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Carol M. Rose  
*Northwestern University School of Law*

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# ENVIRONMENTAL FAUST SUCCUMBS TO TEMPTATIONS OF ECONOMIC MEPHISTOPHELES, OR, VALUE BY ANY OTHER NAME IS PREFERENCE

Carol M. Rose\*

THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT. By *Mark Sagoff*. Cambridge: Cambridge University Press. 1988. Pp. x, 271. \$29.95.

In several of the chapters to his new book, Mark Sagoff begins by telling some story to frame the remainder. One of these is particularly significant for the book: Sagoff retells a *New Yorker* joke in which the Devil tells the new entrants to Hell that they are leaving right and wrong behind, and entering a world of mere preferences (p. 99). The Devil signifies for Sagoff the economics-oriented policy analyst, and the story is prophetic because by the end of the book, that old preference-counting Devil has caught up with Sagoff.

The word "environment" appeared in the titles of several of the earlier essays on which the book is based,<sup>1</sup> but the book has wisely subordinated that E-word to a subtitle; despite the frequent invocation of natural wonders and scenic areas, the book doesn't really focus on the environment until the last chapter. Nope, this book is about that other E-word, Economics, which is so favored by the Devil. More specifically, at least until that last chapter, the book is about how devilishly daffy economists are when they talk about the environment. Sagoff thinks their clever confusions are at best distracting and at worst antidemocratic (pp. 10, 95-97), and if we don't watch out, they are going to lead us off the ethical path and straight down the road to perdition.

Up to the book's end, only an occasional grudging concession<sup>2</sup> relieves the hellfire-and-brimstone economics-bashing. Consequently, dear Reader, you will be ill-prepared for that last chapter where, lo and behold!, it turns out that the true path to environmental paradise is through tradeable emission rights (pp. 209-10). What? What? Tradeable emission rights have been pushed for years by those diaboli-

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\* Professor, Northwestern University School of Law. B.A. 1962, Antioch College; M.A. (Political Science) 1963, University of Chicago; Ph.D. (History) 1969, Cornell University; J.D. 1977, University of Chicago. — Ed.

1. P. x (listing earlier history).
2. See, e.g., pp. 71-73.

cal economists;<sup>3</sup> so you may well put this book down with the thought that somebody has been hoodwinked into a pact with the Devil — or at least that, as with Faust, two souls struggle, ach, within the author's breast.

This book, like Sagoff's work generally, will quite rightly interest many people who are looking for fresh approaches to environmental issues. But at least some readers will be disconcerted or confused by the book's odd internal tension, and so I want to look at each side of the duality more carefully. I am going to focus first on the (anti-economic) soul of the book. Then I will turn to the other soul, and particularly to the implications of the last chapter's concessions to tradeable pollution rights. Finally, I will go back to the first and dominant soul, to try to locate the source of the author's general dyspepsia about economics, because I think his own book suggests some more charitable ways to think about the devilish dismal science in the environmental context.

### I. NUMBER ONE SOUL ATTEMPTS TO CAST OUT ECONOMIC DEVILS

Sagoff's book sets up a number of oppositions or contrasts that will be familiar to readers of his earlier articles. It is not hard to see that in these oppositions, Sagoff wants to preserve the high ground for his own "ethical" point of view. Here are the big ones:

Ethics vs. Economics (pp. 80, 92, 196)

[Public] Values vs. [Private] Preferences (pp. 9, 90)

Citizen vs. Consumer (pp. 7, 27, 53)

Deliberation vs. Dogmatism (pp. 12, 77)

Environmental issues, he says, have to do with the left-hand side — ethics, values, citizens, and deliberation — and not with economics, preferences, consumerism, or dogmatic pseudoscience. Now, can you guess which side wears the white robes, and which side has the horns and tail? If you don't get the message, you might try one of the author's narrative versions of the oppositions: for example, the contrast between a "majestic million-year-old wilderness" on the one hand, and "Disney playland[s]" and "commercial honky-tonk[s]" on the other.<sup>4</sup>

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3. For a recent discussion of the merits of such schemes, see Ackerman & Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1341-51, 1360-64 (1985), and authorities cited therein (particularly at 1337 n.11) (response to Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms*, 37 STAN. L. REV. 1267 (1985)).

4. Pp. 52, 59-60. Some, including my colleague Mark Grady, who professes to have visited the Magic Kingdom well over 200 times, may take offense at the implicit disparagement of Disney enterprises. I myself take offense at the totally misguided disparagement of honky-tonks. To the connoisseur, the honky-tonk represents a charming mix of pedal steel guitars, wailin' tunes, longneck beer bottles, and the Texas two-step, as in Hank Williams' classic lines, "If you got the money, Honey/ I got the Ti-i-me/ We'll go *honky-tonkin'* and we'll have a time." Moreover, the word draws out subtle arguments about gender roles, as in the controversy begun in Hank

So just how high is this high ground that Sagoff is appropriating for his left-hand side of the column? The best way to find out is to think through the oppositions.

### A. *Ethics vs. Economics*

After reading this book, I still don't quite know what this ethics stuff is for Sagoff, or why he plays ethics off against economics. In fact, Sagoff himself doesn't give the reader many clues about what he is calling "ethical" until well into the book, when he starts to tell us something about the "normative position" (p. 90). But it's still not so clear; here and elsewhere he gives Kant pretty big play,<sup>5</sup> and it seems that by "ethics" he means something like Kantian categorical imperatives, and that "ethics" have to do with actions that are right in themselves. Some of the time it sounds as if he doesn't include consequentialism in the category of ethical thinking at all,<sup>6</sup> but then again, he sometimes seems to approve of talk about the "good" as well as the "right" (pp. 94, 155-58). It's all a bit murky.

Either way — whether "ethics" is about the right thing to do, or about the good life — one might well ask: Why should either view be opposed to economics? If you take the economists at their word, they are quite happy to have you approach issues in either of those ways, or in some other way if you like. They don't care if you want to do the right thing, or alternatively, if you want to do the thing that will lead to good results. They just want to know what everybody thinks are the right things to do (or, if it's allowed, what everybody thinks are

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Thompson's *The Wild Side of Life* ("I didn't know God made honky-tonk angels/ I might have known you'd never make a wife") (Capital 1952), and responded to by Kitty Wells, *It Wasn't God Who Made Honky-tonk Angels* (Decca 1952) (my emphasis). My thanks to Ronnie Pugh of the Country Music Hall of Fame and Museum in Nashville for assistance on this point.

5. *E.g.*, pp. 44, 155-56.

6. For example, when Sagoff describes environmentalists as taking a "moral" position about the environment, p. 154, which apparently precludes consideration of welfare-enhancement, he has already contrasted his "moral" position to utilitarianism. P. 152. This would suggest that he does not think utilitarianism or consequentialism is "ethical" or "moral." The same view seems to be behind a rather odd argument he makes against the welfare economists' goal of efficiency. He argues that this position is not really consequentialist or utilitarian at all, since it considers expected utility rather than actual consequences. Pp. 104-07. He cites the case of poor Romeo's purchase of poison, and his mistaken expectation of relative happiness from the transaction, to show how actual consequences diverge from expected ones. P. 105. An economist, of course, might point out that Romeo's real problem was an insufficient market for information, but I will put that to one side. What is odd about the argument is that *any* consequentialist ethic is based on guesses about the future (*i.e.*, expected outcomes), and of course runs the risk of mistakes about actual outcomes. Indeed, Sagoff is repeating one of Kant's critiques of consequentialism generally — that human beings' will is not directed at appropriate consequences in advance, and that one does not know how one's supposedly utility-maximizing behavior will come out in fact. See I. KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS 27, 47-48 (T. Abbott trans. 1987) (people make mistakes about outcomes, can't know what will make them happy and thus can't act on definite principles to achieve that end). If one rejects efficiency because it is oriented to expected gains, one also rejects consequentialism generally — again suggesting that Sagoff rejects consequentialism as an ethical position.

good results). After they get an answer to those questions, economists want to take a further step, to try to get *the most* of whatever it is that people think is right (or good).<sup>7</sup>

So clean air is what you think is right, or good? Great, says the economist. Now, how good or right do you think it is? Do you think having electricity is right too (perhaps because it's right to have light, heat, and dialysis machines)? You do? That's great too. Now, electricity generation usually messes up some clean air, and this is where the economists think they can be helpful: They think they can help you to decide between two right actions if you can't do both, or, at least, if you can't do all you want of both.

On this issue, they think, you're not going to get anyplace by saying that clean air and electricity are both good, or right, or *really, really, really* right or good. When you can't have all you would like of both, all that stuff is just palaver. You've got to ask the questions the economists ask: Which course do you think is better, and at what levels? How much clean air is better than how much electricity? That's what economists are trying to find out when they ask those annoying questions about how much you would pay for environmental goods, or values, or whatever. They aren't telling you what to value, but are trying to find out what you do value, and how much, by comparison to other things you value.

Sagoff makes a big deal of the way people get mad sometimes when economists ask them those weird questions about how much they would pay for environmental goods like clean air and wilderness (pp. 83-84). He takes these reactions as a signal that economists aren't thinking about the environment as citizens would, that is, in an ethical way. But what's the big surprise if people get mad at those kinds of questions? None of us likes the news that the preservation of one resource may come at the cost of something else. We dislike that news most of all when we were thinking that at least some of our favorite resources were free. But then, that's why we have environmental problems, isn't it? Here we were, humming along with the happy thought that the best things in life are free, and using up air and wilderness with the reckless abandon we reserve for "free" goods. Now, along comes some squinty-eyed economist with a lot of questions about how much we would pay for those things. No wonder everybody wants to shoot the messenger. Pay? For *air*? For the great *outdoors*? Who is this bozo?

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7. See Meyers, *An Introduction to Environmental Thought: Some Sources and Some Criticisms*, 50 IND. L.J. 426, 450-52 (1975). Sagoff (e.g., at 43, 45-46) thinks that this kind of neutrality neglects the difference between political values and personal preferences. See, e.g., pp. 43, 45-46; see also *infra* text accompanying note 33. But Dan Farber, who rejects Sagoff's values/preferences dichotomy, points out that noneconomists may be persuaded on grounds of political theory to share the economists' neutrality on values. Farber, *From Plastic Trees to Arrow's Theorem*, 1986 U. ILL. L. REV. 337, 350-51.

He's the successor to Adam Smith, that's who. And before you do shoot the messenger, just remember, he doesn't have anything against Immanuel Kant, whatever Sagoff might think; he just wants to know how the Kantian aspirations come out when they conflict at the margin, in this vale of tears called scarce resources. Remember, when the economist asks those creepy questions about paying, he's not trying to tell you what you should or shouldn't value; he's just asking what you do value, and how much, so that he can help you figure out how to get the most of what you do value, when your values can't all be satisfied at once.<sup>8</sup> What's the matter with that? Surely you don't want to have or do *less* of whatever things your ethics tell you are the right things to have and do.

So Sagoff's opposition, Ethics vs. Economics, doesn't look all that convincing as an opposition after all. Through the book, Sagoff drops a few hints that he may not quite believe in it himself,<sup>9</sup> and by the last chapter, he seems to tank it altogether.<sup>10</sup> How about the other oppositions?

### B. *Values vs. Preferences; Citizen vs. Consumer*

These two oppositions are so closely intertwined that I have to deal with them together. Early in the book, one notices that Sagoff rails at economists for failing to take environmental "values" into account, and then he turns around and rails at them even more when they try to do just that.<sup>11</sup> The poor economists: First everybody said they ignored nonmarket goods, like wildlife and mountainous scenery; and now here is Sagoff telling them they are imbeciles and rogues for trying to translate those nonmarket goods into a cost-benefit calculation for decisionmakers. What's going on here?

What's going on, Sagoff says, is that economists want to talk about environmental matters as if they were (private) "preferences," when they really are (public) "values" (p. 93). When people talk about the environment, he says, they aren't talking about what they prefer for private consumption; they are talking, as citizens, about the things that have value for the whole community (p. 94). So you can't just do a cost-benefit analysis of environmental values, as if you were adding

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8. Note that the tradeoffs are not just between, say, industry and clean air, but also *among* industry-with-some-coal-scrubbers, sort-of-clean air, and a lot of other things we want. You can have some industry, and some clean air, if you pay for the scrubbers, and you can have even cleaner air if you pay for more scrubbers, but the scrubbers themselves aren't costless. They divert resources, talent, and worktime that might have contributed to other activities, such as constructing violins or finding a vaccine for AIDS.

9. *See, e.g.*, pp. 71-72 (perfect environmental purity may give way to other considerations); p. 80 ("We must acknowledge, however idealistic we may be, that clean air, workplace safety, and the like have a price . . .").

10. Pp. 195-224. *See infra* text at notes 26-28.

11. *E.g.*, pp. 9-10, 27, 35-39, 90-91.

up what people say they would pay for a pastrami sandwich. With the environment, they are talking about what is valuable for the community as a whole, not their private preferences.

Now, get ready, because here comes the clincher: Mixing up these discourses, Sagoff says, is a "category mistake" (p. 92). "Category mistake"? My Irish grandfather, who sold liquor, would have said, "Darlin', when they say somethin' fancy like that, close the cash register." But I will take the risk of leaving the register open for the time being, and take up the point.

The point is, I don't know where this alleged category mistake happens. Or if there is some mistake, it is a mistake that is thoroughly embedded in ordinary discourse; and this makes it a little harder to see as a mistake in the first place, at least for somebody like Sagoff, who professes to reject dogmatic versions of knowledge in favor of Richard Rorty's kibbitzing approach.<sup>12</sup>

Let me unpack this:

(i) Just for starters, why does Sagoff seem to think that public values are a matter of discussion, while private preferences aren't, and are just hanging there like lurking components of an idiot id? Surely preferences — including consumer preferences — are educable.<sup>13</sup> Once educated, we may start to call preferences "tastes," but the point remains: One can educate one's preference for movies, beer, music, and all the rest. Moreover, people routinely do so through discussion with other people.

For argument's sake, let's go along with Sagoff's view that one's liking for ski areas is a private or consumer "preference," as opposed to the public "value" in one's yen for wilderness (p. 52). Surely people can educate their liking for *either* ski areas *or* wildernesses, and surely they can learn to like one more than the other. It hardly seems a "category mistake" to see both consumer preferences and so-called public values as learned, and educable, *desiderata*.

(ii) More generally, why does he think there is some qualitative difference between public values and private preferences? People mix up private and civic concerns all the time, and put them all in the same hopper. Sagoff's students, who valiantly chose wilderness despite their fondness for ski resorts (pp. 52, 70-73), may well have wanted *both* wilderness and ski areas, but they may just have wanted wilderness more, and chose wilderness when they knew they couldn't have

12. Pp. 12, 222. See also text at notes 22-25. Rorty himself describes his approach to knowledge as "conversation," and also uses the phrase "useful kibbitzing." See R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 391, 393 (1979) (rejecting epistemological notions of mirroring truth, in favor of more open-ended conversation).

13. Sagoff does acknowledge that private tastes may be educable, p. 104, but most of his discussion sharply distinguishes individual values on public matters, which are shared and discussed with others, from the personal preferences that seem to be undiscussed and amoral. See, e.g., pp. 55, 100, 104.

both in one place.<sup>14</sup> But they are still considering the two not as qualitatively separate categories, but as alternative good things.

It is no big secret that people think and talk about a lot of public and private matters as alternative goods. Take for example a citizen's reaction to a proposal for a new sidewalk assessment. She thinks, in rapid succession: (1) Gee, a new sidewalk would look great in front of the house; and (2) it would make the whole block look spiffier, and give the neighborhood a boost; but (3) it does sound kind of expensive for my budget; and (4) it is really going to take a bite out of old Mrs. Jones' pension.

This is an entirely normal progression of thinking about civic decisions. Does anyone except Sagoff really think that there is some sharp divider between the "public" and the "private" aspects of these reflections, or that some of these aspects are inappropriate to the citizenry's deliberations on matters of public importance?<sup>15</sup>

(iii) To illustrate the supposed category mistake in mixing preferences with values, Sagoff occasionally poses a cute hypothetical: Someone who is promoting a particular public policy is asked how much he would pay to have his policy put into place (pp. 9-10, 223). The very question is supposed to illustrate that it is ridiculous to mix preference-talk with value-talk.

Well, one can agree that this would normally be an odd sort of question, but one still wouldn't have to concede that there is some absurdity in policymakers' consideration of preferences. For one thing, sad to say, sometimes policymakers *are* thinking about how much they would pay, or to put it on the other side of the Coase theorem, how much they are getting paid for taking particular public policy positions. That is to say, they are thinking about their own consumer preferences when they support certain public policies, because someone is going to pay them for supporting those public policies.<sup>16</sup>

Naturally, we think this is wrong. But it isn't wrong because the legislators are thinking about preferences as such. It is wrong because they are thinking about the *wrong people's* preferences — they are sup-

14. Or maybe in this class, they thought they would be well advised to want wilderness more.

15. For another critique of Sagoff's division of personal and civic values, see Farber, *supra* note 7, at 344, 347. Cass Sunstein, some of whose work Sagoff approvingly cites, pp. 10-11, does distinguish public and private spheres but does not qualitatively distinguish private preferences from civic values; he rather speaks of levels of preferences, noting that we may have preferences about preferences: we wish we didn't like to smoke, we wish we were more inclined to wear seat belts, etc. See Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1140 (1986).

16. According to some law-and-economics commentators, that seems to be all that legislators are thinking about, whether they decide for or against legislation. See McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEG. STUD. 101, 102-03 (1987) (politicians seek to maximize their own returns by forbearing from regulation costly to others).



posed to be thinking about their constituents' preferences and not their own. As Susan Rose-Ackerman has argued, the legislator who accepts a bribe violates an agency relationship with his constituents, because he is supposed to be thinking about the constituents' preferences, and instead he is thinking about his own.<sup>17</sup> But the legislator still should be thinking about preferences — that is, those of his constituents. If he isn't, he may not be in office too long, because those constituents are certainly considering consumer preferences when they think about, say, whether they want a bond issue to fund the public schools, or whether they want to clean up the roadsides at the expense of paying a bottle deposit, and how they want their representative to vote on those matters.<sup>18</sup> This is not to say that private consumption preferences are the only thing that citizens (or their representatives) think about with respect to public affairs, but it is one of the things they think about. What we really may want from our political leaders is some education of our preferences in matters relating to public affairs; after all, they are in office, and are supposed to have the time to think about these things and explain them to the rest of us working stiffs. But citizens and policymakers don't take a vacation from preferences and utility maximization just because they are talking about public issues.

So where's the category mistake in mixing up citizens' values and consumers' preferences? I think I've lost it. Moreover, I think most people never dreamed of it. Ordinary language mixes these up, and treats all of them as appropriate grist in the political "deliberation" or "conversation"<sup>19</sup> about public decisions, whether they be environmental or something else.

Despite all this, Sagoff is clearly right that there probably is one important sense in which community goals may diverge from the sum of individual preferences. Take public health, for example: Individual health has repercussions beyond the healthy individual, not only because the healthy person doesn't infect others, but also because she holds a job, plays on the neighborhood softball team, acts cheerful, and in general passes on some nice positive externalities to others. But because some of these good things are externalities, she might be

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17. S. ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* (1978). See also Banfield, *Corruption as a Feature of Governmental Organization*, 18 J. L. & ECON. 587 (1975). Sagoff professes to have some experience with bribes, p. 52, and might object that bribing a judge is different, because a judge is not supposed to be thinking about constituent preferences. But a judge should be thinking about constituents' "preferences about preferences," as these are incorporated into the rules of behavior that constituents have given themselves. See Sunstein, *supra* note 15.

18. When Sagoff suggests that costs are unimportant by saying, for example, that maintenance of the national parks in the face of economic progress is an ethical, and not an economic, issue, he may be understating the significance of cost considerations in political decisions. See, e.g., Girdner, *Timber War Pits Law Students vs. Loggers*, Boston Globe, Oct. 24, 1988, at 53, col. 3 (describing local opposition to student efforts to preserve old-growth forests).

19. "Conversation" is from Richard Rorty, whom Sagoff cites approvingly. See *supra* note 12.

tempted to scrimp on expenditures for her own health. And the same goes for everyone else in the community: taken in the aggregate, individuals might not put enough resources into things that are beneficial not just to themselves, but to everybody else too. But the community as a whole will be better off with a higher level of expenditure. The more general point is that the community as a whole has objectives that may differ from the sum of individual wishes; perhaps this was what Rousseau had in mind with all the pluses and minuses in the "general will."<sup>20</sup> On these matters, we want citizens and legislators to pay attention to common goods and evils, which do diverge from aggregated individual preferences.

This is not news in the literature from economics and economics-influenced branches of political science. On the contrary, there is a whole body of work out there about public goods and positive sum cooperative "games," and though not all of it is written by creepy neo-classical economists, economists have certainly had some influence on the discussion.<sup>21</sup> It is a pity that Sagoff does not seem to have addressed this work, for two reasons. First, some of this literature offers some reasons for the public preservation of the environmental goods that Sagoff rightly thinks are so important. And second, this literature poses very important political questions about how people might get over the impulses they have to act self-interestedly, under circumstances where narrow self-interest is inappropriate, and why they might cooperate instead for a greater common good — questions that seem to me to be central to Sagoff's interest in public values. I will come back to this later.

### C. *Deliberation vs. Dogma*

I am not going to say much about this opposition here. It's now quite trendy to describe one's opponents as snapping their chops over dogmatic scientism, while describing oneself as engaging in deliberation or conversation, where the participants are civil and open-minded.<sup>22</sup> No doubt deliberation is a good thing. But here it looks a

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20. William Ophuls, in the context of his discussion of the "tragedy of the commons," notes the relationship between Rousseau's "general will" and the divergence between community good and additive individual preferences. W. OPHULS, *ECOLOGY AND THE POLITICS OF SCARCITY: PROLOGUE TO A POLITICAL THEORY OF THE STEADY STATE* 150-51 (1977). Sagoff also mentions Rousseau, although he does not give the same reasons for the difference between individual and common goals. P. 11.

21. See, e.g., R. DORFMAN, *MEASURING BENEFITS OF GOVERNMENT INVESTMENTS* 4-5 (1965); R. HARDIN, *COLLECTIVE ACTION* (1982); Hirschleifer, *Evolutionary Models in Economics and Law: Cooperation versus Conflict Strategies*, 4 *RES. L. & ECON.* 1 (1982); Schelling, *Hockey Helmets, Daylight Saving, and Other Binary Choices*, in *MICROMOTIVES AND MACROBEHAVIOR* 211 (1978).

22. For a witty example, see "D.A.F." [D. Farber], *The Zapp Complex*, 5 *CONST. COMMENTARY* 13, 14-16 (1988) (complains about law review articles' excessive length and footnotes as attempts to have last word instead of engaging in "conversation" à la Richard Rorty).

little like a trick, because the reader never does get much of a sense of what the deliberation is supposed to be about. In fact, it looks as if the deliberation isn't supposed to be about anything in particular.<sup>23</sup> Dressing up a nonposition as "deliberation" seems like thin stuff, and not much more than another effort to lay claim to the high ground — sort of like opposing gorgeous scenery to honkytonks. Yeah, yeah, maybe the economics crowd does tout itself as predictive scientists,<sup>24</sup> but it doesn't sound very civil and open-minded to say they are just making "category mistakes" either — in fact, the very phrase sounds like the kind of Intimidator Ray Gun that philosophers whip out to shut up everybody else.<sup>25</sup> Now, I do think there is more to Sagoff's claim to "deliberation" than just posturing, and I'll come back to it, but I don't think Sagoff has spelled it out well enough to do justice to his own position vis-à-vis those economic devils.

Maybe that's why they get him by the end of the book.

## II. NUMBER TWO SOUL GIVES IN TO TRADEABLE EMISSION RIGHTS

A kind of diabolical conversion occurs in the last chapter of this book, where Sagoff puts in a plug for tradeable emission rights — those inventions of economic environmentalists.<sup>26</sup> The tradeable emission right idea (which I will call TER) is now a familiar one. In this scheme, we start by setting overall ambient limits for any given pollutant, first by guessing about our health-based and aesthetic tolerance to the pollutant, and then by weighing those factors against our need for products that require the pollutant, and other costs incurred in restraining it. After we have made these calculations and set upper limits, would-be polluters can get permits to pollute, but they have to bid and trade for these now-scarce entitlements. This makes polluters more cost-conscious and more likely to find ways to cut back on their pollution, but we leave it to them to figure out the most cost-effective ways to do so; this is presumably cheaper and more flexible than would be our own efforts to try to figure out controls for them.

In my view, Sagoff's chapter bringing up this approach is among the most sensible and interesting parts of his book, because it is the one place where he starts to reckon with the problem of scarce resources, and with the difficulties of allocating and restraining uses of

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23. *E.g.*, pp. 215-16.

24. See White, *Thinking About Our Language*, 96 YALE L.J. 1960, 1967-68 (1987) (economists, as example of "conceptual" thinking, may see role as putting forth verifiable hypotheses in manner of science).

25. Not that economists are easy to shut up — they've got some ray guns of their own, like "cross-elasticity." What could be more of a silencer than that? — maybe the lit-crit crowd's *phronesis*, or *trope*, or *aporia*. For a comment on "fancy scholarship" in the law, see Schlag, *Comment: The Brilliant, the Curious, and the Wrong*, 39 STAN. L. REV. 917 (1987).

26. See *supra* note 3.

resources that are normally seen as "commons." But I think his endorsement of the TER idea creates some problems for his position about environmental values, and that TER really undermines the whole set of oppositions that inform the bulk of the book. The basic problem is that the structure of tradeable emission rights serves up values and ethics right along with mere low-life consumer preferences. In a TER regime, everything is on the menu, and everything gets traded off with everything else.

Sagoff likes TER, because he says that one can base the overall pollution standards on ethical considerations, like health and aesthetics (pp. 210, 213). And indeed one can. But as he seems to realize (pp. 197-98), nobody *has* to do this — there is nothing in the TER concept that privileges "ethical" environmental concerns over "consumer" concerns about, say, the cost of pollution controls.<sup>27</sup> What does this mean? It means that on the level of setting the overarching pollution limits, my private "preference" for keeping my dollars in my pocket gets into the same discussion with Sagoff's high ethical "value" for spending my consumer dollars to clean up duckponds in Arkansas. Is his ethical choice going to trump my personal preference? Nope. He may win or he may lose, but in principle, under a TER regime, the setting of overall pollution levels need not give his environmental ethics any special place. Instead, a TER regime tries to figure out how much his ethical values are worth, vis-à-vis my low-life preference for cash.

There's another way that TER-thinking messes up the purported opposition between values and preferences. Let's suppose that ethical values do have some privileged position at the policy level — that is, let's suppose they do count a bunch when we are setting overall standards, in the sense that we damn the costs in order to get, say, healthful air. Parenthetically, I agree with Sagoff that a lot of legislation does this, though perhaps not so much as he suggests.<sup>28</sup> But even sup-

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27. Indeed, costs — especially the costs of "do-your-best," technology-based pollution control devices — have been one of the major impulses for turning to TER-type approaches. See Ackerman & Stewart, *supra* note 3, at 1338-40; Note, *Technology-Based Emission and Effluent Standards and the Achievement of Ambient Environmental Objectives*, 91 YALE L.J. 792 (1982) (criticizing performance standards as costlier and less beneficial than pollution-rights approaches); see also Krier & Montgomery, *Resource Allocation, Information Cost and the Form of Government Intervention*, 13 NAT. RESOURCES J. 89, 99-101 (1973) (suggesting that interest in pollution pricing/trading schemes stems from lower costs of those schemes). TER schemes do have their critics; see Latin, *supra* note 3 (arguing that pollution entitlement schemes are practically unmanageable and undermine more feasible environmental control efforts based on technology). Costs, of course, may be seen either as flat cash, or (in more sophisticated versions) as the diversion of resources and related lost consumption opportunities.

28. Sagoff often refers to sections of environmental or health statutes in which the legislatures or the courts have stated that costs will not be counted, to suggest that costs are seldom or never considered in environmental laws. See, e.g., pp. 36 (discussing Clean Air Act, Endangered Species Act), p. 84 (discussing Clean Air Act, OSHA), p. 197 (discussing several statutes). This gives a misleading impression. There are a number of statutory sections where costs are specifically mentioned. To give one example, § 111 of the Clean Air Act, dealing with uniform federal

posing that "values" rule at the standard-setting level, TER still takes the economists' position of agnosticism about values at a lower level. This means that if Sagoff and I both get a small allocation of the few tradeable pollution rights that are allowed, he can hoard his (to protect the air, which he values so highly). I will be delighted, because he is limiting an already-scarce supply even more, and making my pollution rights even more marketable. Because of his noble self-sacrifice, I can get an extra bundle when I sell my now-even-scarcer pollution rights to the styrofoam cup makers. Shoot, maybe I can get enough to finance a trip to Disneyland, and surely enough to go honkytonk-hopping. What do I say to Immanuel Kant's categorical imperative? Hey, take gas, Manny Baby.

The point is that if I can act this way under a TER regime, then the TER regime swallows up Sagoff's ethical and public values in the great maw of economic devilry. What's notable about the book is that by the end, Sagoff seems to have fallen at least as far as the First Circle.

### III. REDEMPTION THROUGH RHETORIC

So what is ailing our Faust, anyway? Why does he burn so hotly about economics, when he concedes so much? I think that what's getting to Sagoff is the rhetoric of economic discussion, not its category mistakes.

Sagoff does not say this in so many words, but he implies that one aspect of economic rhetoric is me-first-ism.<sup>29</sup> For all the supposed indifference to goals in economics, preference-talk has the sound of an irreducible egotism, and implies that preference bearers, in their end-

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controls on stationary pollution sources, requires the Administrator to set performance standards based on the best available technological controls for emission reductions, "taking into consideration the cost of achieving such emission reduction," as well as other health, environmental and energy considerations. 42 U.S.C. § 7411(a)(1)(C) (1982). Sagoff himself notes in passing the cost considerations in this and other sections, p. 201, but only in his last-chapter conversion to taking costs seriously. And even there, when he directly quotes this section, he omits its reference to costs. Pp. 201, 207-08, 211. But cost considerations do come into play repeatedly in this and other areas of environmental law, despite grand statutory prefaces about eradication of pollution; the Clean Water Act, for example, makes a number of concessions to cost considerations, such as the provisions that permit the states to determine varying levels of water cleanliness for varying purposes, including agricultural and industrial purposes. *See* Clean Water Act, § 303(c)(2), 33 U.S.C. § 1313(c)(2) (1982). The "Superfund" statute provides for a National Contingency Plan to set priorities for responses to hazardous substance releases, and requires that relative magnitudes of danger be taken into account as well as costs of remedies. Comprehensive Environmental Response, Compensation and Liability Act, § 105, 42 U.S.C. § 9605 (1982 & Supp. IV 1986). As noted above, the recent interest in emission-rights approaches is closely related to concerns that environmental regulation may be costlier than necessary. *See supra* note 27. For some observations on the relation of control costs to environmental benefits in environmental law, see Stewart, *The Role of the Courts in Risk Management*, 16 ENVTL. L. REP. (Envtl. L. Inst.) 10,208 (1986) (discussing a "risk portfolio" approach).

29. *See, e.g.*, pp. 55-56 (suggesting that economists disregard or attempt to paper over non-self-regarding choices).

less pulse-checking for their own preferences, really don't give two hoots about what their neighbors might want or need. Now, maybe this is a mistaken notion of what economists think, but mistaken or not, the rhetoric matters: If all this preference-talk gives you the idea that you are alone in caring about the neighbors, you may be less willing to act in their behalf. Why be the sucker when the rest of them are all out for themselves?<sup>30</sup> That sort of attitude, of course, leads everybody down the primrose path to the old Prisoner's Dilemma, the ultimate noncooperative end to what should be a cooperative game, the point where me-first-ism impoverishes all the players.<sup>31</sup>

Environmental problems are often commons problems, and thus they present just such Prisoner's Dilemma "games";<sup>32</sup> and insofar as this is true, as I mentioned earlier, the big task is to induce people to cooperate for the common good. In that task, it doesn't always help to have a very powerful rhetoric suggesting that charity and fellow-feeling, while just as good as any other preferences, are really not to be expected — so get yours while you can.

That is one rhetorical aspect of economic talk that may be getting under Sagoff's skin. I am less tentative about saying that he is bothered by a second rhetorical aspect: that is, the purported economic agnosticism about goals, which suggests that goals are all alike and that there is not really much point in talking about them.<sup>33</sup> So you like wilderness? says our economic poll-taker. Great — but let's not talk about why. Sagoff, on the other hand, wants to say that you *can* talk about these matters, and that there is something you can say to shape goals.<sup>34</sup>

On this point, although I disagree with Sagoff's sharp opposition between preferences and values, I think he is on to something. People do talk about the things they want; they change their minds as a result of discussion; they have informed views on what is desirable and why; they talk about traditions and practicalities — and this discussion puts them into a kind of fellowship with other participants in it, including those with whom they disagree on any particular issue. In this sense, Sagoff is not just being trendy in his appeal to Rorty and "deliberation" or "persuasion."<sup>35</sup> When I want to sell my pollution rights to

30. On a related point, see Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1877-87 (1987) (rhetoric of commodification may distort perceptions and attitudes about relationships among people).

31. For this much-discussed "game," see R. HARDIN, *supra* note 21, at 24; Hirschleifer, *supra* note 21, at 13-14.

32. See W. OPHULS, *supra* note 20, at 145-47.

33. Sagoff focuses on this point at pp. 45-46 (cost-benefit analysis indifferent to values) and pp. 40-41, 80-81 (economists treat goals as "exogenous," to be toted up by "appropriate software").

34. *E.g.*, p. 120.

35. See *supra* text accompanying notes 22-25.

the plastics factory, maybe Sagoff and I can talk it over, and maybe he can talk me out of it.

But how is he going to do that? The book is more than a bit frustrating on the things that go into our deliberation: What do we deliberate about, and especially, what kinds of topics will withstand the economic rhetoric that suggests we won't really deliberate at all? Sagoff's major way around this rhetoric is the appeal to "ethics" and to all those other things on the left-hand side of the list of oppositions. As I have said, I don't think these oppositions stand up very well. So what other routes are there to redeem our Faust and get him out of economic hell? What other counter-rhetorics might get around the rhetoric of Me-First and No-Discussion?

One route Sagoff touches upon is the somewhat amorphous work that has been classed as "deep ecology" — a set of writings characterized by their urging that we acknowledge a kind of feeling-in and feeling-with nature.<sup>36</sup> This is not preference-talk, but kinship-talk. Sagoff's interesting chapter on the history of environmentalism brings up this way of talking, pointing out the symbolic impact of nature in our cultural history.<sup>37</sup>

It takes a lot of nerve to get into a discussion of kinship with nature, as the ideas can be easily pooh-poohed;<sup>38</sup> besides, it is not altogether clear that the concept — or feel — of deep ecology can be conveyed adequately by argumentative discourse at all. As Sagoff suggests in his discussion of American literature,<sup>39</sup> this kind of insight may only come through experience, or through artistic and narrative renditions of experience — which may be the reason why people like the photographer Ansel Adams and the storyteller Edward Abbey are so important in environmental history.<sup>40</sup> Sagoff's discussion of an aesthetic or a narrative counter-rhetoric is an important contribution to the environmental "discussion" — and in my view considerably more provocative than his preferred argumentative rhetoric of "ethics."

A second route or counter-rhetoric is an expanded version of rights. Sagoff mentions this route in his nods to libertarianism on the one hand (p. 16) and to animal-rights advocates on the other (pp. 156-57). Rights-talk is tricky, though, because rights and entitlements are very much a part of the neoclassical economic baggage: Fixed and firm entitlements, one might think, are only there in order to assist in

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36. For a discussion of the various sources of this literature, see Devall, *The Deep Ecology Movement*, 20 NAT. RESOURCES J. 299 (1980). See especially *id.* at 309 (deep ecology tries to avoid focusing on human needs, instead tries "thinking like a mountain").

37. See ch. 6, "Nature and the National Idea," pp. 124-45, particularly pp. 141-44.

38. See, e.g., W. BAXTER, *PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION* 5-9 (1974) (rejects idea that nature has normative content aside from human preferences).

39. *E.g.*, pp. 142-43.

40. See Devall, *supra* note 36, at 308; R. NASH, *WILDERNESS AND THE AMERICAN MIND* 263-65 (3d ed. 1982).

investment, trade, and all those Pareto-optimal moves in the Me-First universe.<sup>41</sup> Maybe this explains why Sagoff himself is leery of rights-talk.<sup>42</sup>

But rights-talk has another rhetorical face as well. As Martha Minow has pointed out, by applying rights-talk to such unexpected subjects as children and the mentally disabled, one invites the listener to take seriously their condition.<sup>43</sup> These unorthodox subjects are not at all the usual rights-bearers, who defend their own entitlements. But the very metaphoric quality of rights-rhetoric, on behalf of those who are somehow rights-disabled, bridges a gap to the more ordinary rights-holder, and adds drama to the plea to consider their situation, *as if* they could stand up for rights in a more conventional way. Thus rights-talk may borrow the neoclassical rhetoric of entitlement, but may turn that rhetoric around to lend gravity to the discussion of novel subjects. Minow uses this rhetorical turn for children, but one could do the same for animals and plants and places of breathtaking beauty.

The turn-around in the rhetoric of rights suggests still another kind of counter-rhetoric, one that Sagoff eschews, though I think perhaps too hastily. It is the counter-rhetoric of cost-benefit analysis, which seems to me to have done a good deal to get us off the mark in thinking about the desirable qualities of the natural environment. Sagoff feels a monumental fury about the "shadow-pricing" of environmental benefits (pp. 88-92). He is right in a way; it does seem jarring to cost out, say, the scenery at Mt. Whitney.

But why shouldn't we see that shock as the same kind of shock that comes with the discussion of trees having rights?<sup>44</sup> Why not see it as an effort to bridge a gap, to dramatize the value of things that are too easily ignored, to invite a discussion of the things we value, even though the neoclassical market rhetoric seems deaf and dumb about them? So what if we borrow that market language? We have to use what we have, and this talk may help to disarm those who would simply ignore environmental values. More important, the very pirating of

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41. See Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577-78, 605-06 (1988); see also Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363, 1392-94 (1984) (rights-talk is a part of capitalist culture and focuses on negative rights of individuals rather than positive claims of those in need); cf. Perry, *Taking Neither Rights-Talk nor the "Critique of Rights" Too Seriously*, 62 TEXAS L. REV. 1405, 1415 (1984) (Tushnet offers no better alternative to rights rhetoric to support claims of needy).

42. Sagoff, however, says that he rejects rights-talk in environmental law because the rights concept is either inconsistent or overly rigid. See pp. 156-57.

43. See Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1866-67, 1892-93, 1907-08, 1910-11 (1987) (second meaning of rhetoric of rights, inviting "conversation" about unconventional claims).

44. See C. STONE, SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS (1974). For Stone's most recent effort, see C. STONE, EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM (1987), which again focuses on the moral status of nonhuman things.



market-talk adds to its metaphoric power when we use that talk to dramatize things that are not bought and sold at all. It's a dangerous game, to be sure, but the imaginative use of rhetoric may open up some minds that would otherwise be closed.

The major problem of environmentalism is that we live in an imperfect world of limited resources: There just isn't enough of everything to have all we would like, or even all we think would be good for us. But in talking about the environment, we realize that we live in a limited rhetorical world, too. We can't talk about the natural surroundings as we no doubt romantically dream that the Native Americans did in olden times — with ease, grace, and transparent understanding of the awe and loveliness of the earth and its creatures. Instead, we have all this pinched yakking about what's mine, and what's yours, and how much you are going to have to pay me if you want to get what's mine. But there are ways to build on this rhetoric, ways to move out from under its limitations.

Sagoff's book gropes toward a different rhetoric, and while he concentrates on his sharp distinctions between ethics and economics, I think he makes a much more substantial contribution with his brief discussion of narrative and artistic renderings of the experience of nature. Still, my chief concern is that he is neglecting the rhetorical resources that are available in other standard ways of talking. On the subject of economics in particular, his book sends the very mixed — but still rather conventional — signals of sin and salvation. A less belligerent exploration, on the other hand, might have opened up some more creative rhetorical possibilities in the language of rights, entitlements, and even costs and benefits. But whatever the price the book pays to its own Manicheanism, it does make some important contributions, and I have to hand it to Sagoff: What he has done better than anybody else so far is to point out that the way we talk about the environment is going to influence the way we think about it, and the things we do about it.