Law Reform or World Re-form: The Problem of Environmental Rights

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Developments in the area of the environmental law are proceeding at a rapid pace in Canada. More and more legislation is appearing, judicial decisions are being made and lawyers are actively involved, all to the point where environmental law, once an anomaly, is becoming a very prominent field.

Many environmentalists argue that this is not enough, that true guarantees of environmental protection will only come when society extends rights to the environment, to guarantee it equal status with other rights-bearing entities.

The authors here take a completely different approach. They argue that the environmental movement in Canada has been diverted from its original goals by the application of traditional legal solutions to the very un-legal problems of environmental degradation.

The extension of environmental rights would mark a final step in this process. The authors argue instead for the notion of rightness, a notion directed not at legal reform and its accompanying restraints, but world reform: the development globally of a whole new perspective on the interrelatedness of humankind and nature.

Les développements juridiques dans le domaine de l'environnement progressent rapidement au Canada. Une législation sans cesse croissante, des jugements rendus plus fréquement, et des juristes plus impliqués ont fait du droit de l'environnement un domaine juridique bien en vue.

Plusieurs environnementalistes clament que ce n'est pas assez, que de véritables garanties de protection de l'environnement n'existeront que lorsque la société sera prête à octroyer des droits à l'environnement, en quelque sorte lorsqu'on lui garantira un statut égal à celui d'autres sujets ayant des droits.

Les auteurs adoptent ici une vision complètement différente. Ils prétendent que le mouvement écologique au Canada a vu ses buts originaux supplantés par la mise en oeuvre de solutions légales traditionnelles pour règler des problèmes complètement dénués de substance légale.

L'octroi de droits à l'« environnement » constituerait l'étape finale dans ce processus. Les auteurs prétendent qu'il ne faut pas se concentrer sur une notion de réforme légale, car celle-ci est toujours sujette à des restrictions inhérentes au droit, mais plutôt qu'il faut travailler à une réforme universelle: celle du développement global d'une nouvelle perspective de l'interdépendance entre la nature et l'être humain.

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Synopsis

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Introduction

Our society's growing awareness of tremendous environmental damage has prompted an expressed need to "do" something, to "fix" that which is being done to the earth. News of rainforest depletion, of extremely contaminated land, of trees dying due to acid rain, and of toxins present in our lakes and water supplies all support the feeling that something has gone wrong, that something has run amok. Consequently we speak of an "environmental problem". As lawyers, or people involved in the legal profession, we think that maybe law can address the problem.

In rushing to take action however, we hastily assume that some *immediate* course of action will suffice. We neurotically crave quick fixes that will allow us to "get on with things", neglecting the fact that the solutions to the problems of our dying world lie much deeper.

This paper begins with an outline of the birth of the "modern" environmental movement, which was responsible, in some part at least, for the current conception and characterization of the environmental "problem". This conception has resulted in deficient accounts of what environmental crises are, and in the application of traditional reactive legal remedies, based both on these narrow

characterizations of the "crises" and on particular views of what is meant by the "environment".[1]

Recognising the limitations of attempts at environmental regulation, environmental advocates have proposed, and lobbied for, environmental bills of rights or the ascription of rights to "natural objects". This paper will present and then criticize such legally oriented approaches to our continued abuse of nature. Relying on writers such as Laurence Tribe, Christopher Stone and Martha Minow, an overview of "neo-rights" theory is presented. Rejecting the efficacy of reform in the guise of legal rights, we argue instead for the notion of "rightness" (an illiberal norm which prescribes a need for a proper and healthy relation between persons and nature).

Deep ecological thought provides a basis for the concept of "rightness". Deep ecological theory argues for a re-evaluation of both ontological and teleological visions regarding the relationship of humankind and the environment. This paper will illustrate how this primarily essentialist and relational account of being and nature, which stresses rightness over rights, leads to genuine world re-form, as opposed to mere adjustments of our existing institutions.

The legally trained will ask of deep ecology, "What are you offering lawyers?"; lawyers need to feel that there is something for them to do. Our response is that deep ecology offers lawyers, as "lawyers", precious little. Conservative jurisprudence, which sees law as being both the most appropriate and most effective instrument of social change, is in need of rethinking. Ecological disasters such as oil spills and the depletion of the ozone layer provide ample evidence of how inadequate the legal framework is for dealing with deep-rooted cultural problems like our destruction of the planet.

In response to these perceived problems, cries go out for more regulation or legal action. This craving for a legal "solution" for our dying world is misguided. By maintaining the illusion that tougher legislation, or alternatively, expanded environmental rights, can significantly change the world, the deep questions necessary for genuine world change are precluded.

In all the fingerpointing and allegations surrounding ecological disasters in an attempt to find a culprit, we have successfully avoided self-reflection. Consciousness of our own participation in the destruction has once again escaped us. This cannot continue; new, deeper questions must be asked. A sys-

[1]As Neil Evernden writes in *The Natural Alien: Humankind and Environment* (Toronto: University of Toronto Press, 1985) at x [hereinafter *Natural Alien*], "Environment is never isolated from belief, and a discussion of environmentalism is inevitably also an account of the relationship of mind to nature — what Paul Shepard once called 'the central problem of human ecology'. Our perceptions and expectations of environment are inseparable from our moral commitment to particular beliefs and institutions."

tem such as law, whose primary objective is to maintain prosperity-producing relations in society, cannot involve itself in wide-ranging teleological deliberation, for the legal institution itself is premised on a specific teleology of material growth and the maintenance of the institutional status quo. If anything at all can be done in regard to our environmental crises it is a rethinking of our senses of being and value, rather than a legal reaction to immediate problems. This paper does not intend to be a list of environmental ills and remedies. The reader will find no horrific statistics, no appeals for drastic action or grand schemes concerning resource management. Rather, the environmental rights critique and the presentation of deep ecological theory here will focus primarily on the "affairs of the mind"[2] that make it so difficult to arrive at easy solutions to environmental concerns.

I The Birth of Modern Environmentalism

It is difficult to pinpoint precisely when the consideration of "environment" began to permeate popular consciousness. The origins of ideas are probably more fluid and less determinable than we might care to admit. Although absolute beginnings might be impossible to ascertain, certain pivotal moments do stand out.

In regard to modern environmentalism the publication of Rachel Carson's *Silent Spring* in 1962 was one such moment[3]. This book was a well-researched, no-holds-barred account of ever-increasing and harmful pesticide use. Among the consequences of pesticide use, Carson observed birds writhing and convulsing on the ground, eventually dying, foretelling of a time when "Spring" would be "silent", and life on earth would begin to die unless we did something. Carson was dismissed as reactionary and over-emotional, guilty of unnecessarily alarming the public. Time Magazine claimed that "her emotional and inaccurate outburst in *Silent Spring* may do harm by alarming the non-technical public, who should be reassured that while some pesticides may be dangerous, many are roughly as harmless as DDT."[4] Today we see the irony of this statement, having since banned DDT in most First World countries. However, what may not be so evident now is that Carson was describing a conceptual model which included human beings as part *of* an ecological system. In urging us to care about the environment, Carson was appealing to our human instinct for self interest.

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[2]*Ibid.* The book provides an eloquent investigation of such "affairs of the mind".

[3](New York: Fawcett Crest Books, 1962).

[4]N. Evernden, "Nature in Industrial Society" in I. Angus & S. Jhally, eds, *Cultural Politics in Contemporary America* (New York: Routledge, Keegan Paul, 1989) at 151. The author is quoting from "Pesticides: The Price of Progress" *Time Magazine* (28 September 1962) 68.

In Neil Evernden's "The Environmentalist's Dilemma", he writes that with the appearance of Carson's book the "tenor of the debate concerning human treatment of the natural world was dramatically altered."[5] Unlike nature and wildlife advocates before her, who spoke for wildlife in direct terms, Carson explained the threat to wildlife in terms of damage to ecosystems. No longer did one have to have an affinity for a particular species of animal in order to see, and therefore speak for, its importance for *our* (human) world. According to Evernden, Carson's book introduced a new protagonist, "environment", which allowed us to shift the focus of the debate from the issue of protecting other forms of life to protecting *our* home (or "environment").[6]

Over a quarter of a century after the arguable birth of the modern environmental movement, environmentalism is still very much with us. Today one need not be an ardent nature enthusiast to know of, and be concerned about, problems like acid rain, nuclear power, rain forest depletion, and ozone deterioration. On the face of it, it would seem that environmental concern is at a new all time high. However, we have yet to answer a key question — what is it that concerns us?

As the environmental movement began to have an institutional impact in the late 1960s and 1970s, institutional solutions were sought. Lobby groups put pressure on governments and politicians to address the "environmental crisis". Perceiving lack of control as the root of the problem, law quickly attempted to "fix" it. Before 1970 environmental law was a virtually unknown area. Since that time countless acts and regulations have been passed. Common law causes of actions have been developed using nuisance, negligence, riparian rights, trespass, contract and more. Both federal and provincial environmental protection acts have been passed in Canada as well as federal and state acts in the United States.[7] The latter, much further ahead than Canada in developing environmental regulation, has even set up a fund using public monies and tax revenue from chemical producers to use for the clean-up of environmental disasters, spurred on by such infamous disasters as Love Canal in upstate New York.[8] Even an

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[5]In N. Evernden, ed., *The Paradox of Environmentalism: A Symposium, May 2, 1983* (Toronto: York University, 1984) 7 at 7 [hereinafter *Paradox*].

[6]*Ibid.* at 8.

[7]Some examples in Canada are, *Canadian Environmental Protection Act*, S.C. 1988, c. 22; *Environment Quality Act*, R.S.Q. 1977, c. Q-2; *Clean Environment Act*, R.S.N.B. 1973, c. C-6; *Environmental Protection Act*, R.S.O. 1980, c. 141; *Department of Environment Act*, S.N.S. 1981, c. 10; *Environmental Management and Protection Act*, S.S. 1983-84, c. E-10.2 and *Clean Environment Act*, R.S.M. 1972, c. 76. This list is by no means exhaustive of Canadian environmental protection legislation.

[8]In 1942 Occidental Chemical Corporation decided that Love Canal would be an appropriate site in which to deposit industrial waste materials. They bought the property and then proceeded to dump 42 million pounds of waste into the canal. The corporation sold the land which eventually ended up being used for a school and other public amenities. Residential houses were built on adja-

official "National Priorities List" has been created, listing those sites that most need to be cleaned up.[9]

Across Canada and the United States we have Clean Air Acts, Clean Waters and Streams Acts, Transportation of Dangerous Goods Acts, Emission and Effluent Regulations, Pits and Quarries Regulations and Litter Acts. Volumes upon volumes of environmental legislation are being developed. Whereas before industrial developers had a virtual carte blanche from the state to expand, now they have to submit to such procedures as environmental impact assessments, control orders and monitoring by appropriate environmental officers. While in theory these seem to be progressive developments, in practice they have become nothing more than costly legitimation projects. One early participant who had given his time with the best of intentions later griped that the whole process was "a grandiloquent fraud, a hoax, and a con."[10]

Many environmentalists realise that environmental regulation has become nothing more than a licencing system for polluters. In addition, it is a booming business, lining the pockets of law firms engaging in environmental prosecution and defence, and environmental consultants conducting environmental audits for large corporations, federal and provincial governments and municipalities.

This regulatory approach is understood and thus apparently encouraged by a variety of social institutions, including government, law, corporations and the media.[11] While the environmental movement has been successful in making people aware of a problem in how we deal with nature, responses from social institutions suggest that many perceive it as merely a technical concern. Expert planners and analysts were enlisted to make the necessary managerial adjustment from irresponsible industry to responsible, conservation-oriented industry. From the technocrat's point of view environmental concern is nothing more than trying to find the perfect balance of utility: the point at which production can be maximized and serious health hazards minimized.

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cent land. After a time, residents noticed adverse health effects. Millions of dollars have been spent for evacuation and clean-up and litigation over who should pay for these costs still continues. In 1980 the U.S. Congress, under the Carter administration, passed the *Comprehensive Environmental Response Compensation and Liability Act* (CERCLA) 42 U.S.C. ss. 9601-9675 (1980) Pub. L. No. 96-510, which established a federal fund for the clean-up of hazardous waste. In 1986 CERCLA was amended, after much criticism, by the *Superfund Amendments and Reauthorization Act* (SARA) Publ. L. No. 99-499 which provides for a tax on chemical feedstock, a broad based tax on business income and increased taxes on petroleum.

[9]The "National Priority List" is a public register of contaminated sites, developed by the U.S. Environmental Protection Agency, on which federal "Superfund" monies may be spent for clean-up. See 40 C.F.R. 300 Appendix B (1986) for current N.P.L.

[10]J.A. Livingston, *The Fallacy of Wildlife Conservation* (Toronto: McClelland and Stewart, 1981) at 33.

[11]*Ibid.* at 5.

The environmental movement has become conventional, embracing and applying economic and managerial techniques to individualized issues.[12] Those still concerned about the degradation of our natural world have witnessed the unfortunate and misguided co-option of the environmental movement's best insights. Looking back, radical "social ecologist" Murray Bookchin refers to "the vapid environmentalism of the early 1970s."[13] For Bookchin, the environmentalism of the 1960s and 1970s too often gave rise to an "engineering approach to nature, an approach that was ultimately directed towards allowing us to ravage the earth with minimal effects on ourselves."[14] Bookchin is not alone in holding this critical perspective. According to Evernden, a very different kind of radical ecologist, "environmentalism in its modern incarnation is not about nature but about people controlling nature."[15] The offshoot of this human-centered interest in nature is that we have come to equate value or worth with human usefulness. As Evernden observes, "rather than defend wilderness, the new environmentalist defends the genetic diversity in wilderness which humans may someday need for the production of new crops."[16]

The modern environmentalism of which Evernden writes still dominates popular culture. "The environment" has become a key character in contemporary political drama. Candidates for election compare their "records on the environment". The environment is now a *bona fide issue* for the leaders of all our political parties, and they pay substantial lip service to the cause.[17]

In the face of all this apparent concern *about* the environment one starts to wonder if there is still anyone who cares *for* the planet. While the concern of technocrats can be seen as a shallow commitment to the maintenance of the status quo, the concern of nature advocates has always been for the world in-itself. Where have the nature advocates who originally played such an integral role in the birth of planetary consciousness gone?

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[12]N. Evernden, "Introduction" in *Paradox*, *supra*, note 5 at 5.

[13]"Social Ecology v. Deep Ecology", special supplement of *Kick-It-Over* (1987) at 4A. *Kick-It-Over* is a Toronto-based anarchist publication. P.O. Box 5811, Station A, Toronto, Ontario M5W 1P2.

[14]*Ibid.*

[15]*Supra*, note 5 at 13. Evernden's radical ecology differs from that of Bookchin's in that Bookchin's approach has its roots in critical social theory, whereas Evernden's sentiments lie with nature and its preservation.

[16]*Ibid.*

[17]In this regard see L. Solomon, "The Price of Political Lip Service" *The [Toronto] Globe and Mail* (21 October 1988) A7. As Solomon puts it, "The NDP's [New Democratic Party's] approach, like that of the other two parties, involves throwing billions of dollars in subsidies at mines, logging companies and other resource industries — for the past 100 years the prime rapers and pillagers of this land — and then creating a $200 million Environmental Clean-up Fund to begin to tackle the mess these same industries created."

In contrast to industry oriented, managerial environmental regulation, some nature advocates have sought refuge in the "environmental rights movement",[18] which, as the name suggests, argues for the ascription of "rights" to the environment. Christopher Stone, in a ground-breaking, rather provocative article, "Should Trees Have Standing?"[19] argued that we have failed to see the *moral* worth of natural objects. As a consequence we have manipulated our natural world as a resource, subject to the whims of human will, without regard for the rights of these objects. Since "Trees" a whole body of literature has been written on legal rights and legal standing for the environment, both supportive and critical.[20]

Laurence Tribe in "Ways Not to Think About Plastic Trees"[21] railed against the instrumental rationality inherent in our present "regulation"-oriented environmental policies. Tribe argued for a theory of environmental action and value based on "immanence and transcendence"; that is, a recognition of inherent or intrinsic value in nature reconciled with a non-static, process-oriented, ever-evolving legal scheme/community. In such a theory rights are seen to embody and advance an increased consciousness of the "sacredness" and "value" of the

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[18]The most famous of the "environmental bill of rights" examples is the *Michigan Environment Protection Act of 1970*, Mich. Comp. Laws 691.1201 (1970), which, unlike other EPA acts that are really schemes to grant licences and permits, removed almost all judicial impediments in using courts to protect the environment in the face of development. This act encouraged the courts to decide the conflicts between development and the preservation of nature. In Canada in 1979 Stuart Smith, Ontario leader of the opposition, introduced "An Act Respecting Environmental Rights in Ontario". It was introduced into the Ontario Legislature as a Private Member's Bill. Needless to say it received little support from those in political office. In British Columbia in 1971 Bill 101, "The Environmental Bill of Rights, 1971" was introduced by the New Democratic Party (opposition). Two years later when the NDP gained power the bill was missing from the list of government bills. Numerous environmental rights bills have been introduced, argued and lobbied for since that time.

[19](1972) 45 S. Cal. L. Rev. 450 [hereinafter "Trees"].

[20]It should be noted that Christopher Stone has since written an article entitled "Should Trees Have Standing Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective" (1985) 59 S. Cal. L. Rev. 1 [hereinafter "Trees, Revisited"]. As well he has expanded on these ideas in a book entitled *Earth and Other Ethics: The Case for Moral Pluralism* (New York: Harper and Row, 1987) [hereinafter *Earth and Ethics*]. In "Trees, Revisited" Stone introduces a more comprehensive notion than legal rights: legal considerateness. By his own admission in "Comment" (1987) 9 Environmental Ethics 281 at 281, Stone does "not intend to abandon an interest in rights. The illustration I employ in "Trees, Revisited" of the paradigm institutionalization of considerateness involves the elements identified with legal rights holding in 'Trees'. In *Earth and Ethics* Stone still operates with a "persons" framework: an argument which extends the notion of "persons" in order to secure legal considerateness in the form of rights for those objects which previously were not considered to be of value in traditional legal systems. *Earth and Ethics* as well as "Trees, Revisited" have more to do with Stone's attempt to flesh out a theory of moral pluralism than with adding anything new to his original conception of "environmental rights". Therefore, in this article we will be dealing with the basic framework for environmental rights set out in the original article, "Trees", *ibid.*, note 19.

[21](1974) 83 Yale L.J. 1315 [hereinafter "Plastic Trees"].

natural world. Tribe regarded the extension of "rights" as part of our ever-expanding recognition of valuable entities. Although he recognised that such an environmental rights regime might be a "useful but quite transparent legal fiction"[22], the "concept of rights for natural objects would probably represent a valuable doctrinal innovation";[23] (that is, it would deal with the problem of standing requirements). Tribe hoped for even more, claiming that rights would lead to an "assault on [the] domination" of nature and to a "broadening realisation of reciprocity and identity"[24] and therefore, a felt sense of obligation.

In environmental and ecological journals the debate continues between those justifying and those rejecting rights as the method by which to address our "environmental problem". For those of us concerned for the natural world this controversy is somewhat confusing. How is it that we should address this issue? What reasoning shall we use? What kind of discussion shall we have? What is to be done?

Contemporary jurisprudence has engaged in a great deal of discussion on the usefulness and validity of "rights" as a means of addressing social problems, such as racism, sexism, child abuse, etc. In the face of strenuous rights criticism there are those who still wish to suggest that rights are an appropriate method by which to address questions of value and thus, social conduct. The most recent defence of this "neo-rights" or "re-invested rights" position is referred to by its supporters as the "interpretive turn". This theory looks to judicial action as an act of interpretation of a communal language: law.

A leading advocate of this "interpretive turn" is Martha Minow, a Harvard law professor who is interested in, among other things, children's rights and feminist issues. In her article, "Interpreting Rights: An Essay for Robert Cover"[25], she attempts to discuss the usefulness of rights in light of her "interpretive" theory.

Minow outlines a methodology very close to that of Christopher Stone and Laurence Tribe. Although she does not speak of the "environment", she is concerned with the extension of rights to "entities" that have not been traditional right holders, and therefore not "noticed" by legal institutions. Minow, like Stone and Tribe, is interested in investigating law to understand how it constitutes, and is constitutive of, the world around us. Her agenda is ultimately to elicit social reform through law reform.

In essence this piece is a reply to the late Robert Cover's well known article, "Violence and the Word"[26]. Involved in the process of the extension of

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[22]*Ibid.* at 1343.
[23]*Ibid.*
[24]*Ibid.* at 1345.
[25](1987) 96 Yale L.J. 1860 at 1880 [hereinafter "Interpreting Rights"].

rights to the southern American Blacks, Cover also supported rights as a method of social reform. Environmentalists have much to learn about such conversations concerning rights, precisely because our social and legal institutions did not and do not consider the natural world as worthy of moral, and therefore, legal consideration.

The question, however, that all of us must ask, regardless of whom or what we wish to extend our "care" to, is whether "rights" are the appropriate method by which to express care. More generally, are rights the appropriate vehicle for social reform? Is law reform, through the ascription of rights to the environment, the way to effectively address our ecological sickness? Critical as we may be of ineffective regulatory environmental legislation which supports the technocratic status quo, we must ask ourselves whether rights are really the activist change that we must seek if we really want world re-form, not merely legal reform.

II The Environmental Rights Perspective: Rights as Reform

By describing law's method as "interpretation", Martha Minow argues for legal reform as the basis for social reform. In approaching law as communal language she attaches law to the social contexts in which norms can be generated and given meaning.[27] Legal rights become part of a "language of rights" which "creates and gives meaning to norms."[28] In order to defend this theory against claims that legal language is sheer, brute authority of the state, Minow claims that the meaning given to the language of rights is often generated *outside* legal formal institutions such as the courts. Legal interpretation becomes "an activity engaged in by non-lawyers as well as by lawyers and judges."[29] Interpretive activity, then, is not exclusive to an overriding authoritative community (judges and lawyers); "people living in worlds of differences" also participate in it.

Through interpretive activity people "summon up a sense of potential community membership without relinquishing struggles over meaning and power."[30] This conception of law addresses several objections raised against rights theory. First, the charge that "new rights" lack objective foundations is rebutted by grounding "rights" in the processes of "communication and meaning-making, rather than in abstract or enduring foundations."[31] Second, in response to the charge that rights are indeterminate, this theory maintains that organic meaning is created by the community through interpretation rather than through textual

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[26](1986) 95 Yale L.J. 1601 [hereinafter "Word"]. This article is an anti-law-as-just-interpretation argument.

[27]*Supra*, note 25 at 1861.

[28]*Ibid.* at 1861-62.

[29]*Ibid.* at 1862.

[30]*Ibid.*

[31]*Ibid.*

exegesis. The "interpretive turn" encourages and permits debate over the legal and political choices inherent in interpreting rights. This allows us to avoid the coercion involved in the presumption that all rights are supported by social harmony or consensus. Rights are presented as pragmatic "tools" that give expression and lend strength to a community.

The inherent loss of community that accompanies the ascription of rights (liberal atomism) is often a concern of anti-rights thinkers. However, rights may be described as rights-consciousness instead of as a collection of positive, formal rules. Rights are *representations* of claims that people make to others of what they care about, and what they feel *ought* to concern others: a metaphor for relationships between persons as well as for more traditional normative valuing:

> By invoking rights an individual or group claims the attention of the larger community and its authorities. At the same time, this claim acknowledges the claimant's membership in the larger group, her participation in its traditions, and her observation of its forms.[32]

On the surface rights might appear to speak little of community. Minow insists however, that in the *practice* of rights, in the *exercise* of them, one becomes engaged in conversation with a larger community. Rights become that language that can be used by all in the community (and by diverse communities).

Other supporters of the "interpretive theory" include Milner S. Ball who has suggested that law can become a medium that is engaged in connecting, not disconnecting, people, and that it should enhance a "flow of dialogue".[33] James B. White, another "interpretivist" scholar has suggested that,

> law establishes roles and relations and voices, positions from which and audiences to which one may speak, and it gives us as speakers the materials and methods of a discourse....It makes us members of a common world.[34]

Thus, legal rights create conversation; they force dialogue. People are *required* to respond to each other by virtue of the skeleton of due process which accompanies rights. When persons assert rights they secure the attention of the community "through the procedures the community has designated for hearing such claims."[35] The subsequent "argument" can be seen as a form of cooperation, as dialogue, as "attention". Minow posits that:

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[32]*Ibid.* at 1874.

[33]*Lying Down Together: Law, Metaphor and Theology* (Madison, Wis.: University of Wisconsin Press, 1985) at 122 [hereinafter *Lying Down Together*].

[34]*When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character & Community* (Chicago: University of Chicago Press, 1984) at 266.

[35]*Supra*, note 25 at 1875.

> Legal rights, then, should be understood as the language of a continuing process rather than the fixed rules...[as] language we use to try and persuade others to let us win this round.[36]

Rights, then, are really the negotiation of new relationships which express human interconnection, not separation. By giving rights to the environment we would, the theory suggests, see ourselves as interacting with the natural world in a "conversation" regarding value.[37] Environmental rights would force us to give "attention" to the earth.

White supports this notion of interconnection when he suggests that legal cases establish an equality between persons, proceeding by a method of argument and conversation that includes both the person's conception of his/her own situation but also includes the recognition of the other's world view.[38] Rights apparently force those in power to listen, they structure "attention". "New rights" aspire to be a disconcerting cry, an irritating voice to a stale, conservative conversation. The interpretive approach construes a claim of right, made before a judge, as a plea for recognition of membership in a community shared by applicant and judge, much as reader and author share the world of the text.[39]

Although realising that legal institutions and judges can shatter the shared world of reader and author by refusing to recognise claims as deserving communal attention, Minow, the optimist law reformer, claims that through the interpretational conception of rights one can take the "aspirational language of the society seriously and ... promote change by reliance on inherited traditions."[40]

Rights advocates claim that rights talk is a very powerful image within our community. If we ascribe rights to entities in essence we are saying that we "value" those entities. The ascription of rights facilitates the creation of a language which communities agree upon to express their valuing of the right-holder. If we ascribe rights to the environment then, we are expressing how much we value it, in theory at least.

The position that rights necessarily suggest autonomous individuals is rejected in the "interpretive turn" approach; rather, rights are expressions of overlapping relationships of individuals and the larger community.[41] Using the metaphor of rights as conversation, (therefore suggesting the interdependence of individuals and the aspiration of connection), the notion of rights as suggesting

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[36]*Ibid.* at 1876.

[37]One wonders what sort of "conversation" one may have with "right-holders" who cannot speak for themselves or articulate their needs, whether they be trees or small children.

[38]See "Interpreting Rights", *supra*, note 25 at 1877 referring to White, *supra*, note 34 at 274.

[39]"Interpreting Rights", *ibid.* at 1880.

[40]*Ibid.*

[41]*Ibid.* at 1884.

absolute autonomy would be incoherent. Instead we would have a "community willing to recognise and enforce individual rights."[42] Recognising that the "usual" conception of rights is premised on autonomy, Minow points out that even such a traditional view of rights relies on a social or communal world. "The very experience of a bounded personal identity requires not just one individual, but many who help constitute the boundaries"[43] (that is, the social/communal construction of identity and entities).

The neo-rights advocates attempt to present a richer conception of rights, a reinterpretation of the rights framework which would embody the possibility of community-generated meaning and value and human interdependence. In Minow's particular case, she argues for the extension of rights to children. Her logic proceeds as follows: we value children; rights are the language with which our society expresses value and offers legal protection to those things we value; therefore children should have rights. The argument for the extension of rights to the environment follows the same structure: we value the environment; rights express a conception of value; the entrenchment of legal rights will afford protection to the environment; therefore the environment should have rights. Those who advocate legal reform through the ascription of rights assume a subsequent social change in our attitude toward the natural world.

Stone would also posit that rights are an expression of value within our legal system, and to a certain extent within our society. Until a thing receives its rights, the thinking goes, we can only see it as a thing for our use.[44] He reinforces this further by suggesting a paradox:

> [t]here will be resistance to giving the thing 'rights' until it can be seen and valued for itself; yet, it is hard to see it and value it for itself until we can bring ourselves to give it rights. [45]

It is correct to point out that the holder of a legal right *may* gain some advantages (although the assertion that a thing must have rights in order to be valued is a false claim: rights only suggest valuing by the *legal* institution). For example, a public au thoritative body, legal or administrative, will be prepared to give some amount of review, and therefore thought and "attention" (in Minow's terms), to "actions that are colorably inconsistent with that 'right' [of the object]."[46] Several other conditions follow from the ascription of rights:

> 1) The object can instigate its own legal actions (through "guardians"). Because of this, no "human" harm must be shown and standing becomes a much easier hur-

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[42]*Ibid.* at 1883.
[43]*Ibid.*
[44]"Trees", *supra*, note 19.
[45]*Ibid.* at 456.
[46]*Ibid.* at 458.

> dle to overcome. More attention is given to the object itself which means that it does not get lost in the battle of "balancing" the interests of two other parties.
> 2) In determining legal relief or damages, injury to the object itself will be taken into account.
> 3) The remedies will go to the object in order to repair it; money will be spent directly on environmental clean-up.[47]

Stone, however, immersed as he is in the legal world, realises that rights are not the panacea that "laymen" might first assume. Law generally deals with harms after they occur, findings rest on causality, evidence, and those causes of actions and remedies which are available to it. Rights are also only a formal recognition of value and leave much unsaid. However, as Stone suggests,

> ...even as between two societies that condone slavery there is a fundamental difference between S1, in which a master can (if he chooses) go to court and collect reduced chattel value damages from someone who has beaten his slave, and S2, in which the slave can institute the proceedings *himself*, for *his* own recovery, damages being measured by, say, *his* pain and suffering.[48]

Stone also puts forth the argument that "right[s] ... have meaning — vague but forceful — in the ordinary language, and the force of these meanings, inevitably infused with our thought, becomes part of the context against which the "legal language" of our contemporary "legal rules" is interpreted."[49] By acknowledging the powerful, "popular", non-legal meaning or perception of rights, a connection is drawn between the legal world and the corresponding non-legal world. Such an interactive theory of law leads Stone to conclude that law is *constitutive* not only *constituting* — law shapes but it also reflects.

Both Minow and Stone argue that rights *are* the appropriate method by which to value and empower "vulnerable" entities. By giving rights to an object, that object can begin to "participate" in a common community and gain value. Tribe's theory, though very similar, is more sophisticated, as illustrated by his formula of "immanence and transcendence".

In Tribe's "Ways Not to Think About Plastic Trees", he is concerned that we do not turn environmental concern into a scheme whereby a fixed end is determined, thus adopting an instrumental theory of law and social organisation. This is why he calls for the necessary synthesis of immanence (the sanctity or sacredness of "Being") and transcendence (a way of acting, committed to *process*, "valued in large part for its intrinsic qualities rather than for its likely results"[50]). Tribe's emphasis on process attempts to include the human commu-

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[47] *Ibid.*

[48] *Ibid.* at 458-59. We may well ask if there is not a third alternative that is not being explored here, that of no slavery at all.

[49] *Ibid.* at 488. This is akin to Minow's position that the meaning of rights exist outside of legal contexts, thus embedding rights-talk within the norms of the community.

[50] "Plastic Trees", *supra*, note 21 at 1339.

nity in nature and also to infuse community activity with environmentally sensitive moral and normative commitments. The commitments would be organic, generated from within, rather than obtained from outside the community. Our human and social interaction would be part of an evolution to a "destination" that is not preconceived. The destination would continuously change in relation to our new awarenesses, revelations and experiences: an elusive, changing and mutable end, rather than a fixed and immutable one. We would live our lives as a narrative, where the story constantly evolves through the characters. For these characters, there would be no master plan or positive goal, only a sense of a goal, constituted by the knowledge of immanence (inherent value) in the world.

Paul Emond has criticized Tribe's project as being unrealisable and not translatable into legal concepts.[51] Actually Tribe does try to translate his principles into legal concepts, with rights as a progressive step toward identification and increased consciousness of our environment. Again, legal reform is seen as the method to achieve social reform. Law is viewed as a progressive endeavour, a community activity, in keeping with Minow and Stone, where rights at once reflect (a natural law position) and create (a positive law position) that which we value.

Minow's insights take Tribe's thesis to its conclusion, as she tries to deal with the problem of uniting philosophical aspirations with legal concepts and actions. Her "interpretive" analysis implicates the community in "our" law. Minow tries to make law *our* law. Legally entrenched rights are seen as the tools by which continuing communal discourse takes place (akin to Tribe's notion of "transcendence", the devotion to process and change). For Minow, "the interpretive framework seeks to reinvest legal activity with a believable aspiration to create communal meaning amid a world scarred by justifiable skepticism".[52]

By viewing law as a representation of communal activity, a forum for "conversation", the interpreted *meaning* of legal rights and concepts is tied to those communities which generate norms and hold aspirational values. Legal concepts such as rights, therefore, come to embody the aspirational values of the community. It is within this legal rights construct that immanence and transcendence are combined.

Environmental rights advocates argue for a process that is *not* instrumental, that does not view a right as a fixed end but rather as part of a *process* that is valuable in itself. The adjudication of "rights" is intrinsically good not because of the outcome but because, by nature of the process, it allows conversation, debate and interaction. Such a position heeds the warning of Tribe that,

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[51]"Cooperation in Nature: A New Foundation for Environmental Law" (1984) 22 Osgoode Hall L.J. 323 at 332.

[52]*Supra*, note 25 at 1893.

> Unless evolving human consciousness and will are recognised as legitimate and indeed vital parts of the natural order, there can exist only sterility and paralysis, negating all possibility of critique and progress.[53]

"Reinvested rights" allow for legal choices that ultimately incorporate commitment to principles. Because of the interpretive judicial process, rights are also capable of change *as* the interpretive commitments of communities change. For Minow, the "interpretive turn ... pins law not on some force beyond human control, but on human responsibility for the patterns of rights and rules that emerge from legal discourse."[54] This position echoes Tribe, when he claims that we cannot rely on "principles outside ourselves", but that we must live by principles that are "capable of evolution as we change in the process of pursuing them."[55] Rights are seen as that reconciliation of immanence and transcendence. Both Minow and Tribe view rights as that political tool whereby the community and its aspirations may be united in an unstatic, everchanging, *interpretive* process.

Stone, Tribe and Minow illustrate the best possible case for environmental rights. Summarizing their positions, we are left with several basic claims in defence of environmental rights:

1) Rights give us a language to speak in that is intelligible and common.

2) Rights-talk lets us participate in the larger community, it joins us in a "conversation" about whose "story of the world" will win. It brings the vulnerable and the powerful together in a common forum.

3) The entrenchment of rights is an expression of value and also makes us value each right holder.

4) Rights and their legal adjudication, as defined by the "interpretive" approach, allow for the synthesis of immanence and transcendence. By incorporating the interpretive commitments of the community into the meaning of rights, and reinvesting rights with new meaning (including a sense of immanence represented by the title of right-holder), we avoid static, instrumental schemes of social organisation. The interpretation of rights as community norms allows for an evolving process of interaction and change.

III The Critique of Rights: The Monopoly of Metaphor

Much is overlooked in the acceptance of such a theory of re-invested rights (neo-rights). While it may be tempting, an unskeptical acceptance of it indicates a common misperception of law and rights as necessary constructs to regulate

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[53]"Plastic Trees", *supra*, note 21 at 1338.
[54]*Supra*, note 25 at 1892-93.
[55]*Supra*, note 21 at 1338.

and control our society. We feel a need for social reform and assume that laws must be made and the legal system changed in order to realise any reform. The rights critique tries to focus our attention on this misguided sense of necessity.[56] The basic four points, common to Stone, Tribe and Minow, illustrate that to speak of rights as a solution to our environmental dilemma may be to participate in the consciousness of false necessity: the perception that *rights* are a necessary construct to deal with problems of value and social activity. In addition to succumbing to the superstition of false necessity, a commitment to rights also leads us to mistake legal reform for the social change that we desire.

1) Rights give us a language to speak in that is intelligible and common.

Although all three writers realise that the notion of "rights" is a "legal fiction", a "mere concept" or metaphor, they do not investigate the power of language to shape or direct our thought and attention. To a certain extent all language "reifies" our world and our experience of it. We tell stories of the world, contained in words and concepts to "make sense" of the otherwise incomprehensible mass of phenomena. We create abstracted, organised visions in order to "get on with life", to avoid the "insanity" that comes from the inability to make distinctions and therefore, construct a meaningful world. (As Mary Douglas has said, our world is really a structure of meaningful distinctions.[57]) Stories or concepts are also creative in the sense that they enable us to "know". Duncan Kennedy points out in "The Structure of Blackstone's Commentaries" that these classifications or stories "make it possible to know much more than we could if we had to reinvent our own abstractions in each generation. They are therefore priceless acquisitions." Yet he asserts, "on the other hand all such schemes are lies. They cabin and distort our immediate experience and they do so systematically rather than randomly."[58]

Granted, these authors recognise that rights are a concept, a metaphor. They break from the "received tradition" concerning truth and reality that "does not attend to metaphor as a form of thought and to us as metaphor making animals."[59] By choosing rights as our metaphor, as our language in which to value and protect, we are participating in the creation of a reality. However, "metaphor not only reveals, but also restricts or conceals."[60] Rights may be a common

[56]R.M. Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (New York: Cambridge University Press, 1987) [hereinafter *False Necessity*].

[57]"Environment at Risk" in J. Benthall, ed., *Ecology: The Shaping Enquiry* (London: Longman, 1972) quoted in *Natural Alien*, *supra*, note 1 at 139.

[58]In A.C. Hutchinson, ed., *Critical Legal Studies* (Totowa, N.J.: Rowman and Littlefield, 1988) 142.

[59]E. Chase, "Sleeping Alone" (1986) 20 Ga. L. Rev. 781 at 782. Book review of *Lying Down Together*, *supra*, note 33.

[60]See generally White, *supra*, note 34 concerning the destruction of other meanings through particular uses of language and metaphor.

language that we all understand, but what kind of limited language must we then express ourselves in? Are rights the appropriate metaphor for our natural environment? Are we not anthropomorphising nature through the ascription of rights, as John Livingston so passionately argues,[61] to the exclusion of the unique qualities that nature may hold? Since we live in a varied world of experiences, is it appropriate to monopolise the earth with such a ruling metaphor? Since any one metaphor is never complete, as it hides and reveals, expresses and suppresses, should we not use other metaphors at the same time? As Ball suggests, "an adequate conceptual system requires alternate, even conflicting, metaphors for a single subject, and our daily living requires shifts of metaphors for fullness of thought and action."[62]

Our minds have been colonised by the metaphor of rights. Consequently, we forget that rights are metaphorical by nature and come to believe in them in a positivistic fashion. We start to think that we are interpreting something that already exists, that rights are objective and absolute. We also believe in the metaphor of the State and believe that it can create "rights". This is the condition that Alfred North Whitehead referred to as "the fallacy of misplaced concreteness",[63] whereby we mistake the concept of the thing for the thing itself, and begin to believe in its concrete existence. This dulls or destroys alternative conceptions. Other metaphors atrophy as our thinking is held and controlled by a dominant one.[64]

Individual rights are metaphors creating rights-holders who exist as empty vessels, as no-one(thing)-in-particular in relation to other right holders of the same type. To speak of "rights holders" is to erase other experiential realities. If nature is to be a rights-holder then it is not many other things: it is not beautiful, alive, mystical, breathtaking, frightening, part of us, etc. The language of rights comes at a high cost, for in accepting an exclusive metaphor we are precluded from invoking richer and more diverse images of the natural world. Minow's conception of rights as relation does not avoid this problem. Hers is a world of relation between empty objects. Rights metaphors suggest an "absence-of-being-quality", an "alienated role-performance"[65] that speaks only of possible action, not actual being. Rights are also passive; they speak only of

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[61]"Rightness or Rights?" (1984) 22 Osgoode Hall L.J. 309.

[62]*Supra*, note 33 at 22.

[63]*Science and the Modern World* (New York: The Free Press, 1967) quoted in *Natural Alien*, *supra*, note 1 at 54.

[64]For a perfect example of this, think of the recent decision in *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385, wherein to reach what was essentially a moral/ethical decision, the judges used the metaphor of "rights" to one's private property (the person) in order to justify striking down the abortion laws. Regardless of one's position on this issue, it is a strange and counter-intuitive metaphor to speak of bodies and wombs as private property in the legal sense.

[65]P. Gabel, "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves" (1984) 62 Texas L.R. 1563 at 1576 [hereinafter, Phenomenology].

action that may be allowed, not of what is. This metaphor creates an "I" that is a rightholder and an "It" or "you" that also holds rights. It does not create the "I and Thou" world of Martin Buber.[66] The "I" that is involved in the conversation with an "It" or "You" is different than the "I" that is involved in conversation with "Thou". The conversation in the former suggests a relation between atomistic individuals in conflict, the latter speaks of identification, communion and care.

2) Rights-talk lets us participate in the larger community, it joins us in a "conversation" about whose story of the world will win. It brings the vulnerable and the powerful together in a common forum.

The theory of re-invested rights claims that the language of rights allows us to participate in a larger community. But two things must be realised: it is the *legal* community we must participate in and it is with its limited language that we must speak. Legal language is specific, codified and counter intuitive to what most people would call common language. To speak of legal language as common language then, is a mistake, if not an abuse of what common means. Legal language (and legal reasoning) results in a repressive, limited "conversation". It decides what things can and ought to be spoken of in our thinking and our legal institutions, and in what manner, because it sees itself tied to particular histories (precedent) and texts (rules of law).[67]

The frustrating limits of being without one's *own* language is evident to all who have relied on foreigu languages in foreign lands. In courts of law the "legal word" is paramount; the rules of evidence and civil procedure, not to mention the unwritten code of etiquette, ensure this. If we are arguing for the preservation of wilderness that is in danger, we must speak in terms of imminent danger, foreseeability, likelihood of harm, trespass, etc. We cannot speak of beauty, emotion, or even simple "being" when we participate in a "conversation" with the courts about environmental protection.

Suggesting that rights-talk joins us to a community misses the point that the community to which it joins us is the *legal* community. All social or metaphysical ills get pushed into the framework of "legal problems". Within this framework, we must deal with a particular perception of what "law" is. Law deals with "right" and "wrong" conclusions to all conversations. One cannot have an ongoing conversation — at one point it ends, and a winner and loser are declared. Law presupposes a *correct* hermeneutic that is methodologically superior to that employed by those who "lose". If I am an environmentalist who

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[66]See Evernden's discussion of Buber in *Natural Alien*, *supra*, note 1 at 98.

[67]Minow, *et al.*, seem to be more in the vein of Dworkin and his conception of the "chain novel", where adjudication is a progressive, evolving interpretation of the text. See R. Dworkin, "Law as Interpretation" (1982) 60 Tex. L. Rev. 527 at 540.

pleads a case on behalf of a forest's rights, I must be prepared for the court to tell me that I am *wrong* in my interpretation of what the forest's rights are.

Laws are really representations of "normative worlds". As Robert Cover points out in "Nomos and Narrative", we inhabit a normative universe and the normative worlds within it are kept together by the force of interpretive commitments.[68] But if I, as an environmentalist, am *not* committed to the normative world of the court and legitimate legal language, in what kind of conversation will I be able to participate? If law's terms of reference are so drastically different, if its groundwork of rationality is completely at odds with my normative commitment, what *meaning* will my words have? We can imagine an environmental case, where environmentalists are arguing for the preservation of a natural habitat and a lumber company is arguing for the maximization of profits. Neither is really right or wrong: using their own frames of reference, their own normative worlds, only one conclusion makes sense to each. It is the original commitment that differs.

Legal language demands that particular commitments be accepted as given. These commitments limit our language, and therefore, the results of our conversation. If we are speaking a language that uses "rights" as its dominant metaphor then we must speak of individual, right-bearing entities, the *balancing* of these rights, the utility of these rights, and the possibility of overriding these rights. In order to join in conversation with the legal community we must accept one major condition (at least): as Robert Cover has so astutely noted, legal conversations will always be concerned with "a matter of *unclear law*" rather than "a matter of *too much law.*"[69] *Unclear law* suggests that there is a *correct* meaning to be found. *Too much law* suggests that other interpretations of "rights" are equally valid, although they differ from the court's interpretation.[70]

If we speak the legal language of unclear law we are refusing to acknowledge the normative integrity of the communities that have generated their "own laws". We do live in a world of different normative communities (or "worlds of difference" in Minow's terms) and these communities will sometimes generate distinctive conclusions to normative problems. To allow the legal community to conclude the conversation *finally*, is to confuse its status as interpreter with its status as political dominator.[71] It is appropriate to quote *Brown* v. *Allen*,[72] where Justice Jackson pronounced, "we are not final because we are infallible, but we are infallible only because we are final."

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[68]"The Supreme Court, 1982 Term — Forward: Nomos and Narrative" (1983) 97 Harv. L.R. 4 at 30-33 [hereinafter "Nomos and Narrative"].

[69]*Ibid.* at 42.

[70]*Ibid.*

[71]*Ibid.* at 43.

[72]344 U.S. 443, 540 (1953).

By accepting that to use rights is to join in a conversation, we are joining in one conducted in a language that is not our own. We are alienated in the deepest sense by the language we are forced to speak.[73] With no experiential connection, we participate in "role-playing" or "false consciousness". The script is deficient for those who care about the earth. As Peter Gabel has noted,

> The characterization of "rights-bearing citizen" has the intended effect of erasing the concrete and *common* reality in which we act on desire and replacing it with a blank and disembodied reality comprised of what we might call "empty vessels" who act only insofar as they have been filled with "rights". It is this empty vessel quality of the "rights-bearing-citizen" that represents "in law" the anonymous, absence-of-being quality of the alienated role-performance.[74]

The final criticism of the notion of rights as a language which allows us to join in the larger community is the observation that all social interaction ("conversation", "intersubjective action") must occur through the exercise of rights. We would enter into this conversation because we are "allowed" to by the legal community. But what of extra-legal conversations such as those conducted by Greenpeace, Friends of the Earth, Sierra Club and other environmental advocacy groups that rely on a non-legal language of intrinsic value as a basis for their advocacy? Must we be legally defined identities in order to speak or in order to act? Must the environment have rights in order to be seen and heard? There is a world beyond that recognised by the legal community. Yet admitting it endangers the legitimacy of the legal community as it is presently constituted. As a result, this community tries to co-opt activists through the seduction of rights.

The following scenario, which uses an example suggested by Peter Gabel in regard to other social movements, illustrates this process of co-option.

Suppose the environmental movement has been trying to obtain rights, asking the state to recognise some of its particular demands. In order to gain legitimacy, it must place itself within the legal conversation and begin to see the environment through the eyes of the legal community, the source of the legal identity of the environment. The involvement in the legal conversation requires environmental advocates to at least implicitly recognise the legitimacy of the legal enterprise.

The environmental movement is seduced by the possibility of gaining "rights". It begins to concentrate on this as an end, forgetting that this is not the ultimate objective, but only a means to an end.

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[73]Phenomenology, *supra*, note 65 and P. Gabel "Reification in Legal Reasoning" (1980) 3 Res. L. Soc. 25.

[74]Phenomenology, *ibid.* at 1576.

The environment obtains legal rights. The movement's greater ambition to be a transformative force is lost because it is "too radical, too soon". The legal community can only deal with so much at once; legal language is not capable of expressing all things and "courts are not to be legislators!". Goals are postponed "until an unrealisable future, when these ambitions will be allowed".[75] The movement takes its place beside all the other actors or participants in the legal conversation about the balancing of rights. (The balancing is done to maintain the existing order, it should be noted.) In conclusion, the legal community has succeeded in tempting the movement to "substitute rights-*consciousness* for its own critical self-understanding."[76]

3) The entrenchment of rights is an expression of value and also makes us value each right-holder.

This position illustrates the mistake of viewing legal change as social change and *limits* social change to legal change. As Robert Samek suggests, in "Untrenching Fundamental Rights"[77], "No legal entrenchment of fundamental rights can entrench them in a society which does not practice what it preaches."[78] We believe in the constructive quality of the legal text far too often when we advocate rights. No entrenchment of any value, rule or right, can occur in a society that does not practice those values, rules or rights. "A society with an innate sense of human rights does not need to embody them in law."[79] Similarly, in a society that innately values the earth, no law would be needed in order to make us value our environment. The means (rights) are being mistaken for the ends (valuing the earth). Rights are the chosen means of the legal community; they are not to be ends in themselves. Rights will not liberate the environment or force us to value it more — what they do is "allow for" the environment to engage in flawed legal institutions, the arena in which other rights-holders must battle. This is *not true valuing*. It is only a recognition that the environment can be made as empty and abstract a legal entity as we are. (A formal equality is achieved, but it does not recognise the concrete *Being* of the earth.)

Any particular act of valuing depends upon a larger scheme, in which teleological goals are recognised and embraced by the community which does the valuing. To make moral commitments or decide on questions of value without any guidance from a cohesive framework, provided for by a recognition of essentialness or by a teleology, would be impossible. When we decide upon

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[75]*Ibid.* at 1594.

[76]*Ibid.* at 1596. This criticism of "joining in the conversation" that is presented here is *in addition* to the prohibitive cost of litigation, standing problems, harm thresholds, rules of evidence, causation, etc.

[77](1982) 27 McGill L.J. 755 at 762 [hereinafter "Rights"].

[78]*Ibid.* at 755.

[79]*Ibid.* at 761.

questions of value we rely on our cultural and social commitments and frameworks, however tacit they may be. These frameworks, *not* the act of ascribing rights, make us value an entity. The ascription of rights without the requisite commitment by the community results in mere hollow words. Even if we were to say that rights were an expression of value, the question "What is the nature of this value, what kind of valuing are we engaging in?" must still be asked. Do we value the environment because we respect "being" or do we value it in another sense?

A scheme of environmental rights emphasises *things* over relationships. Only isolated entities can have rights; relationships cannot. To ascribe rights to the environment is to engage in a project of dividing up nature, rather than respecting its ecological wholeness. Legal rights are a limited method of valuing; as such the "value" that they create is deficient.

As R.A. MacDonald suggests[80], the entrenchment of rights is "the triumph of legalism par excellence, and since legalism is the professional ideology of lawyers, it is the triumph of lawyer's values."[81] Instead of an emphasis on value, there is an emphasis on technique and professionalism. The granting of rights to the environment may in fact "devalue" it.

A shift to "rights" suggests that we are only capable of perceiving our own particular interests — we assume that as a community we are incapable of perceiving the *common* good. By ascribing rights to the environment, as an isolated entity, we leave our concern for the earth with the advocate in charge of representing the "environment's interest."[82] Having "generously" bestowed rights upon the environment, we can pursue our own autonomous interests without regard for the intrinsic value of the environment and our relation to it.

4) Rights and their legal adjudication, as defined by the "interpretive" approach, allow for the synthesis of immanence and transcendence. By incorporating the interpretive commitments of the community into the meaning of rights and reinvesting rights with new meaning (including a sense of immanence represented by the title of right-holder), we avoid static, instrumental schemes of social organisation. The interpretation of rights as community norms allows for an evolving process of interaction and change.

The metaphor that Stone, Tribe and Minow embrace in supporting the above position is that of "law-as-medium". Neo-rights advocates embrace this

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[80]"Postscript and Prelude — The Jurisprudence of the Charter: Eight Theses" (1982) 4 Sup. Ct L. Rev. 321.

[81]*Ibid.* at 341.

[82]Indeed, in *Sierra Club* v. *Morton* 405 US 727, 752 (1971) [hereinafter *Sierra Club*] Douglas J. suggests that "environmental issues should be tendered by the inanimate object itself".

metaphor in the hope of eliciting a paradigm shift or a transformation of legal thought. This conceptual switch has been summed up as follows:

> Law as medium facilitates crossings over boundaries, change over stability, relatedness over separateness, humility over pretentiousness, love over fear, life over death. "If it is a sufficient aim for philosophy to keep a conversation going...then it may be a sufficient aim for law", as a "medium for responsible human intercourse to keep conversation, negotiation, argument, dialogue and conflict going."[83]

J.B. White elaborates on the "law-as-medium", interpretive theory by stating that,

> Poetry and philosophy and history and moral essays and fiction and politics and law... are all species of the more general activity that is our true subject: the double activity of claiming meaning for experience and of establishing relations with others in language... our subject is rhetoric.[84]

It may be true that law is rhetoric; that it is argument and conversation involved in the activity of "claiming meaning for experience" and also that it functions as a medium through which relations take place. But what must be remembered is that law, through legal adjudication, does not reach agreement by discussion and conversation. Ultimately it reaches a conclusion through the threat of violence.

Using a sufficiently high level of abstraction, we can include everything in the category of interpretation.[85] But constitutional interpretation is different from the interpretation of literary or philosophical texts. As Robert Cover points out in "The Bonds of Constitutional Interpretation: Of the Word, the Deed and the Role",[86] "the practice of constitutional interpretation is so inextricably bound up with the real threat or practice of violent deeds" that it is essentially distinct.[87] Constitutional interpretation, the adjudication of rights, depends upon the threat of violence to end the conversation. As Kenneth Burke wrote, "constitutions are agnostic instruments. They involve an enemy, implicitly or explicitly."[88] Therefore, while one may argue or "converse" with the other, while a "culture of argument" and a community of interpretation may be present, violence is still an important dimension.

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[83]E. Chase, Book Review (1986) 20 Ga. L. Rev. 781. Quoting M.S. Ball's book, *supra*, note 33 at 785.

[84]*Supra*, note 34 at x-xi.

[85]A whole bogus field of semiotics, as well as a neo-Marxist position of 'everything-is-nothing-but-politics', has been founded on the acceptance of such a high level of abstraction.

[86](1986) 20 Ga. L. Rev. 815 [hereinafter "Constitutional Interpretation"].

[87]*Ibid.* at 817.

[88]K. Burke, *A Grammar of Motives* (New York: Prentice Hall, 1945) at 357 quoted in Constitutional Interpretation, *ibid.* at 816.

If we work with the same metaphors (rights) and agree as a community, or agree to disagree, law and legal adjudication is not needed. But, "while argument may be said to take place within a community, violence frequently marks the failure of community and the metaphors that evoke it."[89] In our investigation of rights ascription to new entities, including the environment, there has been a major emphasis on law as language; on the social, constitutive and conventional workings of language. Rights are conceived of as metaphors within a community language that we use to establish relations with others and by which we claim meaning for experience. But it is necessary to emphasise the role of violence within legal discourse and the destroyed understanding that legal violence represents.

Positive law, and its illiberal hermeneutic signal, the failure of community, not the shared experience of common aspirations. Samek states that, "the cult of morality and law flourishes in times of immorality and crime. Far from indicating a people's virtue, they cloak its absence."[90] By focusing on the text or legal concepts such as rights, and the judicial interpretation of these, the "interpretive" position suggested by Stone and Tribe and articulated by Minow, tends to ignore the fate of the litigating parties; the fact that there will always be a silenced "loser". The "meaning" that is created in such a forum "justifies the judge to herself and to others with respect to her role in the acts of violence."[91]

Violence here does not mean just physical violence, but also the violence done to dissenting normative conceptions or pictures of the world. This "interpretive violence" (which must always be connected to the violent deed, for interpretations *are* acted upon where there is power) is so implicit in our constitutional law that we take it for granted. The "infliction of pain" or the violence done to other "non-legal" interpretations, destroys the "loser's" normative world. Cover states, "the logic of that world [legal forum] is complete domination, though the objective may never be realised."[92]

If the environment is given "rights" and advocates argne on behalf of the "earth", the "earth" may be defeated. Once this happens, the "bonds that constitute the community in which the values are grounded" come to an end.[93] No better example of this may be found in law than in *Sierra Club*,[94] where in a famous dissent Justice Douglas argued for "standing" for the environment.

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[89]*Ibid.* at 817.

[90]"Rights", *supra*, note 77 at 761. Along the same line of argument, Livingston argues that moral, ethical and legal systems may be seen to be a substitution or a "prothesis", in place of abandoned biological ways of peaceful group existence. See *supra*, note 61.

[91]"Word", *supra*, note 26 at 1608.

[92]*Ibid.* at 1603.

[93]*Ibid.*

[94]*Supra*, note 82.

Quoting from Aldo Leopold's *A Sand County Almanac*[95], he said that "[t]he land ethic simply enlarges the boundaries of the community to include soils, waters, plants and animals, or collectively the land". Douglas J. recognised both a natural community and a human community and wished to give the former a "voice" in the legal conversation:

> The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal agency. It merely means that before these priceless bits of Americana (such as a valley, alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.[96]

After granting the "environment" a "voice" however, Douglas J. quickly pointed out that

> Perhaps [these voices] will not win. Perhaps the bulldozers of "progress" will plow under all the aesthetic wonders of this beautiful land. That is not the present question. The sole question is, who has the standing to be heard?[97]

Clearly then, we can see that granting the environment a "voice" in the "conversation" of rights adjudication, will not provide us with any necessary scheme of "value" through which to afford protection. Such a scheme lacks any telos telling us that it would be "wrong" to let the "bulldozers of "progress" destroy the natural environment. The ascription of rights to the environment does not protect it from this kind of violence. (In fact, legal adjudication serves to legitimate such violence.)

Legal interpretation through adjudication is "world-destroying", not world creating, as Minow would envision the legal conversation. It is true that there is a "conversation"; that by virtue of giving the environment rights we force others to participate in a legal forum. But what kind of conversation is this? Cover refers to the analogy of torturer and victim, "the torturer and the victim do end up creating their own terrible 'world', but this world derives its meaning from being imposed upon the ashes of another."[98] We may not refuse to accept the torturer/judge's view unless we are prepared to be a martyr — to experience violence and pain. As Cover observed, "[m]artyrs insist in the face of overwhelming force that if there is to be continuing life, it will not be on the terms of the tyrant's law."[99]

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[95](New York: Oxford University Press, 1966).
[96]*Sierra Club*, *supra*, note 82 at 750.
[97]*Ibid.*
[98]"Word", *supra*, note 26 at 1603.
[99]*Ibid.* at 1604.

Since legal norms or commitments are indicative of an imagined future world, martyrs and dissenters require that any future world they "possess will be on the terms of the law to which they are committed."[100]

IV Rightness or Rights

Must environmentalists turn themselves into martyrs in order to express their care for the earth? As Cover notes, "judges of the state are jurispathic ... they kill the diverse [normative] traditions that compete with the state."[101] For this reason constitutional law is "more fundamentally connected to ... war than it is to ... poetry."[102] Rather than speaking a language of community, as argued for by Minow, Tribe and Stone, the notion of rights creates individual entities without community. Rights, as metaphors for relationships, reify and objectify by virtue of their conceptual nature and destroy communication and interrelatedness by virtue of their accompanying adjudicative process. If, as Roberto Unger states, community begins with sympathy,[103] rights inhibit the possibility of community because they destroy sympathies — there is only the recognition of the "other", (and recognition does not necessarily include sympathy, yet sympathy necessarily includes recognition).

Succinctly stated, rights exist within a legal institution which is an association of separate selves and jurisdictional roles, *not* an ecology of experience. A system of rights is part of the larger framework of an institution designed for effective domination. If it were the case, as Minow suggests, (and Stone and Tribe also, to a certain degree), that law is a medium, that the adjudication of law is an interpretive act, then we would not need formal, entrenched laws, backed by force and coercion. Since Minow's sense of interpretation entails a diversity of normative worlds, and therefore, presupposes community-wide commitment to the principle of tolerance, the need to coerce deviants to conform would be at a minimum.

Minow does recognise Cover's warning regarding the violence of rights adjudication and counters that even though judges practise violence through adjudication, if they did *not* adjudicate they would also be practising a form of violence in certain circumstances by not preventing certain actions. What she misses though, is that we are not limited to the choices contained within the framework of rights adjudication, where there is a necessary choice between recoguising one claim of rights over the other.

Minow, Stone and Tribe do not recognise that there is a powerful claim to be made in speaking of *rightness* rather than *rights*. Minow suggests that Martin

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[100]*Ibid.*

[101]"Constitutional Interpretation", *supra*, note 86 at 819.

[102]*Ibid.* at 817.

[103]*Knowledge and Politics* (New York: Free Press, 1975).

Luther King Jr. invoked symbols of the U.S. constitution and rights to help the cause of the American Black. Rights, she claims, represent ideals that can be claimed by the excluded themselves.[104] Minow makes a crucial error here: King was *not* speaking of rights but rather of *rightness*. His distinction was between "just and unjust" laws; in other words he suggested that rights are ultimately a question of rightness. Rights-talk is just a pale shadow compared to the force of *rightness*.

In his "Letter from the Birmingham Jail", King distinguished between just and unjust laws by suggesting that a law is unjust if it leads to segregation.

> Segregation, to use the terminology of the Jewish philosopher Martin Buber, substitutes an "I-It" relationship for an "I-Thou" relationship and ends up relegating persons to the status of things.[105]

King's dissatisfaction with positive law divorced from moral principles lead him to opt for rightness (the moral entitlement), over rights (the legal entitlement).

King realised that law could be a stumbling block because of its devotion to order (the adjudication and balancing of rights) instead of justice (the concern for rightness).

> The Negro's great stumbling block in his stride to freedom, is not the White Citizen's Councillor or the Ku Klux Klan, but the white moderate, who is more devoted to "order" than to justice; who prefers a negative peace which is the absence of tension [the elimination of *too much law* in Cover's words] to a positive peace which is the presence of justice; who constantly says, "I agree with you in the goal you seek, but I cannot agree with your methods of direct action."[106]

Although King did encourage people to follow the Supreme Court decision in 1954 outlawing segregation in public schools, he was *not* trading on the language of rights, but on the power of rightness. Rights are only powerful if they contain the necessary rightness. As he noted, "We should never forget that everything Adolf Hitler did in Germany was 'legal' and everything the Hungarian freedom fighters did in Hungary was 'illegal'.[107] Rightness precedes rights if they are to be valuable and capable of giving value. That which qualifies for rightness has to include the "I-Thou" relationship and avoid that which leads to segregation. Paul Tillich has said that sin is separation. "Is not separation an existential expression of man's tragic separation, his awful estrangement, his terrible sinfulness?"[108]

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[104]"Interpreting Rights", *supra*, note 25 at 1904.

[105] In A. Eastman, ed., *The Norton Reader*, 4th ed. (New York: Norton, 1977) 809 at 814.

[106]*Ibid.* at 815.

[107]*Ibid.*

[108]*Ibid.* at 814. "Sinful" is interpreted here, metaphorically, suggesting an absence of rightness, an absence of relation.

John Livingston argues against rights for the environment, favouring rightness instead:

> As such, the choice is clear: either we must acknowledge the intrinsic "rightness" of non-human existence and sensibilities and express that acknowledgement in *human* behaviour ... or, complete the "humanization" of the planet by making all living things unwitting participants in a prosthetic moral hierarchy.[109]

Rightness involves a proper *relationship* as illustrated by King's account of our attitude toward fellow persons, and Livingston's account of our stance toward the natural world. The "I-Thou" approach of rightness focuses on relationship, not things or objects.

We need to investigate how it is that we think about our "selves", our community and our earth to begin a discusssion concerning new notions of relation. We usually regard the "self" as the basic building block of all of our conceptual endeavors. In law we speak of individuals. In our social world we use the term "I", that autonomous human being or single consciousness that is in opposition to all that is "other". However, Evernden has noted, we are left with a very restricted definition of self if we "fall into the trap of mistaking the skin-encapsulated object for the process of relationships that constitutes the creature in question."[110] Evernden is suggesting that we should regard "ourselves less as objects then as sets of relationships."[111]

Our relationship with the world is valuable, therefore legal rights, which shatter this relationship, predicated on violence and separation, are to be avoided. Relation is concerned with rightness instead of rights, because in a system of rights the violence of rights adjudication necessarily splits up the world. Rightness also implies an ideal state of being to which one can aspire. A system of rights, on the other hand, relies only on its internal rules and logic (at least implicitly) and is devoid of any explicit ideal state of being or affairs beyond its emphasis on procedural justice. Rights are a negation of metaphysical concerns; they are the ultimate reductive process.

Reductivism, arguably, is responsible for our lack of understanding of the interrelatedness of ourselves and the natural world. Therefore, by suggesting that we accord legal rights to nature we are only "throwing more grease on the fire". John Rodman notes this ironic behaviour,

> [I]t is curious how little appreciation there has been of the limitations of the moral/legal stage of consciousness. If an existing system of moral and legal coercion does not suffice, our tendency is to assume that the solution lies in more of the same, in "greatly extending the laws and rules which already are beginning to govern our treatment of nature" .... It is worth asking whether the ceaseless strug-

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[109]*Supra*, note 61 at 321.
[110]*Natural Alien*, *supra*, note 1 at 13.
[111]*Ibid.* at 40.

> gle to extend morality and legality may by now be more a part of our problem than its solution.[112]

Our search then, should not be for "more of the same" in the guise of environmental rights and environmental "legal" reform, rather we should consider developing an ecological consciousness. We do not need to embrace rights in order to find a satisfactory metaphysic concerning the environment.

There must be a conceptual shift, a comprehensive metaphysical overhaul. This is not impossible; certainly the Enlightenment involved a perceptual shift which portrayed "man as a brave naked will surrounded by an easily comprehended empirical world."[113] It is not that we necessarily *are* these naked, rational wills — it is that we perceive ourselves to be so. Deprived of a social language in which to describe ourselves otherwise, we are convinced (at least in public life) that we must be rational, autonomous and self-interested. Iris Murdoch attributes this state of affairs to the problem of the "philosophy of mind".

> Given our philosophy of the mind [conception of self], some values are, as far as modern ethics is concerned, no longer capable of expression; the moral experience of ordinary people cannot be illuminated by a vocabulary used in the ways available to modern philosophy.[114]

Similarly, we can speak of our legal framework as being inadequate in regard to the expression of our possible experiences in the natural world. The vocabulary of our attempted reform movements will have to include the possibility of expressing such experience; no longer can reform, and the subsequent laws it creates, be premised on such a limited philosophy of mind and self.

Murdoch ends on a positive note, by suggesting that it is only our particular philosophical language (in our case, legal language) that is impoverished. She suggests that a richer language that expresses human experience is available; it is "perfectly happily *there* for everyone else, including the philosopher when he [is] not doing philosophy."[115] For those concerned about our "environmental problems" (which are really problems concerning the human mind and its philosophical picture), we can only hope that we can escape from the impoverished language of rights and contribute to a language of environmental protection that is "ecologically conscious". Whether we can invest our consciousnesses with such values is the challenge that we face, not whether we can "*re*invest" the concept of rights.

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[112]"The Liberation of Nature?" (1977) 220 Inquiry 83 at 96.

[113]I. Murdoch, "Against Dryness: A Polemical Sketch" in S. Hauerwas & A. MacIntyre, eds, *Revisions: Changing Perspectives in Moral Philosophy* (Notre Dame: University of Notre Dame Press, 1983) 43 at 46.

[114]I. Murdoch, "The Idea of Perfection" in I. Murdoch, ed., *The Sovereignty of Good* (London: Routledge and Keegan Paul, 1970) 42.

[115]C. Diamond, "Losing Your Concepts" (1988) 98 Ethics at 263, describing Murdoch's position.

V Deep Ecology: Re-forming the Roots

The teleological and ontological impoverishment of legislative approaches to our world crisis underlines the important role which a fundamental reconsideration of being and value must play in any attempt to realise significant world reform. The enactment of legislation creating *rights* for the natural environment can at best do very little, and even then at a very high cost. One has to consider the institutional backdrop against which such rights are created, in order to gauge the efficacy of a rights regime. Only after we have uncovered and analyzed the larger world view upon which such rights are created, will we be in a position to evaluate the soundness of environmental rights.

According to Paul Emond a development oriented world-view is the source of legal attempts at environmental protection. As Emond states, environmental protection laws are premised on the "[assumption] that society has the *right* to develop, exploit and control the environment, subject only to the *restrictions* and *regulations* that are imposed on the most unacceptable activity."[116] If, as Emond suggests, the telos behind legislative attempts at environmental protection is one whose primary concern is still material prosperity, the ability of environmental rights to protect our battered planet will be severely hampered.

One of the most disheartening turn of events in regard to the growth and development of the modern environmental movement has been the extent to which its adherents have remained faithful to technocratic approaches (such as environmental rights) to our world crisis. These so-called "shallow ecologists", who make up the bulk of the environmental movement, are not so much concerned with changing the ends which we as a culture pursue, as with changing the environmentally insensitive means by which we intend to attain those ends. Given their basically uncritical acceptance of our existing institutional framework and its accompanying values, such mainstream environmentalists primarily focus on technological solutions rather than on defining and addressing the underlying problem. Conventional mainstream environmentalists then, do not necessarily have a problem with gratuitous consumption in and of itself (witness their "enlightened" vision of "sustainable development"). Instead they are only concerned about production and consumption when a fairly immediate damage to human health is a byproduct. As Arne Naess, a leading critic of the superficiality of mainstream environmentalism, has cynically noted, the "[f]ight against pollution and resource depletion['s] [c]entral objective [is] the health and affluence of people in the developed countries."[117]

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[116]Emond, *supra*, note 51 at 343.

[117] "The Shallow and the Deep, Long-Range Ecology Movement, A Summary" (1973) 16 Inquiry 95 [hereinafter "Shallow and the Deep"] quoted in H. Goldstein, "The Limits of Politics:

By virtue of their failure to address the teleological dimensions of our environmental crisis, mainstream environmentalists remain implicitly supportive of the status quo. Instead of becoming involved in a "process of ever-deeper questioning of ourselves, the assumptions of the dominant world-view in our culture, and the meaning and truth of our reality",[118] shallow environmentalists prefer to labour in their laboratories and legislatures in the hope they will discover a new miracle cure. But miracle cures are impossible when it is precisely this kind of belief in fantastic techniques that produces the disease. What is needed is not a new potion or elixir that would merely mask the symptoms of our ailment, but a therapy designed to deal with the *causes* of our imminent demise. Deep ecology[119] grew out of a desire to deal with the roots of our environmental crisis rather than with its rotting fruit. In 1972 the Norwegian analytic philosopher, Arne Naess, presented a paper at the Third World Future Research Conference, in Bucharest, entitled "The Shallow and the Deep, Long-Range Ecological Movement".[120] The presentation of this paper marked the birth of the "Deep Ecology" movement. Essentially deep ecology is a response to technocratic instrumental environmentalism, or, as Naess refers to it, "shallow ecology".[121] Unlike shallow ecology, which emphasizes reformist tinkering within existing institutions and modes of thought — a new piece of legislation here, or a new technological innovation there — deep ecology stresses a fundamental reconsideration of the relationship between ourselves and the world.

Central to the deep ecological approach to the world is "the idea that we can make no firm ontological divide in the field of existence: that there is no bifurcation in reality between the human and non-human realms."[122] The deep ecology movement rejects "the man-in-environment image in favour of the relational, total-field image."[123] The thinking here is that beings in relation *are* a total whole. This ontological account is in sharp contrast to the presuppositions that most of us currently hold about our relation to the world. We live with the belief that we are clearly individuated creatures who are *in* nature. It is this ontological narrative that is responsible for the person/nature split that drives much of our instrumental approach to nature.

A Deep Ecological Critique of Roberto Unger" (1989) 34 McGill L.J. 160 at 168 [hereinafter "Limits"].

[118]W. Devall & G. Sessions, *Deep Ecology: Living as if Nature Mattered* (Salt Lake City: Gibb-Smith, 1985) 8 [hereinafter *Nature Mattered*] quoted in "Limits", *ibid.*

[119]*Ibid.* at 167 provides an introductory bibliography of Deep Ecology.

[120]The summary of the paper was later published as "Shallow and the Deep", *supra*, note 117.

[121]For a useful chart illustrating in point form the different assumptions of shallow and deep ecology, see Naess "Identification as a Source of Deep Ecological Attitudes" in M. Tobias, ed., *Deep Ecology* (San Diego: Avant Books, 1985) 256 at 257.

[122]Warwick Fox quoted in *Nature Mattered*, *supra*, note 118 at 66.

[123]"Shallow and the Deep", *supra*, note 117 at 95.

Naess refers to what he calls the process of identification in order to make his point that we do not see ourselves as *ending* at our outer epidermal layer. Identification is defined as "a spontaneous, non-relational, but not irrational, process through which the interest or interests of another being are reacted to as our own interest or interests."[124] As William James wrote, "... our children, the work of our hands, may be as dear to us as our bodies are...".[125] Naess asks us to consider the possibilities inherent in a deepening of our identifications, coupled with an extension of those identifications to beings and places which cannot openly reciprocate. This seems to echo Buber's contention that I-Thou relations could be extended to nature as well.[126] The ultimate goal of this revisionary psycho-ontology is for us to stop seeing nature as some kind of "other" with whom we must learn to co-exist, and instead come to see gophers, trees and rivers as extensions of "us", worthy of the same kind of care that we unreservedly bestow upon ourselves. In addition to its alternative account of ontology, deep ecology is also defined by its commitment to "biospherical egalitarianism — in principle". Since, according to Naess, "each of us has the capacity to identify with all living things",[127] and thereby to experience value-full being(s), it follows that the Kantian principle of respect for persons ought to be extended to all living things. For deep ecology then, all life, not just human life, should be respected and treated as an end, and not merely as a means. The movement's expanded maxim holds that one must respect that with which one identifies, and recognise that it is right for it (or is that "us") to live. We are also encouraged to constantly strive to increase and deepen our identifications with other forms of life.

Deep ecology's critics, like many neo-rights advocates, often make the mistake of confusing rightness and rights and pounce on what they believe is an ascription of a right to life to the non-human world. George Bradford, for one, nastily employs a straw-man argument when he writes that deep ecologists "tak[e] pains to defend every form of life from whales down to even the extinct or near-extinct small pox virus,...[while] human beings are banished from creation for their depredations."[128] The argument here is essentially that since deep ecology asserts the rightness of the continued existence of all forms of life, human beings and their needs are placed below those of the rest of nature. It is here, however, where the qualification which attached itself to Naess' formulation ("biospherical egalitarianism — *in principle*") comes into play. With this

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[124]Naess, *supra*, note 121 at 261.

[125]William James quoted in Naess, *ibid.* at 259.

[126]M. Buber, *I and Thou*, 2d ed., trans. R.G. Smith (New York: Scribner, 1958) at 56-57, 67.

[127]Naess, "Intrinsic Value: Will the Defenders of Nature Please Rise" in P. Reid & D. Rothenberg, eds, *Wisdom in the Open Air: Selections from Norwegian Eco-Philosophy* (Oslo, source unknown, 1986) 116.

[128]G. Bradford, "How Deep is Deep Ecology" (1987) 22 Fifth Estate 3 at 8.

principle it is clear that Naess is not positing some form of misanthropic dystopia; he is only trying to increase our sensitivity to other forms of life.

Deep ecologists like Naess have made it abundantly clear that human beings ought to pursue their own interests, even at the expense of the interests of other forms of life, when *vital* human needs are at stake. What deep ecologists wish to argue is that "a vital need of the non-human being "A" overrides a peripheral interest of the human being "B".[129] Implicit in this formulation, however, is the belief that a vital human interest takes precedence over a vital non-human interest. Critics like Bradford, who incorrectly attribute to deep ecology a position which relegates human needs to the bottom of the priority list, miss this key distinction. The question is not "can a human interest take precedence over a non-human interest?", but rather "when are our needs so vital and irreconcilable with those of nature, that we can justify interference with the needs of other forms of life?"[130]

Hostile critics employ a strong legal sense of the word "right" to show that such a notion of environmental rightness would spell the end of human life, if strictly followed. William Devall, a deep ecologist himself, acknowledges that the misinterpretation of the term *right* has caused the movement some problems. As he suggests, "Many deep ecologists recognise the inadequacies of the term "rights", but employ the concept, nevertheless, in an attempt to convey the meaning of ecocentrism."[131] Devall recognises that human beings must "kill some beings in order to live". Thus, he prefers the notion of "inherent worth" to that of "rights".[132]

Deep ecology, when it speaks of the rights of all living things, is not envisioning a courtroom full of advocates litigating on behalf of beavers, trees, and other mistreated forms of life. Neither is it attempting to formulate an ethic(s) which would allow us to ascertain in each "hard-case" conflict whose interest (between the human and non-human) is more vital. Instead, deep ecology offers us an alternative picture of ontology, one which emphasizes the constitutive role which other beings have for our being. This, coupled with the principle of biospherical egalitarianism, forms a different kind of environmental philosophy unlike the "vapid environmentalism" alluded to earlier. Deep ecology does not look to technological or legal innovation as the antidote to environmental degradation. Its focus is not outward, but inward, in the belief that only by changing ourselves (and our notion of "us"), can we hope to change the world.

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[129]A. Naess, "A Defence of the Deep Ecology Movement" (1984) 6 Environmental Ethics 265 at 267.

[130]*Ibid.*

[131] "Deep Ecology and Its Critics" (1988) 5 The Trumpeter 57.

[132]*Ibid.* at 57-58.

As a result of its non-solipsistic relational ontology, deep ecology challenges the develop-and-consume telos of our age. If a separation between ourselves and the world is ontologically indefensible, we must profoundly reconsider the ends, and not just the means, which we wish to pursue. Hence, the impact that such a revised ontology as deep ecology can have on our teleology is immense. Only after we have carefully considered and revised our accounts of who we are (ontology) and what end it is that we are trying to attain (teleology), will we be in a position to reconsider the instrumental tactics and methods (like law and technology) needed to realise those ends. Deep ecology's strength is that it emphasizes that a metaphysical reconsideration of our world crisis must precede instrumental strategizing; in fact, it has been our propensity to privilege instrumental thought at the expense of metaphysics that has so greatly contributed to our problem.

Once we have reconsidered ourselves as part of the world, and re-evaluated our mutual needs, we can begin considering the most appropriate means for satisfying those needs. There is much which we can do[133] to increase our responsiveness to the world, but that which we do must be done in the right spirit.

A lifestyle informed by the spirit of deep ecology is not concerned for the world in a self-interested way. Instead it places primary importance on the manifestation of genuine care for the planet. Furthermore, it eschews shallow environmentalism and its stop-gap measures which, in the course of its reformist policies, attempts to salvage as much of our current consumeristic lifestyle as possible.

This difference in lifestyle can best be understood by use of an illustration. Shallow environmentalists and neo-rights advocates point to the growing number of so-called environmentally sensitive products to show that increased public awareness, coupled with legal instrumentalism, is helping to solve our environmental crises. But this does not impress the deep ecologist, for the deep ecologist realises that bio-degradable packaging only begs the question of why we need so much packaging (or why we need some of these products) in the first place.[134] The deep ecologist is baffled by our preference for state-of-the-art

[133]For a brief list of principles and actions which flow from a commitment to deep ecology, see A. Naess, "Deep Ecology and Life Style" in *Paradox*, *supra*, note 5 at 57.

[134]The recent phenomena of "environmentally friendly" products produced by large corporations has been skeptically received by many environmentalists. In "No Deals" *The Globe and Mail Report on Business* (October 1989) 77, Greenpeace executive director Michael Manolson commented on the misguided attention given to such so-called "green" products: "The environmental crisis is such that we cannot wait for just market forces to make some of the corrections." He sees the attention given to green products as merely distracting the public from the more pressing cause of industrial pollution — manufacturing. Manolson's focus on the large picture captures the essence of the deep ecological approach.

plastics when a simpler, more traditional solution has always been available, namely the wicker basket.

Simple in means, rich in ends is one of the organising mottos for applied deep ecology.[135] The notion of simplicity is primarily meant to denote an aversion to attempts through high technology to limit environmental destruction and a preference for a reduction in personal, and thereby cultural, consumption. Richness of ends, on the other hand, captures the primacy for deep ecology of revising our teleology to foster increased care for the world. This profound concern for living things (be they human or not), sharply distinguishes it from more reformist variants of environmentalism and results in a more radical approach to practical problems.

The practical implications of the radical nature of deep ecology are not what many might think. A deeper narrative of being does not necessarily result in bomb throwing, or even for that matter tree spiking (remember that etymologically, "radical" derives from "the root", not from terrorism, as many of us have been led to believe). What does flow practically from deep ecology is a sensitivity and commitment to actions which are, in and of themselves, respectful of the integrity and interconnectedness of all living things. Such actions can be surprisingly simple. One can, for example, make an effort to shun disposable items where more lasting alternatives are available. Furthermore, efforts can be made to avoid dealing with multi-nationals and large corporations whose institutional raison d'être, by definition, is to increase production and consumption. This commitment to reducing unnecessary consumption is an important principle of action for deep ecology and helps give sense to the concept of living "light" in nature.[136] This "light" approach is not meant to be entirely prohibitive in scope: it has positive attributes as well. The less consumptive good ("good" meant here in the moral sense) is often not just better for nature but for the person as well, as it leads to qualitatively better human experience.

By acting locally, with an acute sensitivity to how even the tiniest of human actions affects the world, deep ecological followers hope to have global impact. This being the case, time spent in the garden growing one's own food as an alternative to supporting multi-national or large corporations is preferred to lobbying them to remove carcinogenic additives from their prepared food products. This is not to belittle those who do such lobbying, but only to emphasise the centrality for deep ecology of local actions which bring people into closer contact with nature and thus increases their appreciation of a mutually dependant relationship with the world.

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[135]See W. Devall, *Simple in Means, Rich in Ends* (Salt Lake City: Peregrine Smith).

[136]Naess, *supra*, note 133 at 59.

Deep ecology does not lend itself to blueprints for action, instead it invites us to reconsider ourselves and the world and how the two are inter-related, and then to act in a manner faithful to those personal insights. This may result in starting an organic garden, or it may lead to heavily insulating one's home, shunning factory farmed products or participating in grassroots political protest and action; no party line has to be followed. What is shared, however, is a metaphysic which sees all of life, not just persons, as having import and a goal of creating a world in which that life can flourish. In addition, more pragmatically, deep ecologists also share an aversion to legislative or technological panaceas. Since they see the roots of the "environmental problem" as running very deep, they are averse to any attempt to merely doctor the visible blight. Significant activism for the ecologist requires actions that not only temporarily maximize environmental utility, but that also contribute to changing our cultural consciousness and the forms of life (or lifestyles) we practise. This is what marks the difference between deep and shallow ecology; where the former wishes, in its consideration of environmentally sound notions, to change the ways in which we see and feel about the world, the latter merely wishes to maintain an already crumbling industrial/metaphysical fort.

Deep ecology's critique of shallow ecological incrementalism is centered upon the insight that superficial institutional reform cannot re-form the world. Environmental rights legislation might buy technocrats some time, or win politicians an election, but it cannot sufficiently change our consciousness. As a result a new approach to re-forming our world is needed. Deep ecology claims to be that approach, an approach to world re-form that begins at our metaphysical roots.

VI Writing Wrong: New Stories For New Worlds

Law Reform or World Re-form, which shall it be? The question will undoubtedly strike most, particularly those not completely content with the status quo, as being non-sensical. "Surely", the conventional law reformer will respond, "we need not choose between the two; in changing the law we change the world, thus no clear distinction can, or should, be made between these types of reform".

That law reform has traditionally been the response of jurists who are dissatisfied with a given legal regime or social situation needs no substantiation. Trained as members of an elite institution, judges, lawyers and law professors see the world from a "legal point of view".[137] As such, jurists are in no position to evaluate competing teleological pictures of the world. Their training tells

[137]This phrase is an allusion to Robert Samek's distinction between the legal point of view and the moral point of view. See R.A. Samek, *Legal Point of View* (New York: Philosophical Library, 1974) 315.

them that this would amount to participation in the realm of politics. Instead, jurists' training prescribes and equips them for their role as functionaries working *with* the given teleological/institutional picture of the day. That history and teleology are, to borrow a colloquialism from Roberto Unger, "up for grabs",[138] can never occur to them as long as they inhabit their legal frameworks. As Noel Lyon suggests:

> Lawyers are not trained to think in terms of the rational allocation of resources through selected strategies designed to achieve optimum results in terms of defined objectives. We are trained to follow precedent and established procedures whatever the results.[139] ... [A lawyer's] concern is with "law" and "legal" matters. They do not take positions on fundamental value questions. They do not speculate. They apply expertise in an objective area of decision where logic applied to settled doctrine produces legal answers.[140]

Although Lyon's overly scientistic reduction of normative debate to "resource allocation" is somewhat unpalatable, his intentions were nonetheless worthy. Lyon's concern was that the legally trained mind might be a major impediment to genuine law reform; that is, law reform whose end is social change, rather than a mere restructuring of the legal institution. As Lyon saw it, "If we are serious about reform, the first step is to re-educate ourselves in order to escape the orthodoxies of existing legal thinking and technique."[141] Lyon's suspicion was that legal thinking was responsible for at least some of our social ills.

To the extent to which law can be seen to be part of our cultural problem, law reform (as in the mere reforming of the existing legal institution) cannot be considered an adequate response. One jurist to whom the limitation of conventional law reform was painfully clear was Robert Samek. Associated with the early Law Reform Commission of Canada, Samek developed his own philosophy of law reform,[142] central to which was a distinction between "legal" and "social" law reform.

Samek saw traditional law reform, which he termed "legal" law reform, as a "housecleaning" enterprise, primarily designed to produce new improved law to replace its outdated counterparts. Since "legal change cannot guarantee social

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[138]*False Necessity*, *supra*, note 56 at 1.

[139] "Law Reform Needs Reform", (1974) 12 Osgoode Hall L.J. 421.

[140]*Ibid.* at 430.

[141]*Ibid.* at 434.

[142]R.A. Samek's earliest and most important works in this regard are Law Reform Commission of Canada, *The Objects and Limits of Law Reform* (Hull, Que.: Supply and Services, 1975) [unpublished] and Law Reform Commission of Canada, *A Philosophy of Law Reform* (Hull, Que.: Supply and Services, 1976) [unpublished] [hereinafter *Philosophy*]. For a general overview of Samek's writings on law reform, see R.F. Devlin, "Twisting the Tourniquet Around the Pulse of Conventional Legal Wisdom: Jurisprudence and Law Reform in the Work of Robert A. Samek" (1987) 11 Dalhousie L.J. 157.

change",[143] emphasis should be placed on the desired social end being sought, rather than on the means by which that end would be attained (i.e. law). Samek referred to this propensity of ours to be overly concerned with means at the expense of ends as "the meta-phenomenon".[144]

Our obsession with law as *the* means for social change was foolhardy, in Samek's opinion. Unlike its legalistic counterpart, "social" law reform begins with a deep-felt dissatisfaction with a social practice (an end), not with an inadequate law. The object of "social" law reform is to bring about changes in that practice in "the most *appropriate* manner".[145] So, whereas "legal" law reform is primarily directed towards legislative change, "social" law reform is directed towards *practical* (as relating to "practice") change.

The varying degrees of skepticism which early associates of the Law Reform Commission of Canada (like Lyon and Samek) had for law's potential to change the world in a deep way, provide an interesting backdrop for an evaluation of the neo-rights movement as a reform movement. Activists like Minow, Stone and Tribe would undoubtedly like to see their proposals for reinvested rights as reforming the world. The question, however, is, just what is being reformed here — the world or law?[146]

Advocates of re-invested rights like to point to the facilitating function of rights-talk which, they argue, allows for increased community dialogue. Whether this is the case is debatable. What is certain, however, is that if any conversation is enhanced by the concept of rights it is legal conversation. Neo-rights activism, then, necessarily entails a strengthening of law's role in changing social practices. That law professors like Minow, Stone and Tribe select their activist tools from the heart of our legal tradition is indicative of their total comfort with conventional approaches to reform (i.e. "legal" law reform).

In attempting to right wrong, neo-rights advocates hope to reform law so as to make it more sensitive to the needs of the world.[147] The thinking here is that by developing law, so that it is the product of an enriched conversation between selves in community, an institution will be created which is responsive

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[143]R.A. Samek, "A Case For Social Law Reform" (1977) 55 Can. Bar Rev. 409 at 410 [hereinafter "Social Law"].

[144]Samek, *The Meta-phenomenon*, (New York: Philosophical Library, 1981).

[145]*Philosophy, supra*, note 142 at 3.

[146]We realise of course that synthetic responses are also available. One could argue that changes in law change the world. Nevertheless our purpose in this paper is to show that legal change, from the "legal point of view" is severely limited. As such there is some question as to law's suitability as the primary vehicle for social change. As well, even if we agree that law changes the world, is this how we would like our world to be changed, given that such changes will be reflective of the "legal mind", which is restricted to its own limited concepts.

[147]"Interpreting Rights", *supra*, note 25. Though in Minow's case, however, the needs she wants law to respond to might be more anthropocentric in nature, motivated by humanism.

to the needs of all living things (be they infants or gophers). Such an ambitious and optimistic programme for law reform presupposes the normative neutrality of law's facilitating function.

At its best, the proponents of neo-rights see law as a neutral medium which facilitates normative/political conversations. Unfortunately that medium is not as devoid of content as they might like to believe; the legal medium packs its own powerful message. For example, when Minow defends legal discourse because it creates a shared world within the courtroom[148] she seems to be over estimating the quality of the world which is created. Certainly Minow is correct in stating that without "judicial power...some conversations...would never take place."[149] The question is, however, whether these judicially initiated conversations are conversations worth having. By attempting to re-invest *legal* rights-talk, reformists such as Minow reform the law and make it more palatable.[150] In so doing, "legal" law reformists overlook the profound shortcomings of the legal method as a means of radical social change.

It was precisely these shortcomings which led Samek to draw his distinction between types of law reform. The restricted potential of "legal" law reform to enact fundamental social change was obvious. As Samek observed:

> So far from being a universal solvent of social conflict, it (the legal method) tends to cause and exacerbate friction. Being adversarial in nature, it divides people instead of bringing them together, and what is worse, it divides them over the wrong issues, and appeals to the wrong motives ... [Legal issues] [b]y their very nature ... demand black and white solutions which sharpen natural differences to the breaking point.[151]

This darker and more veritable account of legal method significantly dampens the plausibility of a re-invested rights project. If "legal" law reform presupposes "the fundamental soundness of our social system"[152], its ability to change the world will be severely circumscribed. As such, law reformers like Minow, Stone and Tribe have to reconsider the extent to which re-invested legal rights might have world impact. Environmental rights might at best save a forest here or a river there, but in enriching and legitimating the very institution which

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[148]*Ibid.* at 1906.

[149]*Ibid.*

[150]It is important to note that Minow seems to be ultimately concerned with *legal* rights. Unfortunately she has a tendency to want to collapse a moral sense of a right or entitlement, with the legal notion of *rights*. She asserts that "people speak spontaneously of rights, far from legal institutions" (*ibid.* at 1887) in defence of her concept of re-investing legal rights. This move, an attempt to justify legal rights discourse by an appeal to our ethical discourse practices, is quite suspect. That we do contemplate the good, is not necessarily indicative of our desire to adjudicate our competing pictures of it in a win/lose forum. Collapsing the distinction between our moral sense of the good and legal rights only confuses the matter.

[151]"Social Law", *supra*, note 143 at 426.

[152]Philosophy, *supra*, note 142 at 7.

contributes to the reification of trees and water as "property", they may be harming the world more than healing it.

Is there nothing then which we can do? Must we be resigned to accept the world as is and utter the modern credo that there is "nothing to be done?" In responding to these questions Samek's other sense of law reform is of interest. "Social" law reform provides us with a constructive focus for our activist energies. Having come to realise the inadequacy of legal attempts to deal with our ailing environment, we must look elsewhere for world change. Deep ecology offers an approach to world re-form which is consistent with Samek's notion of "social" law reform. Whereas shallow ecological activism is content with treating symptoms of an "environmental crisis", deep ecology wishes to consider the cultural roots of a world problem. By virtue of the scope and depth of its inquiry, deep ecology displays a genuine commitment to social/world change.

Recognising that the violence we heap upon each other and the natural world is the result of a deficient account of ontology, and the values which flow from it, deep ecologists have no faith in superficial institutional adjustments. No environmental bill of rights, which attempts to bestow value *upon* nature rather than recognising the value *within* nature, will do. Only a new account of being, and the increased sense of value which accompanies it, can change and thereby save the world. Attempts to rectify or heal our world situation through the use of legal rights are met with great suspicion by deep ecologists. How can law right the wrong, when law is premised on the very ontological narrative (replete with its stock of binary oppositions: self/other, man/nature, tame/wild, civilized/primitive) which so greatly contributes to our ecological ailment? For deep ecologists then, law cannot right wrong. However, through a process of ontological/normative reflection we, as a culture, may be able to write a deeper story of being and thereby re-*write* the wrong.

As awareness of the state of our dying world increases there is a tendency to assume that a solution is close at hand. With most everyone now concerned *about* the environment it is only a matter of time, we feel, until the necessary corrections are made. But the kind of legislative changes and technical innovations in which we put our faith will not help. Only a comprehensive examination and re-writing of our stories of being and value will repair our cultural trend towards domination and destruction.

The ever-deeper questioning of ourselves and our cultural assumptions proposed by deep ecology provide us with a possible avenue for world change. By focusing on the cultural roots of our increasingly disastrous situation, in the spirit of Samek's notion of "social" law reform, deep ecology aims to achieve more than just a temporary band-aid solution. In urging us to extend and deepen our identifications with the world, deep ecology hopes to re-form or re-shape our culture, by examining the consciousness of the subjects who make up that

culture. If righting, in the "legal" law reformer's sense, involves the institutional imposition of value from without, writing, in the deep ecologist's/social law reformer's sense, involves a personal realisation of value from within, through a rewritten story of being and value. So, whereas rights attempt to change the world mechanically from the outside in, "writing" changes the world organically from the inside out.

By deepening our identification with the world, we come to see the inherent worth of nature, rather than its *rights*. As a result of this deepening identification, nature is no longer the "other" whom we benevolently wish to protect through the bestowal of rights. Instead nature is part of "us" (defined as "self-in-the world") and is worthy of our care. As a result we cease caring *about* the environment and begin to care *for* it. It is this subtle change in being and relation which law and "legal" law reform cannot address,[153] because of their instrumental nature. The changes required for world change can only be brought about by a re-writing of our metaphysic.

In choosing our strategies for world re-form, we must be careful not to be duped by the meta-phenomenon.[154] If law and "legal" law reform have a role to play in world re-form, it is a limited and transitional one. We must always bear this in mind, and remember that our real work lies elsewhere. By attributing to law too much potential for world re-form and change, we miss the forest for the trees and face the real danger of losing both, the trees and the forests, eternally.

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[153]The inappropriateness of "legal" law reform as a means of deep change is by no means restricted to our environmental crisis. Affirmative action, for example, provides us with another instance of our over-confidence in law's ability to change the world. In theory affirmative action legislation, which compels employers to hire a specified group, is intended to increase our respect for that group and thus enhance the quality of our relation with them. But the very act of legislative specification serves to differentiate and isolate that group; to make them into "others". If what we really desire when we enact affirmative action legislation, is to reverse the history of prejudice suffered by women, immigrants, the handicapped etc., we must ask ourselves if law/law reform is capable of aiding us in such a project. Genuine integration — that is, community life based on care and respect for all — is more than an empirical state of affairs; it is a practice. To think that a legislative edict, backed by coercive force, could successfully compel us to *care*, is ludicrous. Practices can only be changed, if at all, by a reconsideration of the narratives of being and value which produce them. As such, as odd as it might seem, a new narrative of being might actually be a more *practical* step towards eliminating discrimination than a new law.

[154]"Meta-phenomenon", *supra*, note 144.