

CLEAR THE AIR

Charles C. Mann and Mark L. Plummer respond to Footnote 65 of Zygmunt Plater's Essay *Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance*, 32 *Envtl. L.* 1 (2002)

To the Editor:

Although we were pleased by Professor Plater's kind words about the literary merits of our book *Noah's Choice* in his essay "Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance,"¹ we were startled by his summary of our argument. We do indeed say that society cannot afford the measures necessary to save all species with one-hundred percent assurance of their future survival. But we emphatically did *not* go on to say, as he inexplicably claims, that therefore society "must regretfully override endangered species according to whatever may be dictated by the marketplace." Such a suggestion is nowhere in our book—indeed, we directly reject it—and we are stunned that anyone would purport that we endorse it.

As we say—in a quote from the great ornithologist and conservationist Robert Porter Allen that provides the title of chapter five of *Noah's Choice*—human beings care about biodiversity "for reasons peculiarly their own" that have nothing to do with the simplistic utilitarian calculation of the marketplace. We include caring for biodiversity in a list of such non-market driven goods that includes attending religious services, volunteering for hospitals, and voting in elections "despite knowing that their input will make almost no difference to a national election."² People save endangered species, we write, "because they have value in a second, nonutilitarian sense, value that consists of some intangible but vital quality such as goodness or nobility of spirit."³ But, we argue, the way we are currently trying to do this good thing—the Endangered Species Act—has proven to be neither effective nor ethical.

Here, in brief, is our argument. Society, we contend, cannot afford maximal protection for all species. Thus, choices will have to be made—some species will receive more attention than others. Indeed, these choices are being made every day. Some species, especially prairie species, are basically ignored; other species, such as those in forests in the Pacific Northwest, are the subject of attention that is disproportionate to their

¹ Zygmunt J.B. Plater, *Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance*, 32 *ENVTL. L.* 1 (2002).

² CHARLES C. MANN & MARK L. PLUMMER, *NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES* 142 (1995).

³ *Id.*

degree of endangerment. There are reasons for that: The spotted owl and marbled murrelet are stand-ins for old-growth forest. But the fact remains that we as a society devote many more resources to some species and ecosystems than to others, and as any ecologist will tell you, this is only loosely related to the degree of threat faced by the species and ecosystems in question.

We say in the book that one way to ameliorate this situation is to spend much more money than the government now spends. But we also argue that Uncle Sam will not and cannot spend enough money—the tragic choices can never be wished away. Our book then asks: How can these choices be made most wisely?

Right now the system is driven by lawsuits. We hope that we will not offend your readership by venturing the opinion that a scattershot of litigation is a poor way to plan the nation's ecological future. Our view is that society and the environment would be better off in a situation where endangered species had less rigorous legal protections—as long as that was accompanied by greatly increased spending on biodiversity, and that the spending was guided by the advice of an ecological/economic council.

Professor Plater may disagree with our suggestions or think them ineffective. But we fail to see how they can be characterized as leaving species to “whatever may be dictated by the marketplace.”

Finally, we found his egregious closing remarks concerning our “intimate personal connections to the resource exploitation industries” offensive. We are shocked that a law review would allow such a snide commentary. The “intimate” connection to which Professor Plater refers is the marriage of one author (Mark L. Plummer). We note clearly in the acknowledgments of *Noah's Choice* that after we received the contract for the book—and after we published the *Atlantic Monthly* article on which it was based—this author's wife, a trained forester and lawyer, left her job with a legal firm to work for the Weyerhaeuser Company. (For that reason, as we noted, we did not write about forest issues in the book.)

Charles C. Mann has never received a dime from any “resource exploitation” industry. He cannot possibly imagine that Professor Plater thinks that simply being acquainted with a single person in an extractive industry makes it impossible for him to write about biodiversity without falling under the sway of corporate America.

Indeed, one of the hopes we had in writing our book was to foster a conversation about endangered species and the hard choices their conservation demands. Such a conversation, we imagined, would respect the full range of values in play, and leave behind the ad hominem attacks that have too often characterized this debate.

Charles C. Mann, Mark L. Plummer
April 26, 2002

Lopsided Journalism in Public Policy Debates—
Professor Plater Responds to Mann & Plummer*

To the Editor:

It was only a footnote¹ but I'm pleased it has provoked this valuable opportunity to analyze further two central themes presented in that essay—that the press often does not give the public accurate relevant information necessary for an informed public debate on important environmental policy issues, and that to understand environmental cases we must consider the political currents playing within the press as well as in the agencies of government.²

In the text of the essay I cited Charles Mann and Mark Plummer's book *Noah's Choice*³ as representing

* I am grateful for helpful comments received from Dr. David Wilcove at Princeton, Dr. Stuart Pimm at Columbia University, and Patrick Parenteau of Vermont Law School on a draft of this response, and for the capable research assistance of Rachel Donn.

¹ Zygmunt J.B. Plater, *Law and the Fourth Estate: Endangered Nature, The Press, and the Dickey Game of Democratic Governance*, 32 ENVTL. L. 1, 25–26 n.65 (2002). The footnote reads:

⁶⁵ See CHARLES C. MANN & MARK L. PLUMMER, *NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES* (1995).

Noah's Choice is a beautifully written book, ostensibly seeking to bring a rational societal overview to the field. It surveys many of the scientific delights and philosophical challenges of endangered species conservation, and advances several major lines of argument. One is that we get very limited tangible benefits from the ESA, and that in effect the ESA is a practical failure because few species have been successfully removed from the endangered list. *Noah's Choice* also notes the powerful perverse incentives the Act gives, especially to private property interests, to subvert its protections. The authors do not take these as reasons to strengthen the Act. Rather, after asserting the lack of success of the ESA and downplaying collateral species protection benefits, they argue that the undoubtedly substantial cost of species preservation is a fundamental reason to back down. Their main argument then, as the book's title indicates, is that endangered species pose an inescapable loaded choice: If we as a society want to save species for whatever their charms, we would have to ratchet back living standards and pay trillions of dollars; otherwise, we must regretfully override endangered species according to whatever may be dictated by the marketplace. Interestingly, a propos of this Essay, *Noah's Choice* appears to be written to "frame" the congressional debates over the Endangered Species Act as an issue of all-or-nothing tradeoffs, either accepting the logic of the marketplace industries that oppose the Act—timber, mining, grazing, real estate—or bankrupting the economy to achieve species protections. The authors also egregiously fail to note what appears to be their intimate personal connections to the resource-exploitation industries. *Id.* But see, Jeffrey J. Rachlinski, *Noah by the Numbers: An Empirical Evaluation of the Endangered Species Act*, 82 CORNELL L. REV. 356 (1997) (reviewing Mann & Plummer and contesting the conclusion that the ESA is a failure).

² For more on this subject, see Plater, *Environmental Law in the Political Ecosystem—Coping With The Reality of Politics*, 19 PACE ENVTL. L. REV. 2 (2002).

³ CHARLES C. MANN & MARK L. PLUMMER, *NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES* (1995)

...the classic put-down of environmentalism, the often-alleged fundamental Unavoidable Tradeoff used by anti-government, anti-regulation activists: "You've got to choose. It's Environment, or Economics. Our society cannot have both." In this tradeoff the little fish translates as a metaphor for Environmental Protection, and the Tellico Dam as Economic Progress in the Marketplace.⁴

In their book, Mann and Plummer attempt to portray their work on the Endangered Species Act as sensible, objective reporting on an important issue of science and policy, but *Noah's Choice*—which received a heady welcome from the Act's opponents in Washington and around the country—and the *Atlantic Monthly* articles paired with it,⁵ appear to me to be distressing examples of journalism serving a narrow, unacknowledged side agenda.

Along with other critics of *Noah's Choice*, I was struck by the book's artful one-sidedness. It proceeds from an uncontroversial premise—that nothing is absolute, including the ESA, which like any statute requires careful ongoing balancing in its enforcement—to the implied anti-regulationist conclusion that most of the ESA's mandates should be weakened or eliminated. The ESA's provisions forbidding indirect harms to species, especially habitat degradation (which experts agree is the number-one cause of species endangerment),⁶ should, in effect, be made voluntary. As Princeton's David Wilcove observed, "[t]heir solution (somewhat simplified. . .) is to 'defang' the ESA so only the direct, intentional killing of a species is punishable by law (destroying the habitat would not be), and supplementing it with a federal trust fund that would acquire lands harboring endangered species." When the government regulates in the public interest, it should pay for the privilege.⁷ The authors' analysis is music to the

⁴ Plater, *supra* note 1, at 25.

⁵ See Charles C. Mann & Mark L. Plummer, *The Butterfly Problem*, 269 THE ATLANTIC MONTHLY 47 (Jan. 1992); Mann & Plummer, *Empowering Species*, 272 THE ATLANTIC MONTHLY 22 (Feb. 1995).

⁶ See David S. Wilcove, David Rothstein, Jason Dubow, Ali Phillips, & Elizabeth Losos, *Quantifying Threats to Imperiled Species in the United States*, 48 BIOSCIENCE 609 (Aug. 1998). The authors calculate that 88 percent of the United States's imperiled species are threatened by habitat degradation and loss, versus 48 percent threatened by the next most widespread factor, competition with or predation by alien species. (Percentages do not total 100 because a given species may be threatened by more than one factor.)

⁷ David Wilcove, *Review of Noah's Choice: The Future of Endangered Species*, 4 BIODIVERSITY & CONSERVATION 1028 (Dec. 1995). "Unfortunately, Mann and Plummer often resort to fear-mongering and selective use of the facts to build their case against the ESA. . . . [I]mproving the ESA will require an honest, rational dialogue about its strengths and weaknesses. That worthy objective is poorly served by this mean-spirited book." *Id.* at 1029-1030. A number of other commentators observing the book from a scientific perspective have criticized its one-sided presentation of the issues. See David E. Blockstein, *Book Review*, 46 BIOSCIENCE 458 (June 1996)

[T]hey use . . . their newly-found knowledge . . . to create a false impression of a nation plagued by irreconcilable and bankrupting conflicts between people and endangered species. The book's central premise is that protecting endangered species is so expensive and so onerous that 'the time has come to question the goal (sic) that underlies the act:

ears of the industry coalitions that are attempting to neuter the ESA, and by extension to discredit environmental regulation generally.

Mann and Plummer's book consistently sidesteps cases that show the ESA's workability and economic common sense. It avoids acknowledging that in many cases it is the Act's opponents in the political and economic marketplace that have hindered the law's effectiveness. It minimizes the important role of ecosystems in endangered species policy.⁸ And it ignores one of the Act's most significant human welfare functions—endangered species serving as “indicators” of threatened human values, the “canary in the coal mine” effect.⁹ The snail darter/Tellico Dam case, as noted in my essay, vividly exemplified all these affirmative arguments that support the Act. But the authors' treatment of the facts of the snail darter case—which was billed as a major focal case study in their book—provides an egregious example of the book's cant. And their treatment of the snail darter case is particularly telling because both authors knew well the facts they were misrepresenting in their text.

While they were researching *Noah's Choice*, both Mann and Plummer interviewed me by phone, as I recollect, for an hour or more. We spoke about the details of the snail darter case, and I forwarded them an article thoroughly explaining the economic facts of the case. The book cites our interview and the article.¹⁰ In our conversation I acknowledged that the

save every species no matter what the cost' (NOAH'S CHOICE, at 215). The premise is flawed because the act does factor in cost. Since 1982 the act has included a semi-judicial process to exempt species from protective measures; furthermore, many of the act's processes, including the designation of critical habitat, take economic considerations into account. Mann and Plummer ignore these facts. Practitioners of the maxim that the plural of anecdotes is data, the authors use a popular style that avoids quantitative analysis. There is no presentation of the extent and distribution of endangered species and of the actual number of legal battles over endangered species. *Id.*

See Rachlinski, *supra* note 1, at 357

Although *Noah's Choice* provides a colorful description of the Act's costs, the book fails to carefully assess its benefits ... Mann and Plummer do not lay out the book's overt political purpose, but in a political environment where the Endangered Species Act is under attack...there is no need for such an explicit statement. *Id.*

See T.H. Watkins, *Book Review*, 11 ISSUES IN SCIENCE & TECHNOLOGY, No. 4. 80(5) (Summer 1995) “[T]hey [Mann and Plummer] reach their answer: The Endangered Species Act has been so damaging to economic enterprise and the private use of private land that it should be abandoned as written and completely overhauled so that it no longer ‘forces conservation down people's throats.’ The evidence they marshal to support this argument, however, is simply unconvincing.” *Id.*

⁸ See Paul R. Ehrlich & Anne H. Ehrlich, *Biodiversity and the Brownlash*, DEFENDERS MAGAZINE (Fall 1996). Also, in their book *Betrayal of Science & Reason: How Anti-Environmental Rhetoric Threatens Our Future*, the authors note that “astonishingly, the word ‘ecosystem’ doesn’t even appear in the index to *Noah's Choice*.”

⁹ See Zygmunt Plater, *The Embattled Social Utilities of the Endangered Species Act—a Noah Presumption, and a Caution against Putting Gas Masks on the Canary in the Coal Mine*, 27 ENVTL. L. 845 (1997).

¹⁰ MANN & PLUMMER, *supra* note 3, at 273, acknowledging Plater's interview and article; *In*

resolution of endangered species conflicts can be expensive in some cases, but I detailed the facts of the snail darter case demonstrating that it emphatically was not an example of endangered species protection imposing great economic burdens, but precisely the contrary. Tellico Dam showed a species powerfully serving human economics by identifying a threatened habitat and development alternatives of great value to humans as well as to its rich natural ecosystem. The darter served to highlight the project's irrational economics and showed that integrating endangered species analysis into development planning can maximize economic benefits and avoid wastefully dysfunctional project effects. Instead of exemplifying the Act's supposed intractability, the snail darter case showed that it was the promoters' intractability that blocked thoughtful accommodations within the parameters of the Act—accommodations that would maximize the private and public returns from development. I noted for the authors the vast private property losses that the darter's protection could *prevent*—thousands of acres of family farms being forcibly taken for an uneconomic government pork barrel development project. I spoke of the indicator function played by endangered species in this and other cases, suggesting to the authors that snail darters were canaries in the coal mine—a vivid concept now relatively common—that I thought they should acknowledge in their analysis of endangered species policy.

The authors also knew these facts on the snail darter case from Dr. Stuart Pimm, an eminent Columbia University ecologist from Tennessee with whom they consulted in researching their book,¹¹ and from the voluminous records of the Cabinet-level Endangered Species Committee (often called the “God Squad”) chaired by Interior Secretary Cecil Andrus. The God Squad unanimously found that the economics of the darter and the free-flowing river were so good and the dam's economics were so bad (even after TVA had poured another \$50+ million into construction and had destroyed as much of the valley as possible) that the project's entire sum of benefits did not add up to the paltry five percent of project costs that remained to be spent.¹²

When *Noah's Choice* was published, however, imagine how surprised we were to discover that it consistently advanced a very narrowed perspective that appeared calculated to set up a series of regretful choices echoing the classic anti-regulationists' false tradeoff. The success stories and affirmative economic consequences of species protections were omitted. The charm of the book's lyrical passages paled for many of us in light of what appeared to be its latent agenda. The book's attractive style and seeming intellectual heft subsequently have been used to legitimize the arguments of timber, mining, grazing, and oil industries, and others, to

the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences, 19 J. LAW REFORM 805 (1986).

¹¹ Dr. Pimm reports that he too had urged upon the authors the “canary in the coal mine” indicator function of endangered species, mentioning the spotted owl and forest economics as well as the darter and the dam's economics. Telephone interview with Dr. Stuart Pimm, May 31, 2002.

¹² Plater, *supra* note 1, at 9 n.25.

undercut the ESA. The book has been invoked by a chorus of anti-ESA activists.

And how did the authors choose to portray what they'd learned of the snail darter/Tellico Dam case? They made it chapter six in their book, the fulcrum upon which their book's message turns. After framing and building the chapter as a story of a trivial fish blocking an allegedly important dam ("the altruistic...centerpiece of a sprawling industrial, commercial, and residential development that would create a glittering new development of fifty thousand souls"),¹³ they quote ardent supporters of TVA like Chairman Aubrey Wagner and Attorney General Griffin Bell to support their portrayal of the court decisions enjoining the dam in order to save a little fish as "flat-out crazy."¹⁴

But what about the dramatic economic verdict of the God Squad that reversed such political caricatures and showed the Act's economic rationality as applied to Tellico Dam? Mann and Plummer avoided mention of the committee's extensive factual and economic analyses that supported the reasonableness of the Act and undercut the dam (this is especially bemusing given Dr. Plummer's stated credentials as an economist). Instead they simply implied that the committee's unanimous decision was the product of prejudice, wryly writing that "Secretary of the Interior Cecil Andrus, chair of the committee, made it clear that Tellico had never stood a chance [in the committee]. 'Frankly,' he said, 'I hate to see the snail darter get the credit for stopping a project that was ill-conceived and uneconomical in the first place.'"¹⁵ The economics and factual logic supporting the case for the darter, on the record compiled during the committee's four-month long inquiry, are never mentioned to their readers.

Mann and Plummer's performance in their snail darter chapter is particularly ironic in light of one of the laudatory quotes used in the book's marketing:

Praise for *Noah's Choice*. . .

Not only a concise explanation of the crisis created by the Endangered Species Act's *inherent conflict between economics and the environment [sic]*, but a sensible prescription to guide those debating the act's future. Zealots on both sides of the debate should read this, for it makes a compelling, science-based case for changes in our approach and in our thinking. . . "—Cecil D. Andrus, former Secretary

¹³ MANN & PLUMMER, *supra* note 3, at 164.

¹⁴ *Id.* at 167.

¹⁵ *Id.* at 170–71. Because throughout the chapter the authors never acknowledge the extensive record and details establishing that the project was indeed "ill-conceived and uneconomical in the first place," this dismissive phrasing implies that Secretary Andrus's comment was a reflection of his bias rather than his summary of an exhaustive inquiry, triggered by the endangered species, that had proven the dam's economic irrationality. The same sarcasm can be seen in Mann & Plummer's treatment of the Supreme Court decision: "Obviously, a \$100 million dam was worth less than an infinitely valuable fish. Simple logic dictated halting Tellico." *The Butterfly Problem*, *supra* note 5, at 47.

of the Interior.¹⁶

It is hard to believe—given Secretary Andrus's extensive efforts with the Department of Interior, the committee, and Congress¹⁷ to study and resolve this endangered species case on a rational economic basis—that Mr. Andrus really wrote this paragraph with its line alleging an “inherent conflict” between species protection and economics, repeating the fundamentally false tradeoff advanced in *Noah's Choice* and so clearly refuted by the endeavor upon which he himself had worked so hard. It's even less likely Cecil Andrus had read the book itself, in which the case for the darter, his own efforts, and his committee staff's voluminous analysis resulting in a unanimous economic verdict against the dam were so archly dismissed.

The factual realities of the Tellico Dam case demonstrated precisely the conclusions that Mann and Plummer's book so studiously avoided—that the Act's regulatory mandates, if they are accommodated rather than resisted, are workable and can serve to improve rather than undercut human economic welfare. Moreover, the manner in which the authors unaccountably overlook the known economic record of this case raises serious questions about the basic integrity of the book. It's hard to avoid the conclusion that the purpose of this book was to skew public policy debate toward factually unwarranted conclusions undercutting environmental regulation.¹⁸

As to my comment regarding “what appears to be their intimate personal connections to the resource-exploitation industries,” I admit to having implied an “appearance” beyond what I knew for certain. *Noah's Choice* did acknowledge Dr. Plummer's wife's employment by a major timber company that maintains an avowed negative position on enforcement of the ESA. My larger concern was the authors' relationship to the Discovery Institute, a Seattle-based “think tank” that I had associated with a decidedly one-sided agenda on government (including support for one of the nation's preeminent supply-siders) and itself supported at least in part by funding sources including timber interests that appear to oppose government regulation and the ESA. I do not know and could not find any details about Mr. Mann's background and affiliations, but knew that he has worked closely and often with Dr. Plummer on articles bannered on the Discovery Institute's Web site. That, coupled with the pronounced agenda-serving nature of their book, led me to conclude that both authors were personally inclined toward the generally anti-regulatory pro-industry positions I

¹⁶ Encomium on dustjacket of *Noah's Choice*, (*emphasis added*); also posted on the book's Internet marketing Web site: <http://www.serve.com/ecobooks/noah.htm>.

¹⁷ Plater, *supra* note 1, at 19 n.56 and accompanying text (noting the vehement arguments Secretary Andrus made on the economic record of the Tellico case that species protection served rather than undercut economic common sense).

¹⁸ The nature and steadfastness of this purpose may be indicated by the fact that even the private property losses of a lot of little people—the more than three hundred Tennessee farm families who lost their land to a federal land re-sale scheme—did not register on the authors in their anti-regulationist zeal to portray our defense of the darter and the river valley as “flat-out crazy.”

associated with the Discovery Institute. I would be pleased to learn more.

I thank the editors, the reader, and Messrs. Mann and Plummer for the opportunity to delve into these matters. Perhaps the further details presented in this "Clear the Air" exchange can serve to advance the inquiry the original essay addressed: Why and how is it that some journalists can so substantially fail to convey relevant accurate information, known to them, that is necessary to a fully informed public debate on important issues of public policy?

In the case of the press, the ESA, and the snail darter, I suspect Thomas Jefferson would not be pleased.¹⁹

Zyg Plater
Boston, Massachusetts
June 14, 2002

¹⁹ Plater, *supra* note 1, at 2 n.1. Thomas Jefferson wrote:

I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion[.]

Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in *THE WRITINGS OF THOMAS JEFFERSON* VOL. XV 278 (Andrew A. Lipscomb et al. eds. 1903).