

BEAUTY AND THE BEAST WITHIN: ON THE SPECIAL NATURE OF NATURAL WORLD LAW

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We are here to celebrate Professor Rodgers and his life in environmental law. As it happens, they grew up together. The new notion of environmental protection gave Bill the chance of his lifetime, to which he returned his full energies, ideas, and writings. In a world of failed relationships, this one was a howling success.

Although we have not seen each other more than twice in forty years, I feel a kinship with Bill that seems particularly close. The link is not simply our ages, nor our passion for environmental law, nor even the activism in which both of us seem to be constantly embroiled. Rather, it is the particular kind of environmental law that brought us into the field and that, even today, gets us up in the morning, engines running, ready to go. In our hearts, we are driven by the natural world.

To be sure, Bill's treatises on the complexities of pollution control are the most comprehensive around, certainly among the more entertaining to read, and I have done my own work with these same subjects as well. But Bill came into the field with rivers and salmon, and I came in with rivers and dams, and when I lay our work together, I feel the pull of nature. Years ago, I remember being told by an exasperated attorney for the U.S. Army Corps of Engineers, "the trouble with you is that you just like moving water!" In truth, he was quite correct, and what is equally revealing is that he thought he was insulting me. Clearly, my attitude was insulting to him and everything his agency stood for. On reflection, it also insulted much that humans have been about since the dawn of time. That impulse makes the law of the natural world uniquely intense and difficult. This article attempts to identify that difficulty, and to propose a modest mid-course correction.

The case could be made, indeed I once took a stab at it, that all environmental programs, be they the control of contamination or the management of resources, are based on a single operating principle. I am still willing to defend that thesis, but there is more to laws than their mechanisms. Laws intended to curb pollution and those intended to

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protect the natural world confront very different psychologies that make their challenges different in theory and practice. At the core, one is incidental and the other is intentional. It is the difference between manslaughter and murder.

When we reflect on the damages of contamination, even in their most aggravated form with climate change, we are looking at something that is a byproduct of something else. We do not, through pollution discharges, set out to change the chemistry of the water, air, or stratosphere. It is not an accomplishment. It just happens, because we are too cheap or lazy to do better. Further, these impacts are largely correctible. With enough will, we can gadget our way out of almost any discharge using alternative technologies, production processes, fuels, and sources. It is even psychologically possible. Even the worst polluters do not go around boasting that they discharged a record amount of contamination. Therein lies the shaming power of the toxics release inventory. You are unlikely to overhear in a bar: "I really cut loose some carbons yesterday!" But you may well hear about how many shots the petroleum geologist got off last week in the backcountry of the Uncompahgre Forest.

Consider now what brought Professor Rodgers into the Puyallup cases and environmental law. It was fisheries, and then the effects of dams, and then logging. The fact is we humans have wasted our fisheries precisely because we intended to catch every single fish we could. We blocked their rivers multiple times and for multiple purposes until we could find no more sites, all by design. We took down every virgin forest from California to Alaska, and we are right now mopping up the strays in British Columbia to the point that only a few museum stands remain. Not one tree fell by accident.

Consider the highway program, the showcase of heroic engineering and the largest construction work in the history of the world. We have succeeded in paving every possible strip of the country to the point that the farthest distance from a road today can be measured in meters, not miles. The farthest distance from human sound has been reduced to just about nowhere. All by design.

To this achievement we can add those of the U.S. Army Corps of Engineers, the Bureau of Reclamation, and like agencies that, after extensive planning, have dammed the rivers, diverted their water, drained the swamps, and changed the American landscape. Set aside the question of whether for good or for ill—the answer to which is often a

mixed one. The point here is that these exercises did exactly as intended: they bound nature to our will.

Which signals the second characteristic of this kind of law: not only are these activities purposeful, but we are intensely proud of them. Corps offices around the country are stocked with films on taming the Mississippi and similar natural enemies—narratives of conquest, in which the word “taming” is often used. A visit to any major Bureau of Reclamation facility will be greeted by diorama and schematics showing the reduction of watersheds the size of the Colorado and the Columbia to a system of gates, weirs, locks, turbines and canals. Before there was only a river—now look at what we have done. In a secular country, these great projects are our temples, our glory to ourselves as gods.

Not only are these works sources of pride, they are personally affirming, manly, and, it must be said, fun to do. Consider the mindset of the logger, chainsaw in hand, wading into stands of virgin timber that he knows will never be seen on earth again. Even the hardest of them recognize beauty when they see it. But there is something irresistible about the blade of the chainsaw, the power of the bulldozer and the thrill of the highwire guiding the big trunks down. It is not just about a salary. There is something very intense about toppling a huge tree—the more huge the better. We, doing this, are real men.

Examine the photographs. They are standing on the stump, a half dozen loggers, at times more. They adopt poses of nonchalance, but there is nothing but pride in those postures. Examine the photos of whalers standing triumphant over a half-peeled and bloated corpse, or of sport fishers around a King Tuna, the bigger and more rare the tuna the better. These pictures are not much different from those taken by soldiers surrounding the shell of any enemy tank, or the digitals that came out of the Abu Ghraib prison. The faces are smiling. This was a very cool thing to do. Of course, these same thrills are now available to all of us through a variety of tools, most prominently suburban utility and all-terrain vehicles which, with names like Expedition and Armada (Query: Do we remember what happened to the Armada?), make similar statements about subjugating the natural world. One recent advertisement features a truck roaring up a rock slope, at the other end of which is seen a cowering cougar. The caption reads: “take back some of their habitat for a change.”

Similar photos decorate the walls of state transportation agencies, positioned to greet visitors in locations where, in other countries, one might find a portrait of the reigning military leader or Jesus Christ. In

Georgia, it could be the five-deck cloverleaf in downtown Atlanta joining four separate interstate highways and more than thirty lanes of traffic, with on-ramps and off-ramps spiraling out in the distance like the arms of a creature from the sea. The walls of your local dam building agency, too, will feature photos of their mighty works, great walls to the heavens, shot from planes or helicopters because no lens from the ground can capture their ambition and size.

There is more than economics working here. These men—they are overwhelmingly men—and their agencies are acting out scenarios that began in the sandboxes of their childhoods with trucks and tunnels . . . Vroom! Vroom! . . . or on the banks of streams, making mud dams and floating sticks. Now imagine getting paid to do this when you grow up, with budgets that seem to have no bottom to them, and when you make a mistake, even one as tragic as the drowning of New Orleans, you get twice the budget to fix it. As will the scientists and technocrats who adhere to these projects like pilot fish, sucking their small measures of research money and acting out their own scenarios of nature manipulation and control.

The great and unique challenge of environmental laws that deal with the natural world is to bring the message that these great works are not necessarily good things to do. The message contradicts all human history. Of the many things that could be said to define human beings, “the creature that intentionally modifies its habitat” would be high on the list. Of course, this instinct has saved human culture many times and has enabled us to prosper to the point of dominance so complete that we are now a threat to the world around us. Like human aggression, this instinct, once an essential survival skill, has turned suicidal. It releases its own endorphins and serotonins, and that rush becomes a reward system, a self-perpetuating reason to go forward. We have developed a “control of nature” gene that presents leaving your mark on nature—be it Daniel Boone’s carving “kilt a bar on this tree” or the mighty J. Bennett Johnston waterway—as a heroic act. We do not name people for bars not kilt nor dams not built. Natural world law struggles against this control gene and its compulsion to demonstrate power by destroying a piece of the natural world. It is not just about money. It is about this beast within.

The struggle is intensified by the degree of insult that it presents. Opposing parties can talk rationally about abating pollution. At bottom, there is only cash on the table. But telling someone to take better care of waste discharges is a world away from telling him that a life’s work and

justification has proven wrong-headed, harmful and ought to be shelved. From an industry point of view, pollution control law picks their pocket. But natural world law attacks their soul.

I was reminded of this difference in the acrimonious conflict over opening a small portion of the Arctic National Wildlife Refuge (ANWR) to oil development. What I could not understand was why the administration and the oil industry would make so big a deal over so small a play. With all the other countries with larger proven reserves begging outright for exploitation, why would they expend so much capital on Alaska, where environmentalists were prepared to resist to the last woman and child? Then it occurred to me that this was actually the point. To the nature control gene, there cannot be a place you cannot go. The notion is as intolerable as a dry state is to a binge drinker. The fight was really about symbols and whether there was a place we would remove from human hands. It challenged the control gene.

The same dynamic emerged from the spate of environmental legislation in the early 1970s. More than a dozen new statutory programs were enacted in the space of five or six years. Which one took the longest time to enact? Not the water or air acts, which have been, to be sure, in continuing evolution since. As a single bill it was the Wilderness Act, whose introduction predated the National Environmental Policy Act and took nine years to become law. Why would that have been? It was not because the concept of wilderness was hard to define, nor because it required complex processes to implement, nor because it would bring about dislocating economic or social hardships. In fact, of all the environmental programs enacted, this one presented the fewest of those difficulties. Rather, it was the simple idea of the thing. Like ANWR, it fought several thousand years of human history. We measure ourselves by our success in monkeying with things, not by our success in leaving them alone.

Consider, today, that one environmental program most certain to produce heartburn, misunderstanding, unthinking hatred, and endless proposals for weakening amendments: the Endangered Species Act. No one could make a reasonable case that this act has impaired any national priority or stopped any significant program or activity, no matter how damaging. Many activities, granted, have been limited and others modified substantially, but the actual impairments are few and far between. At bottom, the heat on this program comes from the same and by now familiar source. By drawing any boundary on how far we can go, it confronts the control gene.

We now find ourselves at a larger crossroads. The evidence is irrefutable that we have done more than alter a little nature here and there. We have brought entire ecosystems to their knees. Some ecosystems, like the short grass prairies of the Southwest, we have even managed to extinguish, their essential soils laid bare and sent up like smoke in the great Dust Bowl. Future chroniclers will note that, before we lost others, the remedy needed was to unplough the prairie, let the forests resume their rhythms, re-open the Snake and Columbia rivers, restore water to the lower Colorado, remove the stranglehold of highways that circle our cities like nooses, set the lower Mississippi River free before Louisiana sinks into the Gulf of Mexico, and let Lake Okeechobee flow south again, as it always did, to replenish the Everglades. Yet these options remain unthinkable, and their heresy does not lie solely in economics. The agricultural areas that impede Everglades restoration are on heavy government subsidy and are unimportant to the country, and the economics of pumping water out of the Snake River gorges to feed a kind of agriculture that is artificial to begin with and replaceable by other crops are similarly unpersuasive. In our minds, we are simply not yet ready to return things to a natural order, to stop monkeying with them, to butt out. It smells too much like defeat. And besides, what would we do then to make our lives worthwhile?

Instead, for the over-control of nature we now prescribe yet more heroic interventions. We resort to hatchery salmon in the Pacific Northwest and barge them around as if it were a natural process. Down in the Everglades, rather than release Lake Okeechobee, we are excavating new lakes from which we will pipe water around to various users like your local utility—and everyone knows who, when water is low, will get first call. Over in Louisiana, having starved a five million-acre coastal plain of water and sediment to rapid collapse, we remain unwilling to release the Mississippi River's natural flows and, instead, are installing more pumps, weirs and pipelines to transport what nature used to transport for free. Natural resource management has become Disneyland, the land of mechanical trees and starfish that, if we suspend enough belief, we can enjoy as the real deal. Of course, once these engineering systems are installed, they will have to be maintained and operated forever; the control of nature business has no end point. It is the ultimate triumph of man.

Today we confront the most acute collapse of natural systems—climate change—whose primary impacts include rising seas

along the coasts and drought in the interior. Given the lag time for even the most optimistic carbon abatement programs to kick in, the safest course for the short term would be to pull human settlement away from the most vulnerable zones. But that would not be us. We do not retreat, we control, and so the too-predictable response will be instead to construct a series of monster levees along the coastline of Louisiana, and a wave of new water mining and reservoirs in the already arid west to suck water sources down to their very last drop. These responses will be risky to engineer, astronomically expensive, and environmentally about the most destructive things we could do. But they are in our genes.

We even hear of more heroic technology on the horizon of what will likely become our next endless war: “the war on climate change.” There is talk of seeding the clouds (again), which reminds us of the “aerial bombardments” during the Dust Bowl intended to release the rains. There is talk of seeding the oceans with calcium to reflect the sun’s rays back to space, of seeding them with fertilizers to grow more algae, and of clear-cutting the great Russian forests to reduce their tendency to trap solar heat. There is talk of constructing shields of parasols in space. As cockamamie as these schemes appear, it is not clear which is the more daunting prospect here—that they will fail or that they might succeed. Consider what happens if some such set of control actually works. Do we really want to regulate the weather? Is there a human institution imaginable for the control of the global climate?

The unique challenge of natural world law, then, is whether we can move to less, not more, control of nature. Left to its own devices, nature is a remarkable healer. The question is whether we can change a deeply ingrained mindset sufficiently to allow that to happen. At first blush, it seems impossible, and it may turn out that way at last blush as well. I come from the Deep South, and we are, today, at least facially integrated against a mindset so hostile to this notion that it was willing to shuck its humanity, re-interpret the Bible and fight the bloodiest war of its century. One is reminded as well of the history of medicine, which, following technological advances, adopted a series of “heroic” interventions so aggressive and ineffective that they became open scandal, yet impervious to change. Only recently have medical schools and doctors begun to think in terms of preventative medicine, of mind and body together, of shelving their gadgets and listening to the natural world. However slowly, the mindset is changing. The next challenge is the mindset of heroic engineering, forged in a long and unwavering march towards the conquest of nature. Can one imagine an engineering

school that taught leaving nature alone? In theory, it may be just barely possible. Or it may be as counterintuitive as a non-god god.

In closing, I would like to resort to a favorite mechanism of Professor Rodgers, the top ten (or whatever number) in a list of serious topics that, in this new light, become slightly ridiculous, hence vulnerable and subject to change. In this vein, I would like to propose a new list of projects that exhibit nature controls gone awry—the Cool Ideas In Their Time But That Time Has Passed list—works that have simply outlived the idea that birthed them and remain with us like great wounds. They exist. I could nominate several water resource calamities off the top of my head, including the now famous Mississippi Gulf Outlet, a canal so marginal it carried virtually no traffic, and so harmful that it threatened the entire City of New Orleans, but could not be called into question until that threat turned to disaster. The people of New Orleans could also nominate an elevated highway through its most historic black cultural district, replacing miles of parks, live oak trees, clubs, and clapboard houses with a wasteland of concrete and crime. Having wandered Seattle yesterday to enjoy its sights, this city might even consider the deconstruction of the former law school, which sits in a Green Zone of its own, ready for the next invasion or the wrecking ball.

The fact is, we have actually begun to relinquish a few such monuments in a piecemeal fashion across the country, starting with the de-channelization of the Kissimmee River in Florida and extending now to a series of dam removals in California, Oregon, and Maine. What is missing is a process, and so to advance the above list to the serious we can conceive of a presidential executive order directing federal agencies to, with full public participation, review completed projects to assess their current viability, and to recommend the closure and deconstruction of those that do not make the grade. It would be the ultimate and most genuine application of the principle of adaptive management, which is too often limited to tinkering at the margins. Through such a process, in open and democratic fashion, we can confront the control gene head on and, in the words of a former president: tear down that wall.

In conclusion, it may be that the ultimate measure of an advanced civilization will not lie in what it built, but in what it did not build as well, and what it was willing, when things turned bad, to tear down. Our true maturity may involve the recognition that in many cases, the uncontrol of nature is the most civilized thing humans can do. We should begin.