conceptions (London: George Allen and Unwin, Ltd., 1894), p. 292.

[4]Feinberg, Social Philosophy, p. 33.

[5]Ibid., pp. 33-34.

[6]Ibid., p. 27.

[7]Ibid., p. 54.

APPENDIX A

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A P P E N D I X B

Theses Stated in the Dissertation

(T) Ascription of legal rights to natural objects is compatible with American legal theory on legal rights and legal right-holders.

(S) Natural objects should be ascribed legal rights.

Propositions Stated in the Dissertation

(1) There is a necessary connection between positive law (or, law as it is) and morality (or, law as it ought to be) and the nature of that connection is given by appeal to natural law or moral principles.
(The Law Necessity Thesis)

(2) All and only positive law which conforms to natural or moral law is valid.
(The Law Validation Thesis)

(3) There is no strict separation between positive law and morality.
(The Law Non-Separation Thesis)

(4) There is a necessary connection between legal rights and non-legal rights (natural or moral rights) and the nature of that connection is given by appeal to natural law or moral principles.
(The Rights Necessity Thesis)

(5) All and only legal rights which are based on natural or moral law are valid.
(The Rights Validation Thesis)

(6) There is no strict separation between legal rights and non-legal rights (natural or moral rights).
(The Rights Non-Separation Thesis)

(7) The meaning of 'legal right' is given in moral terms.

(8) For any entity, X, if X has a valid legal claim, then either X or X's legal representative is in a position to claim.

(9) For any entity, X, if X has a valid legal claim, then X is in a position to claim.

(10) If A has a right against B, then B has a duty to A.

(11) If B has a duty to A, then A has a right against B.

(12) If A has a right against B, then A has a duty to B.

(13) If A has a duty to B, then A has a right against B.

(10') If A has a legal right against B, then B has a legal duty to A.

(11') If B has a legal duty to A, then A has a legal right against B.

(12') If A has a legal right against B, then A has a legal duty to B.

(13') If A has a legal duty to B, then A has a legal right against B.

(14) If B has a legal duty to A, then B has a moral duty to A.

(15) If A has a legal right against B, then B has a moral duty to A.

(16) If B has a legal duty to A, then A has a moral right against B.

(17) If A has a legal right against B, then A has a moral right against B.

(18) For any entity, X, if X has legal rights, then X is a moral person.

(19) For any entity, X, if X has legal rights, then X has moral rights.

(20) For any entity, X, if X has legal rights, then X or X's legal representative is a moral person.

(21) For any entity, X, if X has legal rights, then X or X's legal representative has moral rights.

(22) Restriction of a person's liberties is justified to prevent harm (injury) to others.
(The Private Harm Principle)

(23) Restriction of a person's liberties is justified to benefit others.
(The Welfare Principle)

(24) Restriction of a person's liberties toward natural objects is justified to prevent irreparable harm (injury) to them.
(The Extended Harm Principle)

(25) Restriction of a person's liberties toward natural objects is justified to benefit them.
(The Extended Welfare Principle)

Rules and Rule Schema Stated in the Dissertation

(RS1) If an entity, X, properly is legally represented by an agent, Y, and Y uses correct legal procedure to petition in the name of and on behalf of X that X be recognized as having a legal claim to something, ϕ, and Y provides a case of at least minimum plausibility that X has a legal claim to ϕ, then, provided there are no countervailing reasons to override recognition of X's claim to ϕ as valid, X has a valid legal claim to ϕ.

(R1) Whenever an entity or its legal representative has or asserts a claim to something, and follows correct legal procedure for seeking legal recognition of that claim as valid, and provides a case of at least minimum plausibility for that claim, then the entity has a right to a fair hearing and consideration.

(R2) Where a duly appointed legal representative of a delimited forest area is legally empowered to maintain that area as a recognized "wilderness area," no humans may trespass on or use that area for recreational, industrial or other purposes without the express written consent of the forest's legal representative.

(R3) No humans may trespass on wilderness areas.

(R4) Rule (R3) shall be recognized as a primary rule of the legal system which imposes on humans not specially exempted the obligation not to trespass on wilderness areas.

(R5) The court has the power to appoint legal representatives for designated wilderness areas and to confer on those representatives the powers and privileges customarily bestowed on legal representatives.

(R6) Where a legal representative of a designated wilderness area is legally empowered to speak for, and in the name of, the area it represents, the court has the power to recognize the wilderness area as having certain legal rights; specifically, it has the power to recognize the wilderness area as having a legal right to noninterference by trespassers against any humans not exempted by the wilderness area's legal representative.

(R7) No human being may kill another human being.

(R8) Liability results from failure to employ due care under the circumstances.

(R9) Business and industry must maintain standards of fair competition and just and reasonable rates.

(R10) One must stop, look and listen where traffic is to be expected.

(R11) Trespassing in this forest is prohibited.

(R12) Contracts must be kept.

(R13) Creditors have a right to be paid.

(R14) No human being may kill an animal which is a member of a species officially designated an "endangered species."

(R15) If a human kills an animal which is a member of an officially designated "endangered species," a court has the power to grant survivors of the species a legal representative and to empower that representative to make claims against the offending humans in

the name, and on behalf, of the surviving members of the species.

(R16) Rule (R12) is recognized as a primary rule of obligation of the legal system which imposes on parties to contracts the obligation to act or forbear in the ways specified in the contract.

(R17) The courts and legislatures have the powers to recognize natural objects as parties to contracts.

(R18) Natural objects which are recognized as parties to contracts have the obligation to act or forbear in the ways specified in the contract.

Moral Principles or Rules

(MP1) Killing humans is wrong.

(MP2) Acts which injure humans are wrong.

(MP3) Killing seals for their fur is wrong.

(MP4) Acts which cause irreparable injury (harm) to wilderness areas are wrong.

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