Stone and Trees, 35 Years Later: Where Do They Stand?

Christopher Stone
Should Trees Have Standing?
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The end of the hour was approaching and the students in Christopher Stone's class on property and law were starting to pack up for the next class. Societies, like human beings –Stone had been explaining–, progress through different stages of sensitivity. In the case of ownership, each change in the law regarding what was thought to be legitimate property had also typically triggered a change in social consciousness. Thus, for example, the institution of the will –the power to control one's property after death– had affected our views on mortality. At this stage, Stone realized that he needed to say something shocking enough to win back the audience's attention. It was then that he ventured the following question: "What would a radically different law-driven consciousness look like? … One in which Nature had rights. (…) Yes, rivers, lakes, (…) trees… animals... (…) How would such a posture *in law* affect a community's view *of itself*?" (p. xi, his italics)

The attempt definitely succeeded at recapturing the students' interest, but now the law professor was left with a challenging piece of homework, namely, how to give a coherent account of nature having legal rights. The answer came out months later in the *Southern California Law Review*, under the suggestive title, "Should Trees Have Standing?"[1] (hereafter, *Trees*). It is usually the case that big breakthroughs in our unquestioned paradigms often happen accidentally, without our even intending them. Stone's *Trees* was such a breakthrough.

To mark the 35th anniversary of this landmark essay, a third updated edition has appeared, where *Trees* is followed by a collection of other essays by Stone on law, morality and the environment. Climate change, the depletion of marine resources, the challenges posed by industrial agriculture and the evolution of the concept of 'sustainable development' are some of the topics covered. Throughout these chapters, Stone expounds and expands on his original thesis that voiceless natural objects should have the right to be legally represented in courts, through special, statutory guardians or trustees who defend their interests. He also explores difficult and fascinating questions in the field of environmental ethics and law, like the rights of future generations and the problem of free riding in the global commons –particularly urgent today, when the need to regulate the emission of national greenhouse gases appears more pressing than ever, and the pollution and over-harvesting of the oceans remains rampant. Finally, Stone examines in detail the various indirect ways in which nature and natural entities can be and have been defended and protected under the law, both in the U.S and internationally, even though their rights have not yet been directly recognised. The author insists throughout the text that while these alternative paths may be strategically useful, theoretically they are too contrived, and will eventually prove insufficient.

After summarising *Trees* and signalling its influence in the history of environmental law, in what follows I briefly examine three interesting problems that this and the later essays present from a philosophical perspective; namely, the definition of natural objects, the moral status of future generations and the idea of guardianship.

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1 Christopher Stone, "Should Trees Have Standing? Toward Legal Rights for Natural Objects," 45 *Southern California Law Review* 450 (1972): 450-501.

Toward legal rights for natural objects

In *Trees*, Stone enumerates the three necessary and sufficient conditions for an object to have legal standing, i.e., to initiate an action in court or, more precisely, to institute judicial review. First, it must be able to institute actions at its behest (this does not mean that they have to speak for themselves, but merely that they can have someone speak for them, as is also the case of states, infants, incompetents, corporations, universities, etc.). Secondly, in determining the granting of legal relief, the court must take direct injuries to it into account. Thirdly, the relief must be to the benefit of it; for example, by making it 'whole' again. Insofar as these three conditions are met by natural objects such as forests, rivers or species, their assigned representatives or guardians should be able to file suit when they consider that their interests might be adversely affected.[2]

But is something really won by granting legal personality to natural entities? Can't we get the same results just by using specific legal rules? To these questions, Stone replies that the language of rights gives a flexibility and open-endedness that no fixed list of norms can offer. But, above all, it works at the socio-psychological level, hopefully letting a new collective consciousness dawn. Despite the fact that, up until the time of his writing, all developments concerning the protection of nature had been justified for the sake of human interests[3], Stone already saw some signs that suggested that the environment was starting to matter for its own sake. For example, the idea had emerged that at least some wilderness areas should be left undeveloped. Of course, it is always possible to say that it is not the wilderness areas *themselves* that we are protecting, but the wilderness areas *for future generations of human beings*, who will have a recreational and aesthetic interest in them. Stone dismisses this conservationist claim, however, because it begs the question, as it takes for granted exactly what he is trying to disprove.

Inspired by F.D. Rudhyar's Lovelockian account of the Earth as a living organism (reminiscent of James Lovelock's 'Gaia' theory), Stone wonders instead what a legal system would look like that took a holistic and non-anthropocentric approach to rights, rather than our prevailing one, largely individualistic and anthropocentric. In this he appears as a soothsayer anticipating the global environmental crises of the decades to come: from the depletion of the ozone layer to global warming; from the massive extinction of species to the pollution of the oceans.

It was very timely for Stone that, just as he was writing *Trees*, the perfect case appeared to put his theory into practice. In *Sierra Club v. Hickel*, the U.S Forest Service had granted a permit for Walt Disney Enterprises to develop Mineral King Valley, in the Sierra Nevada Mountains in California, and the Sierra Club had brought suit for an injunction, saying that the 35 million dollar complex would damage the aesthetic and ecological balance of the area. The Ninth Circuit Court of Appeals, however, rejected it, on the grounds that the club had no standing, because they did not meet the second condition above: namely, they could not show that they were going to be directly injured by the construction of the project. Stone then came with the idea to designate Mineral King as the plaintiff and Sierra Club as its guardian.

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2 One of the objections to Stone's proposal was that such a system had already been implemented in the U.S. to some extent. For example, the American Department of Interior was conceived as such a guardian for federal public lands. The author, however, deems this specific mechanism insufficient for two reasons: first, it leaves out private and local public lands; and it has to answer to institutional goals, which many times are at odds with the goals of the natural objects under protection.

3 Cf. the National Environmental Policy Act (1970), which in its preambulatory Declaration of National Environmental Policy aims at "restoring and maintaining environmental quality to the overall welfare and development of man", and to exist with nature in "productive harmony" (p. 23).

Sierra Club v. Morton (the name of the new Secretary of Interior) was already under review by the Supreme Court when *Trees* made its way to William O. Douglas, one of the Justices to decide on the case. And although the Supreme Court finally upheld the decision of the Ninth Circuit, the decision came with Douglas's dissent and with his endorsement of Stone's theory. If ships and corporations are given legal personality in litigation –Douglas argued following Stone–, why not grant the same right to valleys, lakes, swamplands, "or even air that feels the destructive pressures of modern technology and modern life? (...) Contemporary public concern for protecting nature's ecological equilibrium –he continued– should lead to the conferral of standing upon environmental objects to sue for their own preservation."[4]

The story did not end there. Redrafting its complaint by accentuating how damages to the area would affect the 'associational interests' of its members, and claiming that the Forest Service had violated the novel National Environmental Policy Act, the legal defence of the Club then appealed on remand and finally won, when in 1978 Mineral King Valley was incorporated to Sequoia National Park.[5]

In terms of its legal impact, the immediate reaction to *Trees* in the U.S. was a wave of suits filed by non-humans; among them, the river Byram, the endangered Hawaiian bird Palila and the Death Valley National Monument. (p. xvi) However, this trend was short-lived and not very successful. Rather, the most important and enduring tactic for nascent environmental lawyers came to be suits filed in the name of human individuals or groups, claiming that the damage to the environment was a cognizable injury to them. This was possible thanks to the liberalization of judicial standing, in which the courts relaxed the traditional standing requirements (especially, that the plaintiff has suffered 'injury in fact').[6] Another important development was the gradual creation of public trustees for natural resources, like the National Oceanic and Atmospheric Administration (NOAA), in charge of protecting fish and marine mammals and their ecosystems within the U.S. fisheries zone.

Overall, however, the anthropocentric and individualistic approach to legal rights has remained almost undisputed in the last 35 years, both in the U.S. and globally ,[7] a fact that Stone laments throughout the book, insofar as it forces lawyers to make *ad hoc* cases to defend natural objects, instead of filing suits directly on their behalf, which would be "a better fit with the real grievances", and "better suited to moral development." (p. 65)[8]

To some extent, this approach replicates itself at the level of ethics. Although during the last decades the main crusade of environmental philosophers has been to argue for the intrinsic

4 *Sierra Club v. Morton*, 405 U.S 727 (1972), at pp. 741-42 (Douglas dissenting).

5 Cf. http://www.princetonindependent.com/issue01.03/item10d.html

6 Cf., for example, *NRDC v. Winter*, where a number of conservation groups sued the U.S. Navy in their own names, as would-be wildlife observers of the whales off the San Diego coast, that were being affected by the Navy's sonar testing.

7 Some isolated exceptions at the global level have been Ecuador's 2008 Constitution, which devotes one whole chapter to the rights of nature, and states that "Nature or Pacha Mama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. (…) Every person, people, community or nationality, will be able to demand the recognitions of rights for nature before the public organisms. The application and interpretation of these rights will follow the related principles established in the Constitution." Cf. p. 232, footnote 43, and http://yasuni-itt.gob.ec/%C2%BFpor-que-ecuador-propone-la-iniciativa-yasuni-itt/la-iniciativa-yasuni-y-los-derechos-de-la-naturaleza
More recently, in April 2011, Bolivia was the first to grant equal rights to nature and humans, under its 'Law of Mother Earth'. Cf. http://www.guardian.co.uk/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights

8 As Stone exclaims, regarding *NRDC v. Winter* above: "What is strained, silly and 'ingenious' is the theory of lawyers (!) that a suit to stop the Navy from killing whales is on behalf, not of the whales who may disappear, but of people piqued about no longer getting the thrill of 'se[iing] whales spouts as often.'" (p. 65).

value of nature more broadly,[9] thus turning it into a proper object of moral consideration, the main ethical theories still largely ignore other-than-human subjects and, when they include them, they do so for instrumental reasons or indirectly, but hardly ever for their own sake (the most notable exception being utilitarianism, which extends the moral realm to include at least all sentient beings, insofar as they are capable of experiencing pleasure and pain).[10]
Having said this, *Trees* has arguably been more influential outside than inside the law. Especially at the level of environmental ethics, this essay is a classic reference when it comes to topics like the way we think about guardianship, our ontology of things in the natural order and the manner in which we assign interests in the context of environmental protection.

Natural objects, future generations and a Guardian for each and everyone

Apart from being an excellent reference book for those interested in the development of environmental law and litigation in the U.S. but also internationally, this collection will also interest anyone with a taste for deeply philosophical problems. As a lawyer working in the world of actual decision-making, however, the author tends to dispatch in a paragraph or two problems which have troubled philosophers –and especially ethicists– for decades. In what remains, I briefly present three such problems, with no intention of offering a satisfactory answer, but with the hope of at least signalling their complexity; a complexity which cannot be dismissed so quickly.
First, in *Trees* and throughout the book, Stone assumes that we know what we talk about when we are talking about 'natural objects'. However, he never offers a definition of what they are, but rather enumerates different things that we may call by that name. Among many others: a stream (p. 7); the lawn in front of his house (p. 11); nonhuman life (p. 21); wilderness areas (p. 24); the environment (p. 25); animal species (p. 61 ff); and Matthew, a chimpanzee (p. 164). Now, the main problem with such a broad-brush approach is that, when it comes to assigning interests and, furthermore, legal (and moral) rights to such a diverse list, the results will differ wildly, and so will the recommendations as to how to take them into account properly.
For one thing, the interests of individual animals should not be mistaken with the interests of a species as a whole (assuming the latter has any). That a chimp does not want to spend its life in a cage seems quite uncontroversial, but that the species *Pan Troglodytes* does not want to become extinct seems much more difficult to corroborate. Moreover, it is not clear how we should rank the interests of individual natural objects and species as a whole when they collide. For example, in *Palila v. Hawaii Dept. of Land and Natural Resources* (1979), a suit was brought in the name of this endangered bird species against the state agency which allowed feral sheep and goats to invade their habitat. (p. 193, footnote 3) But why should the interests of an endangered bird species matter more than those of individual goats and sheep?

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9 Cf., for example, Kenneth Goodpaster, for whom the necessary and sufficient condition to be morally considered is to be alive: Kenneth E. Goodpaster, "On Being Morally Considerable," *The Journal of Philosophy* 75, no. 6 (1978). For Holmes Rolston III, the relevant feature is to tend to goals, consciously or unconsciously: Holmes Rolston III, "Environmental Ethics: Values in and Duties to the Natural World," in *The Broken Circle: Ecology, Economics, Ethics*, ed. F. Herbert Bormann and Stephen R. Kellert (New Haven: Yale University Press, 1991). For Arne Naess, there is a fundamental equality among all living things: Arne Naess, "The Basics of Deep Ecology," *The Trumpeter* 21, no. 1 (2005). For Paul Taylor, individuals, species and even ecosystems are moral subjects with a good of their own, insofar as they can be benefited or harmed: Paul Taylor, *Respect for Nature* (Princeton: Princeton University Press, 1986).

10 Cf., most notably, Peter Singer, *Animal Liberation* (New York: Harper Collins, 2002).

Just because they are endangered? If we offer this as a reason, it would seem that what lurks in the background are not really the interests of the species themselves, but those of human beings to preserve greater biodiversity –which is precisely the justification that Stone is trying to avoid.[11] On the other hand, if we believe that the reason to assign extra value to an endangered species is that biodiversity is intrinsically valuable, then much more needs to be said to justify this claim.

When it comes to assigning interests to natural objects which are not even alive, the problem worsens. Although we may concede that, as the author points out, the lawn 'tells' us when it wants water by its dry appearance and lack of springiness, it is much more difficult to agree that a river can 'tell' us that it does not want to become polluted –unless by the 'river' we understand the aggregate of individuals that inhabit it. If we opt for the latter answer, however, we veer again toward the standard individualistic type of justification that Stone wants to leave behind.[12]

A second object to which Stone devotes his attention is future generations of humans, to whom the present generation holds, if not duties derived from correlative rights, at least certain responsibilities.

That we do have responsibilities toward those yet unborn is not, however, such an easy claim to make. On the contrary, what has come to be known as the 'Non-Identity Problem' troubles metaphysicians and ethicists. First formulated by the British philosopher Derek Parfit, it could be summed up thus. On the one hand, we normally think that we do something wrong when we affect someone's interests negatively. On the other hand, we also know that the social policies that we implement in the present will affect the details of the lives lived in our community from now on, and consequently, the very coming into existence of future people. Now, if some such a policy worsens the quality of life in the future, most of us tend to think that it is wrong. But why is it wrong, if it affects the interests of no one yet in existence and, furthermore, if those who will be born in the future in a sense owe their very existence to that policy?[13]

With Parfit, I believe that the correct conclusion to be drawn from this is that we must reject the view that a choice cannot have bad effects if it will make no one worse-off. However, even if this means granting that we have a certain responsibility toward those to come, we may still wonder what that responsibility amounts to, a question which is above all a moral one. As Stone recognizes, we may think that we owe future generations a certain level of welfare, a "portfolio of assets" which may vary with time (p. 118); but we can also, more strongly, think that we should leave those to come a fixed legacy of specific and non-negotiable assets –for example, the Grand Canyon–, even if keeping them might reduce both our wealth and theirs. The choice between welfarism and preservationism (as these two positions are labelled), is not an obvious one and theorists on both sides have spent a considerable amount of ink and effort to defend each.

Thirdly and lastly, assuming that we have figured out which natural objects deserve our attention and what kind of responsibility we have toward future generations of humans –i.e., welfarist or preservationist–, Stone advocates the idea of guardianship as the best way to

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11 Arguably, this is the motivation behind a project like The Economics of Ecosystems and Biodiversity (TEEB), which makes an economics case for their conservation, and seeks to assign economic value on non-human organisms in order to protect them for future generations. Cf. http://www.teebweb.org/

12 Stone is right to point out that the problem of guessing the interests of natural objects has been overstated. After all, it could be said to be analogous to the Attorney General guessing the interests of the United States, or to a board of directors guessing the interests of a corporation, and nobody seems to complain about these. (p. 11)

13 Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1987), pp. 377-78.

protect their interests, as well as the best way to protect the global commons.[14] This is purportedly one of his most innovative contributions to the fields of environmental law and environmental ethics, but it is not exempt from problems. To some extent, Stone acknowledges this, especially when it comes to deciding how to choose the right guardian for different objects, and how to resolve conflicts that may occur between them. Regarding the former point, it is not obvious who has the moral authority (let alone the legal one) to claim guardianship over, say, a tropical forest or an endangered species. Going back to *Mineral King v. Morton*, ten other environmental groups could have appeared alongside Sierra Club, all claiming their legitimate right to be the guardians of the forest, probably all of them with different interpretations of what the forest –or some specific natural objects within it– truly 'wanted'. Thus, although the purpose of guardianship is to give a voice to the voiceless, the ultimate decision of who the voice of the voiceless will be, and what that voice will say, remains under human jurisdiction.

Regarding the latter point, it is not clear how disputes would be resolved when conflicts of interest arose between different natural objects, or between these and a group of future humans, or between two groups of future humans at different points in time. At least in the second case, Stone does not choose the obvious answer; namely, that priority should always be given to our species. On the contrary, he proposes to "reinforce the case for Guardians for natural objects (…) since our decisions on whether to make, e.g., whales and songbirds planetary heirlooms will strongly influence –we might say, is logically prior to– the value future persons will place on those *things*; and the decisions regarding those things might most appropriately be made through decisions informed by thing-specific Guardians." (p. 104, his italics) This, however, is disputable and, again, deserves a longer justification.

Having said this, it is only fair to say that Stone's book is a goldmine of empirical data, most valuable for those interested in environmental problems and the way that both the Legislatures and the Courts have dealt with them so far, both in different countries and internationally. But above all, it is a valuable collection of innovative ideas and proposals for alternative normative frameworks (legal and moral) that would help us to cultivate a much healthier relationship with nature. As with any good book, that it leaves many questions unanswered or insufficiently developed is not a drawback, but a virtue. After 35 years, Stone and *Trees* still give plenty of food for thought, making this book indispensable reading for anyone interested in these fields.[15]

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14 The global commons refers to those regions of the planet and its surrounding space that lie outside the territorial sovereignty of states, thus constituting a 'No Man's Land'. They include the atmosphere, outer space, and the high seas, sea beds and sub surfaces not enclosed by any coastal state, and even Antarctica, whose ownership is presently in limbo. (p. 126) The global commons, under Stone's scheme, ultimately get 'indirect' protection through the guardians of the natural objects that constitute them.

15 I am grateful to Holly Lawford-Smith, Jonathan Pickering and Steve Vanderheiden for their input and comments on earlier versions of this review.

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