More Than Human Rights

An Ecology of Law, Thought and Narrative for Earthly Flourishing

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The Rights of Nature: Philosophical Challenges and Pragmatic Opportunities

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In this chapter I focus on conceptual challenges involved in creating an actionable rights-of-nature (RoN) framework that can meaningfully contribute to protecting both humans and the nonhuman world. I begin with an origin story, in which some of these challenges are implicit. I then sketch what I take to be three sources of the current interest in RoN, highlighting some of the opportunities and obstacles they bring to the fore. This chapter asks more questions than provides answers, though I end by gesturing in the direction of a path forward.

Origin stories about rights can be told from the perspectives of different cultures and traditions. I focus on the ancient Greek philosophical tradition and the way that it developed in Western

(especially Anglophone) law and philosophy. In telling this story, I take liberties with nuance and interpretation.

There is no single word in classical Greek that translates as the English word *rights*. Yet it is obvious that the ancient Greeks believed in rights in the sense that individuals had legal protections and prerogatives that were protected by law (e.g., rights to property and citizenship).[1] However, reflecting on and theorizing about these protections and prerogatives was relatively rare.

Stoic philosophy, according to many commentators, is an important source for contemporary ideas of rights through its influence on the development of Christianity and on subsequent Enlightenment thinkers.[2] As Pierre Hadot, the distinguished French classicist, wrote, "It is too often forgotten, and cannot be repeated too much, that Stoicism is the origin of the modern notion of 'human right.'"[3] According to the Stoic-inspired account, rights are founded in a universal human nature by virtue of which we are fellow citizens in a universal cosmopolis. Our universal nature consists in reason, which humans share with the gods but not with other animals. Stoic term for *reason* (*logos*), as it was the used around

1 Miles F. Burnyeat, "Did the Ancient Greeks Have the Concept of Human Rights?," *Polis* 13, no. 1–2 (January 1994): 1–11.

2 Alejandra Mancilla reminds me that the Spanish scholastics (especially the Salamanca school) and early modern natural law theorists such as Grotius and Pufendorf were important way stations between the Stoics and the Enlightenment. For a discussion, see Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law 1150–1625* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 1997).

3 Pierre Hadot, *The Inner Citadel: The Meditations of Marcus Aurelius*, trans. Michael Chase (Cambridge, MA: Harvard University Press, 1998), 311. For an influential recent treatment, see Philip Mitsis, "The Stoic Origin of Natural Rights," *Philosophical Inquiry* 28, nos. 1–2 (Winter/Spring 2006): 159–78; for a somewhat contrary view, see Richard Bett, "Did the Stoics Invent Human Rights?," in *Virtue and Happiness: Essays in Honour of Julia Annas*, ed. Rachana Kamtekar (New York: Oxford University Press, 2012), 149–69.

300 BCE by Zeno, was already associated with language.[4] Stoicism was an important source for the view, dominant in the West, that rights, thought, and language are bound together in an unbreakable package, characteristic of human beings and not found in the rest of nature.

There were dissonant voices in the ancient Greek philosophical world. In the third century CE, Porphyry argued against animal sacrifice and in favor of moral vegetarianism. His treatise, *On Abstinence from Killing Animals*, was reprinted as recently as 2014 and remains a valuable contribution to the literature. Although he himself was a Neo-Platonist, Porphyry argues within a broadly Stoic framework: we owe duties of justice to animals because they are rational beings like us. Centuries before, the fifth century BCE philosopher Empedocles had taught that it was unjust to kill animals for food or sacrifice, and that this was "the law for all."[5]

These accounts give ready answers to two important questions about rights: the Question of Ground and the Question of Identification. The Question of Ground asks in virtue of what an entity has rights. The Question of Identification asks which entities are bearers of rights. On the grounding question, both Porphyry and the Stoics agreed that reason is the ground of rights. On the identification question, Porphyry and Empedocles agreed that both humans and nonhumans are bearers of rights, while the Stoics held that only humans are rights-holders.

There are further questions about rights that did not seem to figure importantly in ancient Greek discussion. One is the Question of Scope: How extensive is a system of rights, and what exactly are the protections and prerogatives afforded by having a right? Another is the Question of Conflict: Can rights or rights-holders come into

4 Zeno is usually regarded as the founder of Stoicism.

5 As quoted in Burnyeat, "Ancient Greeks," 4. Empedocles wrote in verse and only a few fragments survive.

conflict and, if so, how are conflicts resolved? These questions may not have arisen because the ancient Greek discussion was centered specifically on animal sacrifice, with some concern about using animals for food. Other questions that are important to contemporary discussions that did not get much treatment in the ancient Greek tradition are the Question of Function—What exactly is a system of rights supposed to do?—and the Epistemological Question—How do we know which entities have rights? The latter question may not have received much attention from the Stoics or in much of the subsequent tradition because it was widely supposed that having language was the mark of reason and therefore the ground for having rights, and whether or not a creature used language was regarded as an obvious fact.[6]

Other topics of contemporary concern received only marginal attention or were ignored altogether in the ancient Greek philosophical tradition. While the fifth century BCE philosopher Protagoras held what we might think of as a conventionalist view of rights (that rights are socially constructed), such views were largely ignored in the wake of Plato's final dialogue, *The Laws* (written around 375 BCE), which focuses on natural rights. The idea that there could be a system of purely (or almost purely) conventional rights of the sort envisioned by Thomas Hobbes, David Hume, and Jeremy Bentham in the modern world does not seem to have been seriously considered in most of the ancient Greek and medieval traditions. Nor do the ancient Greeks seem to have considered an interest theory of rights of the sort defended by Bentham and John Stuart Mill, and in recent years by Joseph Raz and Michael Kramer.[7]

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6 For some complications, see Katarzyna Kleczkowska, "Those Who Cannot Speak: Animals as Others in Ancient Greek Thought," *Maska* 24 (2014): 97–108.

7 Interest theorists hold that rights are associated with what promotes the interests of rights-holders. See Joseph Raz, *The Morality of Freedom* (New

Porphyry's case for vegetarianism rests on the cognitive and intellectual abilities of animals, and he says very little about their interest in avoiding suffering.

These largely ignored topics in the ancient Greek philosophical tradition are closely related to the question of the function of rights. Early Greek ruminations on what can be regarded as rights, like most Greek reflection on ethical concepts, engage ideas of virtue, community, and human flourishing. By contrast, contemporary discussions of the functions of rights center on the interests or autonomy of individual rights-holders.[8] The contemporary deontological tradition, for example, typically thinks of rights as providing protection against laws, acts, or policies that would maximize the overall good at the expense of rights-holders. Classical utilitarians, such as Bentham and Mill, saw rights as contributing to the overall good. Some recent utilitarians, such as R.M. Hare and Peter Singer, have been skeptical about rights, since they have seen them generally as obstacles to maximizing the overall good.[9]

While controversies remain around these questions and others, there is no denying that powerful theories of rights have developed over the centuries and are now incarnate in a human rights movement of great breadth and power. How should we locate RoN in relation to this movement, and how can we contextualize it in the history that I have been narrating? In some ways RoN seem to extend

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York: Oxford University Press, 1986), and Kramer's contribution, "Rights without Trimmings," in *A Debate Over Rights*, eds. Matthew Kramer, Nigel Simmonds, and Hillel Steiner (New York: Oxford University Press, 1998), 7–112.

8 For further discussion (and a somewhat different perspective), see Fred D. Miller, Jr., *Nature, Justice, and Rights in Aristotle's Politics* (New York: Oxford University Press, 1995).

9 For a discussion of some of the issues, see R. G. Frey, ed., *Utility and Rights* (Minneapolis: University of Minnesota Press, 1984).

this project, but in other ways it seems to fly in the face of it.[10] One way of approaching this question is by examining the sources of the recent interest in RoN.

One source is baldly pragmatic. We are losing what we value in nature and risk losing ourselves in the process. Prevailing theories of rights are inadequate to end the carnage. We need to try something different.[11]

Consider an analogy: Suppose artworks are valuable and that, in addition, a world without artworks would not be conducive to human survival and flourishing. Suppose further that our prevailing system of law does not prevent the massive destruction of artworks. In such a world, someone might argue that we should adopt rights of artworks (RoA), in the hope that this would provide legal remedies that would help stem the destruction and thus also be conducive to human survival and flourishing. The rights granted to artworks could be like those granted to corporations (legal fictions), or they could be grounded in values that we hold dear and take to be true. The mantra of this view is "whatever works." This, I think, is the most powerful source for RoN, and one to which I will return.

A second source is extensionism.[12] On this view, whatever properties we take to ground rights are manifest in the more-than-human

10 For example, "new dignitarians," such as Jeremy Waldron (see Waldron, *Dignity, Rank and Rights* (New York: Oxford University Press, 2012)), think that human rights can only be protected by narrowing the domain of rights-holders, in effect circling the wagons around our own species. The extent to which this is an empirical or normative claim is not always easy to tell.

11 Pragmatism, as I am using the term, is consequentialist but need not be utilitarian. Ascribing rights to nature, it might be thought, may save us from the worst even if it does not achieve the best. For a similar claim about ascribing virtues and vices to agents, see Dale Jamieson, "When Utilitarians Should Be Virtue Theorists," *Utilitas* 19, no. 2 (June 2007): 160–83.

12 While *extensionism* is the usual term for the view that I am describing, it conflates an important distinction. In some cases, rights are extended (e.g.,

world. When, for example, forests or animals are destroyed, this is unjust for the same reasons that it is unjust to destroy humans. These views reject the Stoic view of how rights are grounded and their bearers identified.

Extensionism has been important in the animal protection movement. In 1975 Singer argued that any plausible criterion for moral standing would either exclude some humans or include many animals.[13] He identified sentience as the most plausible criterion and concluded that we should include many animals in our moral universe.[14] However, as noted earlier, Singer was hostile to the idea of rights. Will Kymlicka rightly observes that "it is a source of endless confusion that, for many people, their prime example of an 'animal rights' theorist is someone who explicitly rejects AR [animal rights]."[15] However, in 1983 Tom Regan mobilized similar considerations to mobilize a theory of animal rights, though he was primarily concerned with moral rather than legal rights.[16]

In a remarkable 1972 law review paper, Christopher Stone used an extensionist approach to argue for legal rights for natural

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corporations) and, in other cases, rights are finally recognized that existed all along (e.g., enslaved people). To some extent this distinction is bound up with the distinction between moral and legal rights. See Joel Feinberg, *Freedom and Fulfillment: Philosophical Essays* (Princeton: Princeton University Press, 1992), chapter 8.

13 Peter Singer, *Animal Liberation* (New York: New York Review of Books, 1975), published in a new, revised edition as Peter Singer, *Animal Liberation Now* (New York: Harper Perennial, 2023).

14 Many, not most, since bacteria are the most abundant animal and Singer does not consider them to be sentient.

15 Will Kymlicka, "Human Rights without Human Supremacism," *Canadian Journal of Philosophy* 48, no. 6 (December 2018): 782.

16 Tom Regan, *The Case for Animal Rights* (Berkeley: University of California Press, 1983). My main focus in this chapter is on legal rights, but I move between legal and moral rights when it seems illuminating to do so.

objects.[17] Appealing to the idea of an historically expanding circle of the recognition of rights, Stone writes, "I am quite seriously proposing that we give legal rights to forests, oceans, rivers and other so-called 'natural objects' in the environment—indeed, to the natural environment as a whole."[18] He argues against language as the answer to the epistemological question of how to identify which entities have rights and addressed the Question of Ground, but in an indirect and incomplete way. Stone asserts that calculations of damage to natural objects can be made independent of human interests in those objects and that this shows that natural objects have interests that can and should provide the ground for rights. In a long footnote, he addresses the Question of Identification, appealing to "what aboutism" and the possibility of changing perspectives. This optimistic conclusion obviously leaves a lot of work to be done.

> The problems of selecting an appropriate ontology are problems of all language—not merely of the language of legal concepts, but of ordinary language as well . . . In different legal systems at different times, there have been many shifts in the entity deemed "responsible" for harmful acts . . . I do not see why, in principle, the task of working out a legal ontology of natural objects (and "qualities," e.g., climatic warmth) should be any more unmanageable.[19]

In his 1986 book *Respect for Nature*, the philosopher Paul Taylor worked through some of the problems facing extensionism. Going further than Singer but stopping short of Stone, Taylor argues that

17 Christopher Stone, "Should Trees Have Standing?: Towards Legal Rights for Natural Objects," *Southern California Law Review* 45 (Spring 1972): 450–501.

18 Stone, "Should Trees Have Standing?," 456.

19 Stone, "Should Trees Have Standing?," 456, 457

we should adopt a "biocentric outlook" that involves seeing "oneself as a member of Earth's Community of Life."[20] From this perspective, all living things are of equal inherent value and "the attitude of respect . . . [is] the only suitable or morally fitting attitude to have towards the Earth's wild creatures."[21] This attitude of respect entails duties toward the Earth's "community of life," including individual plants as well as animals.

Taylor does not shrink from the inevitable conflicts; indeed, he specifically addresses cutting down a woodland to build a medical center, replacing a stretch of cactus desert with a suburban housing development, and plowing up a prairie to plant fields of wheat and corn.[22] He develops principles for resolving these conflicts that appeal to such notions as self-defense, proportionality, minimum harm, distributive justice, and restitutive justice. The resulting ethic is extremely demanding, perhaps even unlivable.

An expanded version of Stone's essay was published as a book in 1974, a year before Singer's *Animal Liberation*.[23] Reviewing both books together, John Rodman articulated a third source of the contemporary interest in RoN: the metaphysical critique.[24] Rodman begins by pointing out the way rights figure in our outrage about the destruction of nature. Our first thought when confronted by, say, a mine that destroys a forest is that "they have no right to do this,"

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20 Paul Taylor, *Respect for Nature* (Princeton: Princeton University Press, 1986), 44.

21 Taylor, *Respect for Nature*, 46.

22 Taylor, *Respect for Nature*, 256.

23 Christopher Stone, *Should Trees Have Standing?: Towards Legal Rights for Natural Objects* (Los Altos, CA: William Kaufmann, Inc., 1974).

24 John Rodman, "The Liberation of Nature," *Inquiry* 20, nos. 1–4 (1977): 83–131; Rodman's immediate sources for this critique are Darwin and Leopold.

rather than that the forest has rights that are being violated. Rodman writes that:

> I confess that I sometimes have a similar impression of the logical gymnastics of moral and legal philosophers, who sound as if they want to say something less moralistic, less reasonable, more expressive of their total sensibility, but are afraid of seeming subjective, sentimental, or something that's somehow not quite respectable. . . . it 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."[25]

He writes specifically about Stone that he fails:

> to confront the implicit tension between a rights model and an ecological model of nature, and [he fails] to see that his ultimate vision of the human/nature relationship is probably incompatible with a legal system that operates in terms of objects, interests, property rights, compensable damages, and National Forests.[26]

He concludes that "we may need to become less moralistic and less legalistic, or at least to become less fixated at the moral/legal stage of consciousness."[27]

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25 Rodman, "The Liberation of Nature," 84.

26 Rodman, "The Liberation of Nature," 86.

27 Rodman, "The Liberation of Nature," 103.

In its baldest form, the metaphysical critique can be thought of as saying that our prevailing system of rights rests on a worldview that misunderstands us and our place in nature. We see ourselves as individual atoms, distinct from nature, interacting with each other and the world through a billiard ball model of causation. What we learn from modern science and Indigenous worldviews is that we are necessarily relational beings. We are involved in dynamic systems and communities that our legal systems do not adequately reflect. Trying to protect the more-than-human world with traditional Anglo-American law is like trying to do brain surgery with a chisel. It is no wonder that we are failing. Craig Kauffman and Pamela Martin write that "law has not evolved to keep pace with scientific advancements. Today's legal system is based on a mechanistic view of the world that emerged during the scientific revolution of the sixteenth and seventeenth centuries, one that sees Nature as a machine composed of fragmented, independent parts."[28]

The metaphysical critique sweeps out the old, but it is far from clear what it brings in as the new.[29] At one extreme this critique seems to suggest transcending entirely what Rodman calls the "moral/legal stage of consciousness." If we follow Alexander von Humboldt and some Indigenous traditions in holding that the Earth is a single living system of which we are part, it is difficult to see how the concept of rights can have any traction.[30] Rights typically have

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28 Craig M. Kauffman and Pamela L. Martin, *The Politics of the Rights of Nature: Strategies for Building a More Sustainable Future* (Cambridge, MA: The MIT Press, 2021), 4. See also Fritjof Capra and Ugo Mattei, *The Ecology of Law: Towards a Legal System in Tune with Nature and Community* (Oakland, CA: Barrett-Koehler Publishers, Inc., 2015).

29 This point is powerfully made by Ramiro Ávila Santamaría in his contribution to this volume.

30 On Humboldt, see Andrea Wulf's contribution to this volume; for Indigenous views see the contributions of Craig Kauffman and Emily Jones to this volume. A view similar to these is expressed by William Faulkner's

addressees on whom they impose duties, but on this view the bearer of rights does not seem distinct from that to whom it owes duties.[31] Can nature be unjust to itself? It might seem that the separation between ourselves and nature that is required for duties of justice to obtain cannot plausibly be maintained when everything is one.[32]

Kaufman and Martin distinguish two approaches for structuring RoN laws that in some ways reflect what I am calling extensionism and the metaphysical critique: what they call the "Nature's Rights Model" (e.g., Bolivia, Ecuador, and the United States) and the "Legal Personhood Model" (e.g., Colombia, India, and New Zealand). But the metaphysical critique, as I have been describing it, threatens to overthrow the entire juridical perspective, which RoN in their very name seem to accept. Moreover the alterity of their metaphysical claims threatens to make the Question of Identification even more difficult to answer.

Consider, for example, the status of ecosystems, which are often highlighted as potential rights-holders in the RoN literature. The very notion of an ecosystem is an ill-defined concept that first explicitly appeared in 1935 in the work of the British botanist Sir Arthur Tansley.[33] Not until the 1940s did it begin to figure prominently in scientific thinking. An ecosystem, in the broadest sense,

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character, Isaac ("Ike") McCaslin in the fourth section of "The Bear," reprinted in Malcolm Cowley, ed., *The Portable Faulkner* (New York: Penguin, 2003).

31 For a discussion, visit James Nickel, "Human Rights," *The Stanford Encyclopedia of Philosophy* (Fall 2021 Edition), ed. Edward N. Zalta, https://plato.stanford.edu/entries/rights-human/#GeneIdeaHumaRigh.

32 Dale Jamieson, "Justice: The Heart of Environmentalism," in *Environmental Justice and Environmentalism: The Social Justice Challenge to the Environmental Movement*, eds. Ronald Sandler and Phaedra C. Pezzullo (Cambridge, MA: The MIT Press, 2007), 85–101.

33 Arthur Tansley, "The Use and Abuse of Vegetational Concepts and Terms," *Ecology* 16, no. 3 (July 1935): 284–307.

can be thought of as an assemblage of organisms together with its environment. Exactly which organisms and what elements of the environment count as elements of a particular ecosystem are matters of dispute. There is no consensus when it comes to precisely defining ecosystems or telling us where one stops and another begins. This may not be a problem for doing science, but it is a problem for identifying the bearers of rights.

Some would deny that ecosystems exist independently of the elements that constitute them. Such skeptics say that talking about an ecosystem is simply a way of conceptualizing a collection of individual organisms and features of their environment. On this view, ecosystems are like constellations, while organisms and features of their environment are like stars. Talking about ecosystems (like talking about constellations) is a way of talking about other things (e.g., stars). It may be useful to do so, but we should not think that the world responds to every useful turn of phrase by manufacturing an entity. It might be useful to talk about the average Australian, but do not expect to meet them and their 2.5 children. More problematic is how we can tell where one ecosystem begins and another ends. This problem arises on both temporal and spatial dimensions. Grasslands turn to shrubs and small trees, and then to forests. Presumably these are different ecosystems successively inhabiting the same space. What happens on the temporal borders of succession? Do we have a little of one and a little of another? When it comes to space, the problems become even more difficult. It makes sense to say that a little ecosystem has emerged on the north side of the large rock in my garden. But it also makes sense to say that my garden is an ecosystem, and so is the valley in which I live, and so on. All of this is immensely more difficult in the Anthropocene, when all ecosystems are rapidly becoming "novel" ecosystems. Even if they are not directly touched by bulldozers and chainsaws, they are profoundly affected by carbon emissions.

These remarks are not meant to cast shade on the metaphysical critique, with which I have a great deal of sympathy. The challenge is how to move from this critique to actionable RoN that will protect humans and nature. In particular, it is difficult to see how an alternative systems-oriented metaphysics can answer the Question of Identification in a principled way. The extensionist view is more promising in this respect, but questions about the scope of rights and how to resolve conflicts between them seem difficult to overcome.

In the end, I believe, we are thrown back on to pragmatism: we should pursue extensionism while trying to make the metaphysical critique actionable. Knowledge and empathy often grow together and, as we learn more about the natural world, our systems of protection often become more inclusive.[34] Entities whose ontological status would seem to disqualify them from legal protection are gaining advocates, legal standing, and even winning cases in some jurisdictions.[35] In addition, we should not overlook the dynamism and possibility of change within existing legal doctrines and structures.[36]

Consider, for example, climate change, which threatens catastrophe, but seems resistant to doctrinal legal remedies. In 2014 I argued that one reason for this is that climate change confounds traditional causal notions that are foundational to generally accepted notions of liability.[37] Now, nearly a decade later, the evidentiary gap

34 Dale Jamieson et al., *The Role of Agency, Sentience, and Cognition in the Protection of Aquatic Animals* (New York: Center for Environmental and Animal Protection, New York University, 2023), available at https://wp.nyu.edu/ceap/research/aquatic-animals-report-2023/.

35 See Agustín Grijalva's discussion of the Los Cedros case in this volume.

36 Douglas Kysar, "What Climate Change Can Do About Tort Law," *Environmental Law* 41, no. 1 (Winter 2011): 1–71.

37 Dale Jamieson, *Reason in a Dark Time: Why the Struggle to Stop Climate*

appears to be closing with the rise of "attribution science," an area of research that seeks to link climate change with specific extreme events.[38] This development has implications, not only for tort law but also for other areas of law, perhaps even criminal law.[39]

Doctrines can change, but so can concepts, and words can shift meanings while leaving doctrines intact. What appear to be sober causal claims are especially flexible and contextual, and open to multiple interpretations and descriptions, since they often express views about moral responsibility.[40] As Bernard Williams pointed out, "There is not, and there never could be . . . just one correct conception of responsibility. . . [W]e ourselves, in various circumstances, need different conceptions of it."[41] When faced with climate disaster, canonical notions of causation, which can seem glacial in their solidity and stolidity, may melt into air.

In this chapter I have tried to identify some philosophical challenges to RoN, as well as some pragmatic opportunities. RoN may be part of an extensionist project that will expand the domain of rights-holders, or part of an entire revisioning of the way that we

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Change Failed—and What It Means for Our Future (New York: Oxford University Press, 2014).

38 See Rupert F. Stuart-Smith et al., "Filling the Evidentiary Gap in Climate Litigation," *Nature Climate Change* 11 (June 2021): 651–55; see also John C. Dernbach and Patrick Parenteau, *Judicial Remedies for Climate Disruption: A Preliminary Analysis* (Washington, DC: Environmental Law Institute, 2023), https://www.eli.org/sites/default/files/files-pdf/Judicial%20Remedies%20for%20Climate%20Disruption_FINAL%20WORD_formatted.pdf.

39 David Arkush and Donal Braman, "Climate Homicide: Prosecuting Big Oil for Climate Deaths," *Harvard Environmental Law Review* 48, no. 1 (forthcoming 2024).

40 Christopher Hitchcock and Joshua Knobe, "Cause and Norm," *Journal of Philosophy* 106 (November 2009): 587–612.

41 Bernard Williams, *Shame and Necessity* (Berkeley: University of California Press, 1993), 5.

think about ourselves and nature. More modestly, RoN may inform and inflect existing legal doctrines in ways that provide greater protection for nature. These are early days, and there may be possibilities I have not envisioned. "Let a hundred flowers bloom!"[42]

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42 Thanks to the participants at the More-than-Human Rights Conference in Tarrytown, New York, in September 2022 (MOTH 22); Alejandra Mancilla and Christopher Shields for written comments on an earlier draft; and Douglas Kysar for helpful discussion. I have also benefited from comments by Patrik Baard whose work on this topic I have not been able to fully take on board.