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Response to Reverend William Schweiker

BY HEATHER ELLIOTT⁺

The textbook that I use to teach environmental law contains a chapter on what is known as the Public Trust doctrine.¹ In order to better describe this doctrine the authors give the following example. Imagine that a research scientist, who sets out to find the oldest living thing on Earth, concludes that the Bristle Cone Pine tree is the most likely candidate. Unfortunately, his mission pre-dates modern microscopic coring tools, so to determine the tree's age—and with the permission of the government official in charge of the forest—he cuts the tree down and counts its rings in the cross section. He finds that when he killed it, it was 4,990 years old. In fact, this is not just a hypothetical; there was indeed such an event in the 1930s. The example concludes by asking: “Did you feel something move in the pit of your stomach from the death of, what they call, the Methuselah tree?”² My students invariably reply that they experience that feeling in the pit of their stomachs, just as I also do. This is likely the result of a shared intuitive sense that the Methuselah tree was worthy because it was *there*—because it survived for that long. We are all left with the unmistakable impression that we should choose not to hurt it precisely because we are able to so choose.

The Public Trust doctrine is one of the few legal doctrines that gives us a hook on which to hang action and conformity with these intuitions, but it is famously nebulous to the extent that cases involving virtually the same facts come out in opposite ways.³ The intuition that we should save the Methuselah tree because it is there, and because we can, stops well short of allowing for accurate predictions of a consistent course of action. It is in drawing out the meaning of this intuition that I find Professor Schweiker's analysis valuable. Certainly, he takes an important step by reconciling the anthropocentric and ecocentric approaches to environmental problems. In doing so he attempts to bridge a divide that has produced a number of fruitless disputes over the recent decades; indeed, arguments over how to reconcile our existence as both biological entities and moral agents has brought about the death of a notable number

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¹ ROBERT H. ABRAMS ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 1065-66 (3d ed. 2004).

² *Id.* at 1066.

³ Compare *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) (ruling that the bodies of water at issue, which all involved parties agreed was so shallow as to render them non-navigable, fell within the scope of the public trust doctrine by virtue of the fact that they were indirectly subject to the influence of the tides), with *United States v. Oregon*, 295 U.S. 1 (1935) (finding an area of water that is rarely more than four feet deep, choked with mud and vegetation, bound by ice for three to four months of the year, and almost entirely dry during the summer to be non-navigable and therefore not within the scope of the public trust doctrine).

of trees. But more importantly, he has started to define a means of giving moral heft to our intuitions regarding ecological problems.

As Professor Schweiker explains, ecological rationality dictates that we should not, and indeed cannot, separate ourselves from the ecology that supports us because to do so misunderstands the nature of the problem that confronts us.⁴ Such ecological rationality is a necessary step in supporting what we intuitively know to be true: human beings are not the only living things that deserve consideration in our moral calculus. However, he notes, rationality such as this may weaken our ability to stake moral claims upon ourselves. For Professor Schweiker, this means that a necessary element of any ecological ethic is a cogent analysis of who can take moral action. The logic of agential reasoning gives us the tool to perform that analysis—to decide who can be held responsible for environmental harms. But who can enforce that liability when many environmental harms are so broad in scope and so protracted in time that we are almost unable to comprehend them? In the Global Age, if we cannot obtain this kind of accountability—which becomes particularly important when considering the question of God’s judgment in the next world—how can we make agents responsible for environmental harms? Professor Schweiker’s answer is that we must combine the ecological and agential rationalities into a theory that accounts for the complex responsiveness of ecological systems without overlooking the ability of agents to make choices within those systems.⁵

This is a valuable contribution to a literature of environmental ethics that tends to fall victim to a totalizing instinct: either humans are the only concern or ecology is. Each approach fails to provide a workable ethic. By emphasizing that both the ecological and the agential rationalities are subsets of the larger inquiry and that one not need choose between the two—indeed, one *cannot* choose between the two—Professor Schweiker moves us beyond a frustrating impasse. As he said, “complexity goes all the way down.”⁶ However, as a lawyer, I am interested in the applied aspect of this ethic, and in that sense I am not sure how much further along we are than when we started, particularly if our purpose is creating an ethic that will foster choices addressing ecological harm. I am certain that we have a more nuanced account of why nonhuman entities deserve moral consideration: Not simply because they are there, but because of the reflexive rationality that consideration of our planetary system demands. I am also certain that we have a more nuanced explanation for how accountability can be ascribed to nonhuman actors, although as a lawyer I am used to having courts assign such responsibility without much theoretical grounding. But I see great things ahead as we begin to try to answer the next questions: How do these principles combine to produce moral directives in particular situations?; How does this theory start to resolve the endless competing arguments that environmental problems raise? That being said, I am forced to acknowledge that, just as the Public

⁴ Reverend William Schweiker, *Global Problems, Global Responsibilities: Accepting and Assigning Liabilities for Environmental Harms*, ante, pp. 348-49.

⁵ *Id.* at 347.

⁶ *Id.* at 346.

Trust doctrine shows great promise but remains a challenging tool to use due to its uncertainty, I find *myself* uncertain of where we go from here.

Perhaps my ultimate question is: "How would this ethic rule on the Methuselah tree, and if there were other such trees, does it matter that this one was cut down?" If no, what of our intuition that it was wrong regardless? Is it the frivolity of cutting it down just to see how old it is? The scientist who cuts the tree down and the government official who approved the cutting are clearly moral agents. Does it matter if the scientist works for Exxon or for the University of California? Does it matter if the official's government is democratic or totalitarian? Why even care about the Methuselah tree? As Professor Schweiker has argued, life *qua* life is not the moral goal, but the integrity of life more generally.⁷ Yet still there is that feeling, that intuition, in the pit of our stomachs, or at least in the pit of *my* stomach, that the Methuselah tree *is*, and because it has survived, we should protect it if we can. If an ecological ethic cannot vindicate that intuition, perhaps it is not the ethic we need.

⁷ *Id.* at 358.

