

**RATS AND TREES NEED LAWYERS TOO: COMMUNITY
RESPONSIBILITY IN DEODAND PRACTICE AND MODERN
ENVIRONMENTALISM**

Trayce A. Hockstad

Introduction.....	106
I. A Historic Look at Legal Representation for Non-Human Objects: Community Responsibility	108
A. Deodand Practice	108
B. Implications of Deodand.....	111
C. What Happened to Deodand?	114
II. Modern Laws of Nature: Environmental Standing in the United States	116
A. Ideological Shifts	116
B. Where Do We Stand?	118
III. The Danger of Divorcing Community Interests.....	121
A. Philosophical Motivations	121
B. What’s Wrong with Rights?.....	122
C. Restoring Humanity with Hierarchy	125
IV. Why Local Court-Appointed Counsel Best Serves Environmentalism	128
A. What Deodand Got Right	128
B. Sustainable Legal Protection for the Environmental Community ...	131
Conclusion	132

INTRODUCTION

Since humanity first began to establish legal norms and regulate community relationships through law, we have struggled to understand how our concept of order applies to the environment.¹ Legal traditions from centuries ago demonstrate human attempts to address conflict with the natural world in a systematic way.² Despite a sense of powerlessness to prevent devastation and accidental fatalities from chaotic forces of nature, ancient and modern societies alike have created intricate legal processes for resolving tension with the environment. Why?

Historians often posit that early efforts to impose law on animals and other natural objects, like trees, reflect a need in society to find closure after catastrophe or to exact vengeance after wrongdoing.³ Medieval deodand law, inspired by ancient near-eastern traditions, demanded full trials and executions for non-human things involved in the death of human beings.⁴ These proceedings were conducted at the expense of the local community and included funding court-appointed attorneys who advocated vehemently on behalf of their non-human clients.⁵ This effort to provide non-humans a place in the legal system and impose a human concept of order on the natural world has been considered primitive and infantile in the philosophical development of the law.⁶ Early twentieth century scholars mocked these legal practices as futile pantomimes reflective of superstitious cultures.⁷ But despite the apparent absurdities of deodand practice, the

1. See Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 477–79 (1996) (noting that judicial procedures for resolving disputes may have predated writing and the earliest written codes, including the Laws of Ur-Nammu from approximately 2100 B.C and the Lipit-Ishtar Lawcode containing provisions addressing goats, cattle, sheep, and wool).

2. *Id.* at 478–85.

3. E.P. EVANS, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS* 190 (1906) (describing the objective of laws intended to punish nature as one “to atone for the taking of life in accordance with certain crude conceptions of retribution”).

4. Walter W. Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. PA. L. REV. 696, 710 (1916); see Teresa Sutton, *The Deodand and Responsibility for Death*, 18 J. LEGAL HIST. 44, 53 (1997) (describing deodand practice as “not really an oddity of legal history” but “a concept which adapted to meet changing needs” and “one method of trying to deal with the trauma of sudden unexpected accidental death”).

5. Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 ANIMAL L. 97, 99 (2003).

6. EVANS, *supra* note 3, at 186; see Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 170 (1973) (noting the “universal condemnation [deodand] has received by those who have paid it even the least attention in recent times”).

7. Girgen, *supra* note 5, at 116.

tradition makes an important societal statement: it is the responsibility of the local community to provide legal protection for the environment.

Recent developments in environmental law have found fresh motivation for humanity's initiative to find a place for ecology in our legal systems: the preservation of our home. Today, we just as often find ourselves abusers of the natural world as victims of it. Our growing understanding of human impact on the environment has led us to reevaluate our relationship as humans with other living members of the community.⁸ In the last fifty years, American courts have entertained a variety of proposals from environmentalists on the best ways to recognize and protect the welfare of the natural world in our legal system.⁹ The conversation of the last few decades, however, has shown little consensus over proper methods of litigating environmental interests.

Numerous legal and philosophical issues exist in the debate over how the law should address human conflict with the environment.¹⁰ While an understanding of our interdependent relationship with nature has grown, legally complicated standing requirements remain problematic in environmental litigation. Satisfactorily answering (1) "[w]hose interests are injured by environmental harm?" and (2) "[w]ho may properly represent this injury in court?" has not proven an easy task for environmentalists.¹¹ The lack of successful litigation on behalf of natural habitats and their members has driven the environmental agenda to focus not on the human interests at stake in the loss of biodiversity, but on granting legal rights to various non-human species.¹² Instead of emphasizing humanity's benefits and responsibility for ensuring protection of natural resources, the present discourse has removed human interests from the preservation equation, forcing the environmental movement into a legally untenable position.

8. David Favre, *Wildlife Jurisprudence*, 25 J. ENVTL. L. & LITIG. 459, 468 (2010) ("For the first 100 years of American history, wildlife was generally considered a consumptive resource. . . . Beginning in the 1880s, new . . . perspectives said that wildlife should not be left to the settlers, trappers, and the market hunters, but should be protected.").

9. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (denying standing to an environmental special interest organization on the grounds that it lacked an injury in fact).

10. Wise, *supra* note 1, at 543–46 (arguing that an anthropocentric worldview has skewed the development of the law away from more educated and scientific perspectives that would extend legal values, principles, and rights to non-human animals).

11. See *Bennet v. Spear*, 520 U.S. 154, 161–62 (1997) (showing that proving injury and the right to represent is extremely complex); see also *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 555–56 (1992) (showing an example of a case in which environmentalists failed to prove injury or right to represent); *Sierra Club*, 405 U.S. at 728; *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1171 (3d Cir. 2004).

12. Favre, *supra* note 8, at 462 ("[T]o better understand the presence of wildlife within our jurisprudence, it is necessary to adopt a broader definition of legal rights. . . . [R]ights for wildlife should be considered to exist when a court . . . takes into account the interests of wildlife and gives some weight to those interests.").

This article examines a history of community responsibility in legal representation for non-human parties in the environment. A correct understanding of humanity's relationship to the natural world underscores a premise that has been present instinctively in societies across the world for many centuries: humans are responsible for providing sustainable legal protection to the environment. This article suggests that, in the wake of current challenges with environmental standing and litigation, courts should appoint local counsel to advocate for the protection of non-human members of the environment based on the human interests at stake in the preservation of the natural world. For centuries, communities were obligated to participate in trials and provide legal representation for parties in the form of court-appointed counsel. These practices accurately demonstrate that proper legal treatment of the natural world is the concern of local populations.

Although the recent ecological conversation has centered on rights for natural objects and the idea that environmental interests should be separated from human interests, these propositions have diluted the correct understanding of environmental responsibility. We need not attempt to divorce the interests of the environment from those of humanity, because humanity is utterly dependent on the preservation of natural resources. Instead of isolating environmental interests in the name of pursuing rights for non-human objects, counsel should be appointed to advocate for the injury caused to local citizens by loss of biodiversity in the affected area. This approach toward environmental litigation is best, because (1) it acknowledges the responsibility of the human community to care for the environment based on a sense of order common in legal history, and (2) it best satisfies modern standing requirements for litigation, enabling effective and sustainable environmental protection for the community.

I. A HISTORIC LOOK AT LEGAL REPRESENTATION FOR NON-HUMAN OBJECTS: COMMUNITY RESPONSIBILITY

A. Deodand Practice

In 1522, Bartholomew Chassenée began preparing for a trial that would define his career as an attorney and later a French jurist.¹³ A complaint had been filed with the bishop's vicar.¹⁴ Chassenée had been appointed defense counsel for a group of nefarious community members and was to appear in

13. EVANS, *supra* note 3, at 18.

14. *Id.*

ecclesiastical court to plead their desperate case.¹⁵ Under threat of excommunication for having eaten the barley crop of the province, the rats of Autun had been summoned to court.¹⁶

On the first day, the rats did not appear in court.¹⁷ Chassenée argued that their citation was insufficient; it had not been posted in the surrounding villages where the rats were known to roam, and they likely had not read it.¹⁸ Finding this an acceptable defense, the court ordered that citations be sent to the neighboring towns, so that all the rats might be notified.¹⁹ After another default on the part of his clients, Chassenée insisted that the rats could not make the journey to appear in court for the perils along the road.²⁰ Dogs and cats might devour them on the way, and the rats were not required to appear in court if they could not do so without risking their lives.²¹

Strange as this legal proceeding may sound, granting court-appointed representation to non-human parties on trial was once a commonplace practice under the law of deodand. This practice required that chattels convicted by a coroner's jury of causing the death of a human being be forfeited to the king.²² The word deodand was created from the Latin phrase *deo dandum*, meaning "to be given to God."²³ If the item that was found to be deodand was unable to be physically taken, its value was to be paid to the crown by the owners, or if they were indigent, by the community.²⁴ Theoretically, this payment was to be applied for some pious use for the good of the town.²⁵ However, the process of trying and convicting a deodand was not a mere formality or a means to an end for achieving valid

15. *Id.* at 19.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Anna Pervukhin, *Deodands: A Study in the Creation of Common Law Rules*, 47 AM. J. LEGAL HIST. 237, 237 (2005).

23. *Id.*

24. See Edmund W. Burke, *Deodand: A Legal Antiquity that May Still Exist*, 8 CHI.-KENT L. REV. 15, 15–16 (1929) (noting various definitions of deodand including a "personal chattel whatever, animate or inanimate, which, becoming the immediate instrument by which the death of a human creature was caused, was forfeited to the king for sale, and a distribution of the proceeds in alms to the poor by his high almoner, for the appeasing of God's wrath" and "every beast or thing movable inanimate which occasions the death of a man within the body of a county without the default of himself or another, shall be forfeited to the king as a deodand").

25. See *id.* at 16 (describing a case in which a man was killed by his own cart, a deodand, and the price was allotted to his children, not by being heirs to their father's estate, but because they were likely to be needy and such use of the funds was sufficiently pious); Pervukhin, *supra* note 22, at 237.

forfeitures. If a specific animal was charged with the crime of injuring a human, it was often imprisoned alongside criminal individuals²⁶ until tried by a secular tribunal²⁷ and, if convicted, hanged.²⁸ If a threat existed to the community at large, as in the case of the Autun rats, the proceedings were conducted in ecclesiastical courts.²⁹ In these cases, the defendants were often vermin or insects accused of depleting a food supply and were summoned to court to prevent continued destruction.³⁰ In both situations, defense counsel was appointed for the accused parties at the expense of the town.³¹

While deodand practice reached its height in the early 1600s,³² laws and legal processes for dealing with offending non-human objects occurred far earlier. Under the Laws of Alfred the Great of Britain, written circa 900 A.D., a tree that fell on a man and killed him was to be cut down and given to his family within thirty days of the accident.³³ This practice was known as “noxal surrender” and was not meant to restore the value of the lost life, but was considered a ransom for the evil done by the tree.³⁴ Turning over the wrongdoing chattel to the injured party prevented further legal action against the chattel’s owners, because the offending “agent” had been surrendered.³⁵ This idea of enacting legal punishment on an offending natural object also appears in India.³⁶ The Kukis believed that if a man fell from a tree and died, the spirit of the tree had caused the event, and the wood must be cut up and spread across the land before the wrong was properly rectified.³⁷ The Athenians publicly condemned weapons that had

26. Girgen, *supra* note 5, at 111 (noting that a jailer charged the same daily fee for boarding a pig as that for boarding a human prisoner).

27. *Id.* at 99–100 (noting that secular tribunals heard criminal cases against animals, whereas ecclesiastical courts conducted proceedings against pestilence and hordes of animals accused of causing damage to the community, similar to a public nuisance proceeding).

28. Hyde, *supra* note 4.

29. Girgen, *supra* note 5, at 99, 102; EVANS, *supra* note 3, at 31.

30. EVANS, *supra* note 3, at 3; Hyde, *supra* note 4, at 703 (“[A]ll wild animals of the noxious sort, such as rats, locusts, etc., were tried in the ecclesiastical courts and their punishment was either death or excommunication and banishment by formal decree.”).

31. Girgen, *supra* note 5, at 99.

32. *Id.* at 117 (noting that deodand practice “reached its climatic point—with both the ecclesiastical and secular trials reaching their point of frequency and greatest geographic spread—in the early 1600s, an age of relative enlightenment”).

33. Finkelstein, *supra* note 6, at 181.

34. *Id.*

35. *Id.*; see Burke *supra* note 24, at 16 (arguing that the implication of deodand practice was that even if the owner of a chattel employed in the killing of another was not involved in the act, the instrumentality “was morally effected from having caused the death”).

36. Girgen, *supra* note 5, at 108 (stating that the family of a man killed by a tiger must chase and kill it or else be disgraced in society).

37. E.P. Evans, *Bugs and Beasts Before the Law*, 11 GREEN BAG 33, 37 (1899).

caused death and threw them outside their borders.³⁸ In 1591, a Russian tribunal banished a bell to Siberia for having been rung in announcement of a political assassination.³⁹ In China as recently as 1888, idols and corpses were tried and sentenced to decapitation.⁴⁰ In American tradition, ships at sea robbed of their cargo by pirates were condemned and sold without the owners' consent because the proceedings were "against the vessel for an offense committed by the vessel."⁴¹

These roots and remnants of deodand practice undoubtedly seem eccentric in a modern context. The idea of putting a non-human thing on trial appears perhaps as ludicrous as imagining rats avoiding a court summons for lack of posted notice. Nevertheless, the earnestness and longevity of this type of proceeding warrants a closer look at the implications of deodand. What is really going on in society behind the apparent absurdity?

B. Implications of Deodand

Deodand tradition was influenced most likely by the biblical practice of stoning oxen known to have gored men to death.⁴² These Judeo-Christian laws can be traced to the Noahic covenant,⁴³ but similar edicts can be found in the Laws of Eshnunna and the Laws of Hammurabi,⁴⁴ indicating that legal regulation of human conflict with nature was a community goal that transcended religion and culture.⁴⁵ Over time, laws addressing non-human

38. EVANS, *supra* note 3, at 172; *see also* Hyde, *supra* note 4, at 696 (noting that the Athenians had a distinct court, the Prytaneum, for trials of murder cases in which the murderer was unknown or could not be found, an inanimate thing had caused the death, or an animal had caused the death).

39. EVANS, *supra* note 3, at 175 ("After a long period of solitary confinement it was partially purged of its iniquity . . . and suspended in the tower of a church in the Siberian capital; but not until 1892 was it fully pardoned and restored to its original place in Uglich.").

40. *Id.* at 110.

41. United States v. Cargo of the Brig Malek Adhel, 43 U.S. 210, 234 (1844).

42. Wise, *supra* note 1, at 514; J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921) (citing scripture for justification of deodand practice, "[a] like punishment is in like cases inflicted by the Mosaical law: 'If an ox gore a man that he die, the ox shall be stoned, and his flesh shall not be eaten'").

43. *Genesis* 9:5-7.

44. Jacob J. Finkelstein, *The Ox That Gored*, 71 TRANSACTIONS AM. PHIL. SOC'Y 1, 29 (1981).

45. Esther Cohen, *Law, Folklore and Animal Lore*, 110 PAST & PRESENT 6, 9 (1986) ("While legal processes may have sprung from certain beliefs, rituals and perceptions that form part of the general expression of spirit commonly termed culture, those processes in themselves consist equally of a cultural manifestation, not only in so far as they stem from a specific cultural environment, but also because they contribute to the formation of the same environment.").

offenders expanded to include various kinds of accidental human deaths⁴⁶ and unnatural acts of animals.⁴⁷

With the exception of the Mesopotamian culture,⁴⁸ these laws of ancient near-eastern civilizations directing human interaction with the natural world indicate a strong sense of hierarchy in responsibility and authority.⁴⁹ This sense of vertical structure in creation—with humanity at the pinnacle—was clearly sustained in Western development and reflected in early legal procedures concerning non-human parties,⁵⁰ but perhaps with surprising results. The precision and importance evident in deodand proceedings reflect an understanding of our complex relationship with the environment, and our duty as humans to ensure justice and peace in the community. Because they recognized human beings as supreme caretakers of our natural surroundings, early legal jurists placed the burden for ensuring functional and sustainable relations with non-human things on local governments and legal systems.⁵¹

Early criminal prosecutions of non-human offenders clearly reflect a desire for vengeance after catastrophe,⁵² but other motivations are apparent. The language of deodand law emphasized wrongdoing when the object in question had “moved to the death” in causing the accident.⁵³ For instance, it might be relevant whether the inanimate object or animal had shifted on its own, or whether it was stationary during the calamitous event.⁵⁴ Any movement was considered evidence of malevolence for which the object could be held accountable.⁵⁵ While this search for volition in non-human

46. Pervukhin, *supra* note 22, at 238.

47. EVANS, *supra* note 3, at 162 (describing how in 1474 a rooster was burned at the stake for laying an egg).

48. Finkelstein, *supra* note 44, at 8–13 (describing how Mesopotamian concepts of deity and society departed from what would become the Western world’s understanding of a vertical hierarchy of order and noting that “Mesopotamian cosmology, on the other hand, was an attempt to resolve the tension between consciousness and society by effecting the submersion of the self in society and by assimilating the phenomenon of man—individually and in the aggregate—to the external and objective universe of nature”).

49. Wise, *supra* note 1, at 477–88; Cohen, *supra* note 45, at 15.

50. Finkelstein, *supra* note 44, at 83; *see* Cohen, *supra* note 45, at 36 (arguing that medieval scholastics “viewed justice as a universal attribute, applicable to all nature” and believed that “[i]f man was to rule nature, he must do so according to the same principles that governed his relationships with fellow humans”).

51. Girgen, *supra* note 5, at 119–20.

52. EVANS, *supra* note 3, at 147, 190; *see* Finkelstein, *supra* note 6, at 197 (“The unnatural death of a human being was, at the very least, a quasi-crime; the effect of it transcended mundane considerations, and entailed expiation in one form or another.”).

53. Pervukhin, *supra* note 22, at 252; EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 57 (1628) (“Deodands when any moveable thing inanimate, or beast animate, do move to, or cause the untimely death of any reasonable creature by mischance in any county of the realm.”).

54. Pervukhin, *supra* note 22, at 252.

55. *Id.*

defendants at times manifested in procedure as a warped anthropomorphism,⁵⁶ the contrast of providing a standard legal process for a thing accused of chaotic savagery was perhaps an attempt to distinguish humanity from the rest of the environment and stabilize our relationship with the natural world.⁵⁷ In an effort to acknowledge the value and interests of the offender and ensure a just judicial process, non-human defendants were afforded the protection of legal representation.⁵⁸ Pronouncing and enacting punishment on non-human offenders was taken very seriously, and vigilante justice on the environment was not tolerated.⁵⁹ It would have been far easier and more economically efficient simply to kill offending non-human parties. Instead, non-human members of the environment were also entitled to legal protection, despite having violated human interests.

A mutual concern for the interest of humans and non-humans is most clearly demonstrated by medieval ecclesiastical proceedings. When a complaint was filed, an investigator was sent to examine the alleged damage, usually to land or crops, and defense counsel was appointed to represent the non-humans' interest in continuance of whatever action had caused the disturbance.⁶⁰ Defense attorneys, like Chassenée, took their role as advocates seriously, employing a variety of legal strategies to vindicate their clients.⁶¹ In 1338, a complaint was filed in the ecclesiastical court at Kaltern, Italy, against a swarm of locusts that were devouring crops and laying eggs in the ground, likely causing continuous agricultural devastation.⁶² In a rather lengthy and dramatic speech, the locusts' attorney argued that the insects were only acting as God intended them to behave,

56. EVANS, *supra* note 3, at 140 (describing a trial where a pig was convicted of disfiguring a child and dressed in a man's clothes before hanged).

57. Finkelstein, *supra* note 44, at 83; *see* Cohen, *supra* note 45, at 10–11 (describing the trial and conviction of a pig accused of murdering a five-year-old boy and the acquittal of her six piglets, who were found covered in blood but not witnessed to have bitten the child, as “typical in its painstaking insistence upon the observance of legal custom and proper judicial procedure” and “neither a vindictive lynching nor the extermination of a dangerous beast”).

58. Girgen, *supra* note 5, at 104; *see* Nicholas Epley et al., *On Seeing Human: A Three-Factor Theory of Anthropomorphism*, 114 PSYCH. REV. 864, 864 (2007) (“Anthropomorphized agents can act as powerful agents of social connection when human connection is lacking” and “treating agents as human versus nonhuman has a powerful impact on whether those agents are treated merely as objects, on how people expect those agents to behave in the future, and on people's interpretations of these agents' behavior in the present.”).

59. EVANS, *supra* note 3, at 147 (describing how a hangman who killed a sow without a trial was excommunicated for his act of vengeance).

60. Girgen, *supra* note 5, at 101; *see also* Hyde, *supra* note 4, at 704 (“If the grounds for bringing the animal to trial were found to be sufficient, an advocate would be named to defend them or to show cause why they would not be summoned.”).

61. Girgen, *supra* note 5, at 101–02; *see* Cohen, *supra* note 45, at 13 (“The arguments between the lawyers on both sides, duly presented in writing, considered and rebutted, cover a wide range of issues.”).

62. EVANS, *supra* note 3, at 93–100.

and such conduct could not be curtailed simply because it was offensive to man.⁶³ Similar arguments were made in defense of weevils, moles, slugs, and a wide variety of unsavory members of the environment that were considered a public nuisance.⁶⁴

The remedy for these actions if decided in favor of the plaintiffs, as in the case of our locusts, was excommunication from the land in question by a given date, on pain of being anathematized.⁶⁵ Such a sentence likely seems as rational to us as it was effective in its day.⁶⁶ Some jurists, including Chassenée, who later served on the judicial assembly of the Parliament of Provence, speculated about the authority and success of such environmental censures, questioning human capacity and correctness in cursing natural beings.⁶⁷ This struggle to resolve practical and philosophical flaws in environmental legal proceedings reflects early legal thinkers' understanding that settling conflict with the natural world was a serious responsibility of the human community. Despite imperfections in the process, deodand law required court-appointed counsel to make a case for the environmental interests at stake when a conflict arose between humans and the natural world.

C. What Happened to Deodand?

Notwithstanding issues of practicality and efficacy, deodand practice remained part of English law until 1846 when it was abolished by Parliament.⁶⁸ Was it some revolution of thought that put an end to legally processing crises with non-human material objects? Not quite. With the coming of the railroad came an influx of accidental human deaths, and railway cars proved too expensive to condemn and forfeit to the state.⁶⁹ Other advances in the technology and machinery of the Industrial Revolution led to numerous inadvertent deaths, compensation for which would have jeopardized the financial stability of manufacturing markets.⁷⁰

63. *Id.*

64. *Id.* at 38–49; Hyde, *supra* note 4, at 705.

65. EVANS, *supra* note 3, at 106; Cohen, *supra* note 45, at 15.

66. EVANS, *supra* note 3, at 36–37 (noting that slugs were warned repeatedly after ignoring a court's instructions to vacate an area).

67. *Id.* at 22–23; *see also* Hyde, *supra* note 4, at 717 (noting that among the critics of the practice of cursing animals was Thomas Aquinas).

68. Pervukhin, *supra* note 22, at 249; Finkelstein, *supra* note 6, at 170.

69. Pervukhin, *supra* note 22, at 249; Finkelstein, *supra* note 6, at 172–73 (noting that in *Regina v. Eastern Counties Railway Co.* (1842) 152 Eng. Rep. 380, 382; 10 M. & W. 58, 60 a jury awarded £500 for the value of an engine, the boiler of which had exploded during the train's derailment).

70. William Pietz, *Death of the Deodand: Accursed Objects and the Money Value of Human Life*, 31 RES: ANTHROPOLOGY & ATHLETICS 97, 105 (1997); Finkelstein, *supra* note 6, at 170

Although local governments historically initiated deodand proceedings for the protection of the community from a perceived threat, this same rationale was used to abolish the practice in England.⁷¹ State officials feared that forcing railroad corporations to pay the price of their cars for each death resulting from train wrecks would bankrupt the industry.⁷² The economic disruption that was sure to follow led to a prompt dismissal of the entire deodand practice.⁷³ Legal representation and due process for non-human objects languished in the shadow of industrialization and, almost at once, society began to consider deodand practice an embarrassing past pursuit.⁷⁴ In their move to eradicate the deodand, members of Parliament criticized the practice for its absurdity and argued that it should have been eliminated long before.⁷⁵

Although the practice of deodand has been described as “a childish disposition to punish irrational creatures and inanimate objects, which is common to the infancy of individuals,”⁷⁶ there are hidden merits of the tradition. As long as law has existed, it has attempted to resolve human conflict with the natural world in an orderly and just manner.⁷⁷ Historically, this meant sincerely-conducted legal proceedings, trials, and court-appointed counsel for non-human members of the environment.⁷⁸ By funding court-appointed representation for the offender⁷⁹ and possibly the price of the deodand if it were condemned,⁸⁰ the law recognized that regulating conflict with the environment was the community’s responsibility. These laws are best understood not as products of irrational minds, but as communal efforts to restore order when an imbalance had

(stating that the explanation for the abolition of the deodand “obviously lies in the socio-economic conditions, particularly with respect to the revolution in industry and technology early in the 19th century”).

71. Pietz, *supra* note 69, at 106.

72. *Id.*; Sutton, *supra* note 4, at 46–47 (describing the language of deodand cases involving multiple deaths from railroad car derailments as pointing toward “the two key reasons why the deodand was abolished in 1846 — that it was an expensive inconvenience for some transport enterprises and that a more appropriate means of dealing with fatal accidents was now required”).

73. Sutton, *supra* note 4, at 46 (noting the particular influence of the Sonning railway disaster in which a train from Paddington carrying a number of laborers employed at the Houses of Parliament struck a landslip on Christmas Eve and killed or injured some twenty-five people, each of which were potentially entitled to the price of the deodand).

74. *Id.* (citing a parliamentary debate in which Deodand practice was described as “extremely absurd and inconvenient”).

75. Pietz, *supra* note 69, at 106.

76. EVANS, *supra* note 3, at 186.

77. Finkelstein, *supra* note 44, at 19–20 (noting the similarity of laws of ancient cultures in prescribing procedures for non-human offenders in the environment).

78. Girgen, *supra* note 5, at 99.

79. *Id.*

80. Pervukhin, *supra* note 22, at 237.

occurred.⁸¹ Humanity used the law both to distinguish itself as the rational capstone of an earthly hierarchy and to correct disturbances in the environmental community.⁸²

II. MODERN LAWS OF NATURE: ENVIRONMENTAL STANDING IN THE UNITED STATES

A. *Ideological Shifts*

After the abolition of the deodand, legal prosecution of non-human objects dwindled in Western law.⁸³ Instead of reacting to catastrophic events in nature, the law began to perceive and address threats to the environment by protecting ecosystems and conserving natural resources.⁸⁴ Although Western law had regulated the community's use of common resources since at least 1016,⁸⁵ judicial opinions for these restrictions predominantly discussed the state's police power⁸⁶ and sparsely recognized the merits of preservation of the natural world.⁸⁷ By the mid-twentieth century, however, an ideological shift began to take place in the federal government's approach to environmentalism. In passing the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA), Congress officially recognized the "esthetic, ecological, educational, historical, recreational, and scientific value" of wildlife and plants.⁸⁸ Part of this newfound appreciation for the natural world included efforts to grant legal "personality" to things other than humans, much like what had been done already for corporations.⁸⁹ Although animal-interest activists sought greater protection in the form of legal rights for individuals and species of

81. Cohen, *supra* note 45, at 8, 15 ("[T]he increasing frequency of animal trials was contemporaneous with the so-called revival and acceptance of Roman law, with the great codifications of criminal law and altogether with an ever-increasing coherence of rational systems of law and thought.").

82. *Id.* at 8.

83. See Girgen, *supra* note 5, at 122 (citing only five cases between 1906 and 1927 in which animals were known to have been prosecuted).

84. Favre, *supra* note 8, at 468 (noting the development of conservation as a legal concept through efforts like the Lacey Act).

85. WILLIAM NELSON, *THE LAWS CONCERNING GAME*, at x-xi (4th ed. 1751).

86. *Geer v. Connecticut*, 161 U.S. 519, 533 (1896).

87. Favre, *supra* note 8, at 468 (discussing the seminal case of the time regarding state's police power rather than the merits of preserving the natural world).

88. Endangered Species Act, 16 U.S.C. § 1531(a)(3) (2012).

89. Favre, *supra* note 8, at 476.

wildlife,⁹⁰ it was not until 1972 that this argument was made for inanimate objects in the environment.

Christopher Stone first posed the question, “[s]hould trees have standing?” when he argued that elements of inanimate nature should be granted legal rights in order to sue on their own behalf through volunteer representation.⁹¹ It was this article that inspired Justice Douglas’s well-known dissent in *Sierra Club v. Morton*, in which he stated: “Contemporary public concern for protecting nature’s ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.”⁹² The central theme of this argument was that natural objects had the capacity for legal rights in much the same way as a corporation or even a fetus does, and as such, they should be legally recognized without being tied to the interest of any human person.⁹³ Although Stone’s arguments for legal rights for trees have never found their way into a majority opinion from the Court, the decades since *Sierra Club* have only seen an increase in litigation regarding environmental issues.⁹⁴ Unfortunately, environmental plaintiffs have struggled to effectively represent the interests of nonhumans.⁹⁵ However, despite progressively stringent standing requirements, the mainstream environmental agenda has adhered to Stone’s proposition of “rights for natural objects,” ironically stunting enhanced legal protection for the natural world.⁹⁶

90. See *id.* at 462 (providing an excerpt from an article written by an animal interest activist supporting legal rights for wildlife).

91. Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 456 (1972) (“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.”).

92. *Sierra Club*, 405 U.S. at 741–42 (Douglas, J., dissenting).

93. Stone, *supra* note 91, at 464–73 (arguing that each prior extension of legal rights, whether granted to women, children, racial minorities, or corporations, has been unthinkable in its day, so the strangeness of the notion of granting legal rights to the environment should not warrant dismissal).

94. NANCY MARION, *MAKING ENVIRONMENTAL LAW: THE POLITICS OF PROTECTING EARTH* 38 (2011).

95. See Stone, *supra* note 91, at 467–70 (discussing multiple cases in which environmental plaintiffs had a difficult time representing the interest of nonhumans).

96. See *Defs. of Wildlife*, 504 U.S. at 555–56; see *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 872 (1990); see generally *Sierra Club*, 405 U.S. 727 (referring to denial of standing due to no individualized harm to petitioner or its members); see generally *Cetacean Cmty.*, 386 F.3d 1169 (resulting in the denial of standing to humans suing for harm to the environment based on a very weak or altogether absent showing of harm to any recognized human interest in the name of advancing legal recognition of the natural world).

B. Where Do We Stand?

The problem of standing is at the heart of resolving legal issues on environmental harm.⁹⁷ The law has long recognized suits over injury to our common natural surroundings through the public nuisance doctrine,⁹⁸ but who can bring such a claim in court? Stone argued that courts should allow organizations to apply to represent natural objects and be appointed as guardians with the ability to bring suit.⁹⁹ This premise relied on the legal recognition of injury to the environment without an individual human asserting a claim of harm against a polluter or other such offender.¹⁰⁰ To date, however, courts have refused to grant non-human members of the environment standing to bring suit on their own behalf, even with the presence of volunteer counsel.¹⁰¹

Since the United States Supreme Court denied standing to the Sierra Club—acting as a representative of the public to prevent environmental destruction for the development of a ski resort—private parties have attempted a variety of strategies to circumvent the lack of standing for natural objects.¹⁰² According to *Sierra Club*, among other standing requirements, the party bringing suit must be among the injured.¹⁰³ This showing of individual injury has proven to be the most difficult element for environmental activists to show during the litigation process.¹⁰⁴ Although some government policies include citizen-suit provisions allowing for private parties to enforce environmental regulations,¹⁰⁵ individual suits have not been very successful absent a strong showing of economic injury.¹⁰⁶

97. See generally *Sierra Club*, 405 U.S. at 740 (articulating a standard for establishing standing based on a showing of injury-in-fact to the party bringing suit).

98. Elizabeth R. Potts, Comment, *A Proposal for an Alternative to the Private Enforcement of Environmental Regulations and Statutes Through Citizen Suits: Transferable Property Rights in Common Resources*, 36 SAN DIEGO L. REV. 547, 560 (1999) (“The public nuisance cause of action . . . originally founded modern environmental law.”).

99. Stone, *supra* note 91, at 462–70 (“On a parity of reasoning, we should have a system in which, when a friend of a natural object perceives it to be endangered, he can apply to a court for the creation of a guardianship.”).

100. *Id.* at 458–74 (“If the environment is not to get lost in the shuffle, we would do well, I think, to adopt the guardianship approach as an additional safeguard, conceptualizing major natural objects as holders of their own rights, raisable by the court-appointed guardian.”).

101. *Cetacean Cmty.*, 386 F.3d at 1179.

102. Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 934 (1998) (describing attempts by individuals and private organizations to bring suit on behalf of various species and natural resources threatened by human activity in various parts of the world).

103. *Sierra Club*, 405 U.S. at 735.

104. Lauren Magnotti, *Paving Open the Courthouse Door: Why Animals’ Interests Should Matter when Courts Grant Standing*, 80 ST. JOHN’S L. REV. 455, 467 (2006).

105. Endangered Species Act, § 1540(a); Clean Air Act, 42 U.S.C. § 7604 (2012).

106. *Compare Nat’l Wildlife Fed’n*, 497 U.S. at 876–87 (1990) (explaining that affidavits of individual injury were considered insufficient because plaintiffs alleged recreational use of land “in the

Is this evidence that American law and policy tend to be hostile toward expanding environmental legal protection? Not necessarily. Shortly after the Court denied standing to the Sierra Club, it found that a group of law students, together with the Environmental Defense Fund, had standing to sue the Interstate Commerce Commission for failure to prepare an environmental impact statement mandated by the EPA for a rate increase of railroad operations.¹⁰⁷ The plaintiffs argued that the cost of recycled material would increase, and their enjoyment of local forests and streams would be diminished by the destruction of natural resources from the non-use of the more expensive recycled material.¹⁰⁸ The Court accepted this showing of injury and specifically noted that courts should not deny standing just because many people suffer the same injury.¹⁰⁹

In 1995, the Ninth Circuit found that a county had standing to allege a procedural injury for the United States Fish & Wildlife Service's failure to prepare an environmental document according to NEPA standards.¹¹⁰ The court agreed with Douglas County that the county's lands might be affected by the supervision of the neighboring federal property, and thus, its interests were in the recognized zone of concern for the environment.¹¹¹ Whether the issue in an environmental case appears to be procedural (such as noncompliance with federal regulations regarding paperwork) or substantive (such as a threat to a species), courts stress the importance of actual use and the existence of a geographical nexus to the affected area.¹¹² It appears that the judicial system is prepared to grant standing to a wide variety of potential plaintiffs bringing suits for environmental harm,

vicinity" of an affected area), and *Defs. of Wildlife*, 504 U.S. at 564 (1992) (stating that the requirement for imminent injury was not met because plaintiffs did not demonstrate any specific plans to return to the land in question), with *Bennet*, 520 U.S. at 167–68 (1997) (explaining that standing was met by a showing of economic injury from a change in maintenance of water reservoirs).

107. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 670 (1973).

108. *Id.* at 676.

109. *Id.* at 685–86.

110. *Douglas Cty. v. Babbitt*, 48 F.3d 1495, 1495 (9th Cir. 1995).

111. *Id.* at 1501.

112. *See, e.g., Sw. Ctr. for Biological Diversity v. Fed. Energy Regulatory Comm'n*, 967 F. Supp. 1166, 1171 (D. Ariz. 1997) (showing that because members live in the state where the endangered species is found, visit the specific area, and maintain a factual and scientific understanding of the species, plaintiff has shown sufficient direct contact for standing); *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 449–51 (10th Cir. 1996) (explaining that plaintiffs must establish a geographical nexus to or actual use of the site where alleged injury will occur, and explaining how affiants established geographical nexus near site); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 555–58 (5th Cir. 1996) (showing that living near the source, using it for recreational activities, and being dependent upon decent water quality is sufficient to establish a fairly traceable injury in fact); *Didrickson v. Dep't of the Interior*, 982 F.2d 1332, 1340–41 (9th Cir. 1992) (stating that those who work or observe the threatened animal in the very area of the world where the species is threatened will have an injury).

provided that there is a showing of actual human injury. A few courts have even declined to challenge standing *sua sponte* when species of the environment themselves were named as plaintiffs and defendants did not raise the issue.¹¹³ In other words, when humans bring a cause of action based on injury to their local environmental communities, courts have treated this close relationship to the affected area as substantial in granting standing to sue. Individual parties who regularly interact with local ecosystems most effectively prove injury sufficient to satisfy legal requirements.

A desire to increase individual awareness and accountability for human impacts on the environment also can be found in legislative policies. From the citizen-suit provisions of the ESA and NEPA, to the passing of the Clean Water Act and Clean Air Act, environmental concerns have become increasingly prioritized. Federal protocols have not focused exclusively on the plants and animals of the ground but have extended to the skies in regulating pollution of the atmosphere through Tradable Emission Permits.¹¹⁴ Efforts to understand and ensure a plan for maintaining a healthy, natural world are present on the international stage as well. The United Nations Educational, Scientific, and Cultural Organization created a controlled ecosystem study known as “Man in the Biosphere” to better observe the role of human impact in ecology and to develop and improve ecological sustainability options based on the data.¹¹⁵ In 1992, the Convention on Biological Diversity adopted the Biodiversity Treaty, recognizing an international focus on conservation of natural resources and preservation of balanced ecosystems as global goals.¹¹⁶

Despite this growing global sentiment for ecological responsibility, a tension exists in the current environmental conversation. Because finding appropriate legal representation for the environment has proven difficult, environmental theorists have fixated on the need to separate the interests of non-humans in nature from humanity and grant them distinct recognition under the law in the form of rights. But, the language in legal debates between human interests and interests of natural objects often sounds

113. See, e.g., *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1447–48 n.13 (9th Cir. 1992) (stating that the court is not considering the standing of the Mt. Graham Red Squirrel because the issue was not raised); see also *N. Spotted Owl v. Hodel*, 716 F. Supp. 479, 479 (W.D. Wash. 1988) (showing a case where standing was not addressed even though the northern spotted owl was listed as plaintiff).

114. See generally *Clean Air Act*, 42 U.S.C. §§ 7651(a)–(o), 7661 (2012) (discussing the ability for companies to buy or sell emission permits).

115. William M. Flevaris, *Ecosystems, Economics, and Ethics: Protecting Biological Diversity at Home and Abroad*, 65 S. CAL. L. REV. 2039, 2075–76 (1992).

116. Convention on Biological Diversity, pmbl., June 5, 1992, 1760 U.N.T.S. 79.

irreconcilable because we are not even comparing apples and oranges but humans and trees. It is not hard to imagine that in any case where the interests of the environment are pitted against those of humanity, the latter will trump the former almost without exception. So, what is the problem in the current conversation about the place of the non-human members of the environment in the law? Many environmentalists have focused their agendas on achieving “legal rights” for natural objects and have neglected a more important and more challenging dialogue, implicating the interests and responsibilities of the human role in the natural community.¹¹⁷

III. THE DANGER OF DIVORCING COMMUNITY INTERESTS

A. *Philosophical Motivations*

Distinctions in the law between “personhood” and “thinghood” can be traced back to Roman and Greek jurisprudence.¹¹⁸ Beings that lacked free will were considered *res* and not *personae*, indicating their property status in society.¹¹⁹ Things considered property were incapable of possessing legal rights.¹²⁰ Roman tradition further designated some things as *res communes* (things owned in common), which included the air, the seas, and running water.¹²¹ The idea that the natural world existed as community property prevailed in the development of common law regarding nature as existing for the purpose of human use and therefore, subservient to humanity’s interests.¹²² Undoubtedly, this perception skewed the language of early judicial opinions to spend more words explaining the concepts of governmental regulation and police power doctrine than our

117. See Favre, *supra* note 8, at 507–08 (arguing that rights for animals and ecosystems will provide sustainable protection for the environment); Wise, *supra* note 1, at 544 (arguing that denying legal rights to non-human animals is part of a primitive hierarchical worldview that hinders the development of the law); Cormac Cullinan, *Do Humans Have Standing to Deny Trees Rights?*, 11 BARRY L. REV. 11, 14–15 (2008) (arguing that non-human things in the environment possess inalienable rights by virtue of existence).

118. Wise, *supra* note 1, at 493 (“From the beginning, ‘person’ in Roman law comprehended every being who had rights, while ‘thing’ included everything that could be considered as the object of the right of a person.”).

119. *Id.* at 493 (“Nonhuman animals never shed their property status, never had rights, and never were subject to duties.”).

120. *Id.* (“The legal right even arbitrarily to deprive nonhuman animals of their lives and liberties and to exert total control over those nonhuman animals that they allowed to live was so ingrained in Roman law that history reveals not a single instance of a Roman jurist questioning its legality.”).

121. *Id.* at 503.

122. *Id.* at 543 (“It was only in the eighteenth century that Western legal philosophy commenced its long separation from a theology that was seen as the ultimate source of law and posited the inherent and immutable superiority of human over nonhuman animals.”).

interdependence on nature and our need to protect the environment.¹²³ This anthropocentric approach in law that regarded nature as a collection of resources for human use and management became known as conservationism.¹²⁴

It was in reaction to this human-centered tone of the law that early and mid-twentieth century environmental writers, like Aldo Leopold and John Muir, began to talk about the ethics of preservation.¹²⁵ Preservationists seek to shape environmental law and policy around the idea of ecological equality, believing that nature exists for its own sake and humans are not inherently superior to other living things.¹²⁶ Although not necessarily dominant, this perspective greatly influenced the tone of environmental legal ethics in the latter half of the twentieth century and directed the mainstream environmental movement away from a conglomerate assessment of community interests when determining the value of natural resources.¹²⁷

B. What's Wrong with Rights?

Ever since Stone argued for legal rights in the form of personhood for natural objects, environmentalists have attempted to assimilate plants and animals with humanity in a way that echoes the bizarre anthropomorphization of deodand practice.¹²⁸ Stone analogizes the denial of legal rights for natural objects to the once-unrecognized legal personhood of children, prisoners, women, and racial minorities.¹²⁹ Recently, a converse approach to expanding legal personhood has been attempted by arguing that

123. See *Geer v. Connecticut*, 161 U.S. 519, 522 (1896) (concluding that the solution to the issue “involves a consideration of the nature of the property in game and the authority which the state had a right lawfully to exercise in relation thereto”).

124. Carlson, *supra* note 102, at 965 (describing the motivation of conservationists as “not to consume . . . resources until depletion, but rather to manage them wisely for human use”).

125. *Id.* at 964–65.

126. See PAUL W. TAYLOR, *RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS* 13 (1986) (arguing that “living things of the natural world have a worth that they possess simply in virtue of their being members of the Earth’s Community of Life” and that their worth “does not derive from their actual or possible usefulness to humans, or from the fact that humans find them enjoyable to look at or interesting to study”).

127. Cullinan, *supra* note 117, at 11 (noting Stone’s influence in *Sierra Club* and continued impact on environmental discussion); Carlson, *supra* note 102, at 970 (arguing that Stone’s and other preservationists’ agenda to separate environmental interests from human interests will, over time, erode environmental protection).

128. See, e.g., Cullinan, *supra* note 117, at 20 (referring to trees as “our ancient elder cousins”); see Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 *ANIMAL L.* 1, 6 (2010) (arguing that great apes and cetaceans as well as humans possess significant bodily integrity and bodily liberty to create autonomy and dignity).

129. Stone, *supra* note 91, at 451.

humans are not entitled to personality merely by being *Homo sapiens*.¹³⁰ Arguments for granting personhood to non-human animals often take on an urgent feel and deny the efficacy of alternative proposals for enhancing legal protection of the environment.¹³¹

This strain of discussion presents serious philosophical issues that confuse an already tangled legal situation and distract from the proper focus of environmental policy. Despite exhaustive lists of similar biological functions,¹³² it is by no means commonly recognized in law or philosophy that animals are as autonomous as human beings and should, therefore, be granted personhood.¹³³ In fact, humanity's rationality has long been considered the dividing factor between mankind and the rest of nature.¹³⁴

In an effort to obliterate the longstanding notion of hierarchy in the natural world, proponents of rights for natural objects employ a Darwinian cosmology that blurs the distinction between humanity and other species.¹³⁵ But if we accept Darwin's position that the difference between the rationality of humans and other species is "one of degree and not of kind,"¹³⁶ the debate will merely refocus on varying degrees of autonomy,¹³⁷ which perhaps adds more levels in the pyramid but does little to create a horizontal cosmology. It is virtually impossible to argue that all living things exist at one level of autonomy and deserve equal protection under the law. The impulse to reject hierarchy in environmental dialogue has extended as far as arguing that there is "a logical duty to limit human

130. Wise, *supra* note 128, at 7 ("I have never encountered either a philosophical or jurisprudential argument—as opposed to a mere declaration—that rationally claims that such a *Homo sapiens*, human merely in form, is entitled to legal personhood solely because she is a member of the species *Homo sapiens*.").

131. See Favre, *supra* note 8, at 476 (arguing "the future of wildlife within our legal system turns upon the issue of legal personality").

132. *Id.* at 477–78.

133. Wise, *supra* note 1, at 543; KEITH THOMAS, *MAN AND THE NATURAL WORLD: CHANGING ATTITUDES IN ENGLAND 17–30* (1983) (describing numerous historically accepted distinctions between humans and animals including the belief that "animals were prisoners of their instinct, guided only by appetite and incapable of free will").

134. Wise, *supra* note 1, at 524; see Cohen, *supra* note 45, at 36 (arguing that medieval practices of providing trials and representation to non-human parties "did not mean that animals deserved the same rights as people" and that animals "were subject to the universal law that had placed them below man, and must refrain from harming him").

135. Wise, *supra* note 1, at 544–45 ("The twentieth century also has witnessed the birth of the scientific disciplines and discoveries that have powerfully supported Darwin's notion of evolution by natural selection and have steadily and more truly revealed the natures of both human and non-human animals. . . . Because law values the past merely for having been, and because judges routinely misconstrue humanity's place in Darwin's world, judges routinely rely upon the prior judicial decisions and jurisprudential writings of those who lacked any modern scientific knowledge.").

136. CHARLES DARWIN, *THE DESCENT OF MAN* 105 (1871).

137. See, e.g., Favre, *supra* note 8, at 508 ("[T]he ethical logic of equality diminishes when faced with the reality of politics and resource limitations that define the legal world.").

population growth” to sustain wildlife habitat and support biodiversity.¹³⁸ That impulse has also likened the human presence on earth to that of a pathogen, which the planet will exterminate by raising temperatures beyond hospitable levels unless we become more symbiotic.¹³⁹

In law, the push for rights for non-human objects does nothing to advance the goal of finding a way to provide increased environmental representation in litigation that is both functional and sustainable. Although many have advocated that the environment should be granted personhood in the same way the law was willing to recognize corporations,¹⁴⁰ it is because corporations are institutions of people that they have legal personality.¹⁴¹ It has been proposed that natural objects should be given rights but perhaps not to the extent of recognized human rights.¹⁴² One does not have to ponder the concept of “limited rights” for the environment for very long to find that there is hardly an articulable conversation to be had on the subject. Should a river be granted the right to flow but not to flood? Should courts recognize a tree’s right to grow and not be cut down but only if it remains healthy or does not pose a threat to a human dwelling? If a tree is granted rights, will it not also incur prosecutable liabilities and perhaps return us to absolute deodand practice of old?¹⁴³

This line of thinking not only quickly leads to, perhaps, insurmountable legal problems¹⁴⁴ but also, sadly, has distractingly diverted the environmental conversation since first proposed in 1972. Very few other proposals have received significant attention from the environmental

138. *Id.* at 484.

139. *See, e.g.*, Cullinan, *supra* note 117, at 18 (arguing that “[c]ompliance with the organizing principles of the higher order holon is a condition of continued membership in it” and that if we do not become more symbiotic, the Earth, “like a host animal infected with pathogens, must either kill the pathogen [for example, by global warming that raises average temperatures to levels inhospitable to human life], or enter into a new symbiotic relationship with it” perhaps on the basis of a far lower human population).

140. Favre, *supra* note 8, at 499; Stone, *supra* note 91, at 457.

141. *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 737, 740–41 (1888).

142. Stone, *supra* note 91, at 457–58 (suggesting that “to say the environment should have rights is not to say that it should have every right we can imagine, or even the same body of rights as human beings have . . . [or] that everything in the environment should have the same rights as every other thing”).

143. *Id.* at 481 (noting that “if ‘rights’ are to be granted to the environment, then for many of the same reasons it might bear ‘liabilities’ as well” given that “[r]ivers drown people, and flood over and destroy crops; forests burn, setting fire to contiguous communities”).

144. Potts, *supra* note 98, at 576 (arguing that “[g]ranting legal standing to animals and inanimate natural resources would require a great shift in the legal system” and that it “would be difficult to persuade a legislature, much less the judicial system or people in general, to accept it”).

community, though not for lack of meritorious arguments.¹⁴⁵ Most disturbingly, in our efforts to find the correct legal place for non-human members of the environment, we may have forgotten our own. In this attempt to reorganize a natural order perceived by societies across the globe and structured in their laws for thousands of years, we have neglected our role as caretakers responsible for our surroundings and lost a proper understanding of the value of our home.¹⁴⁶ To be a tree is not to be human, but perhaps, it is still something to be a tree.

C. Restoring Humanity with Hierarchy

In 1998, Ann Carlson offered a fresh perspective on the issue of environmental standing.¹⁴⁷ In contrast to the negative view of most environmentalists concerning the heightened standing requirements in the wake of court rulings since the 1970s,¹⁴⁸ Carlson argued that the stricter regulations would provide unanticipated advantages for environmental plaintiffs.¹⁴⁹ Specifically, Carlson believed that a standing requirement that focused on human injury would lead plaintiffs to show why environmental resources deserved protection and would expand consideration of who is affected by the degradation of those resources, which would inspire greater environmental protection in time.¹⁵⁰

Because the issue of standing is one of jurisdiction and may be raised at any time, including by the court *sua sponte*,¹⁵¹ environmental plaintiffs often make a weak showing of injury at early trial stages in an attempt to

145. See *id.* at 577 (arguing, based on the Coase Theorem, that allowing individuals to purchase rights to natural resources in a form of free market environmentalism would increase environmental protection).

146. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 133 (C. & J. Rivington et al. eds., 1824) (explaining that humans, even in a state of liberty, do not have the liberty to destroy “any creature in his possession” unless “some nobler use than its bare preservation calls for it”).

147. Carlson, *supra* note 102.

148. *Id.* at 933–34 (noting that most commentators regard the increasingly strict standing requirements since *Sierra Club* as “damaging to the environmental cause” and have sought “either to eliminate the central standing requirement that environmental plaintiffs demonstrate ‘injury in fact,’ or to render the requirement essentially meaningless”).

149. *Id.* at 935 (“By making the requirement more stringent, the *Lujan* cases may actually push environmental groups to grapple more seriously with the relationship between humans and environmental resources. That grappling, I argue, may help environmental plaintiffs win more cases and achieve deeper, broader relief in the cases they do win.”).

150. *Id.* at 936 (“Stricter standing rules could even lead environmentalists to think differently both about who is affected by the degradation of an environmental resource. . . . [A] change in focus could, in turn, help environmental groups reach beyond their traditional constituencies to people who have not previously considered themselves environmentalists.”).

151. See FED. R. CIV. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).

bypass the issue unless forced to offer evidence.¹⁵² This strategy of alleging general and seemingly unsubstantiated harm has neither yielded favorable litigation results¹⁵³ nor enhanced awareness of the common goal of humanity to protect natural resources.¹⁵⁴ It is Carlson's position that environmental litigation and law would be greatly enhanced by "a stronger focus on the human relationship with the environmental resource at issue."¹⁵⁵ Because this interdependence has been largely ignored and legal discussion of environmental protection so often has pitted the rights of humans against the interests or "rights" of natural objects, it has been argued that there is "no shared, positive understanding of the human relationship to the natural world" in the environmental movement.¹⁵⁶

It is clear that preservationists, who advocate for rights for the environment, and conservationists, who focus on human interests at stake in environmental litigation, share a common goal of enhancing legal protection for the natural world.¹⁵⁷ Nevertheless, the philosophical distinction between the two streams of thought may prove important for understanding the power of the connection between humanity and nature.¹⁵⁸ If standing were granted to non-human objects to sue in their own capacity, what need would there be to present testimony at trials of human reliance on natural resources? Even the citizen-suit provisions of the Clean Water Act and the ESA, heralded as profound developments in environmental law, do not require such showing of the value of the natural resource in question, provided some satisfactory measure of human harm has been shown.¹⁵⁹ Embracing an anthropocentric approach to standing in environmental law, however, forces plaintiffs to examine and explain the injury borne by specific communities or individuals in the degradation of our ecosystems.¹⁶⁰ It is almost impossible that these efforts would not raise widespread

152. Carlson, *supra* note 102, at 953.

153. *See Wilderness Soc'y v. Griles*, 824 F.2d 4, 12 (D.C. Cir. 1987) (dismissing for lack of standing for plaintiff having "not pointed to any specific lands that they wish to use" that would have been reclassified).

154. Carlson, *supra* note 102, at 934-35 ("[E]nvironmental organizations have, at the Supreme Court level, also consistently advocated either a very loose application of the injury-in-fact standard or its elimination.").

155. *Id.* at 963.

156. BRYAN G. NORTON, TOWARD UNITY AMONG ENVIRONMENTALISTS 9 (1991).

157. Carlson, *supra* note 102, at 967.

158. *Id.* at 967 ("Believing that a species should be preserved because it has an inherent right to exist is quite different from believing that species preservation is important because of the benefits biodiversity may produce for humans.").

159. *Id.* at 977.

160. *Id.* at 986-87 ("A standing inquiry focused on injury in fact will obviously not transform national environmental groups into organizations focused only on the convers of the common person. . . . But a human-centered standing inquiry at least pushes environmental groups to think about who benefits from environmental protection and how they benefit.").

awareness of the importance of humanity's impact on the environment and our responsibility to guard our natural resources vigorously on every front available to us.

For example, in 1973, a group of citizens brought suit under the ESA to stop the Tennessee Valley Authority (TVA) from constructing a dam in the Little Tennessee River because damming the water would totally destroy the habitat of a local endangered species, the snail darter minnow.¹⁶¹ The case drew heavy criticism as an example of environmentalism gone wild, immortalized under the slogan "fish bites dam."¹⁶² When viewed from the perspective of "minnow interests" versus "human interests," undoubtedly, it seems impossible to find those interests equal, if even comparable. Less discussed in the discourse of those who followed the case, however, were the interests of the families in the Tennessee Valley who depended on the river for watering farms, fishing, or recreational and esthetic uses.¹⁶³ Because it served as both a feeder and food supply for many species, the absence of the snail darter would have caused a severe crisis in the local ecosystem, as had already happened in other parts of the Little Tennessee River.¹⁶⁴

Although later superseded by a congressional bill exempting the TVA project from the ESA, the Supreme Court affirmed the injunction prohibiting construction of the dam.¹⁶⁵ Sadly, mainstream media chose to ridicule the case and its outcome as extremist environmentalism instead of emphasizing the importance of biodiversity in the local ecosystem and explaining the potentially devastating effects on the river and the human way of life dependent on it.¹⁶⁶ In order to combat such skeptical social attitudes, litigators should present a more compelling legal and moral narrative by highlighting human interests at stake in the preservation of the natural world instead of downplaying humanity's relationship to the environment in favor of inflating the proposed interests of non-human objects.¹⁶⁷

Even accepting that a human-centered approach to environmental standing provides the best long-term perspective on legal representation for

161. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 153 (1978).

162. Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences*, 19 U. MICH. J.L. REFORM 806, 812 (1986).

163. Carlson, *supra* note 102, at 973.

164. *Id.*

165. *Hill*, 437 U.S. at 153.

166. Carlson, *supra* note 102, at 973.

167. *Id.* at 976 ("[H]ighlighting the complex human relationship with an environmental resource in a way that is either explicitly human-centered or that embodies a more nuanced notion of the role environmental resources play in human existence seems more compelling and persuasive than ignoring or downplaying that human relationship.").

natural objects, the question becomes: Who should represent the human interests at stake? Perhaps it was once fathomed that the national government in the form of the Department of Interior would be capable to protect public lands.¹⁶⁸ But that has proven to be an impossible goal, as shown by federal policies that include provisions for citizen suits regarding violations of environmental regulations.¹⁶⁹ Yet, individual citizen suits have had limited success and have often failed to show sufficient injury for standing requirements.¹⁷⁰

These failures to find sufficient standing have caused environmentalists to hone in on Stone's suggestion that interested private parties should apply to courts to be appointed legal guardians for natural resources.¹⁷¹ He suggested that there would be no shortage of organizations willing to play such a role, referencing the Sierra Club, Environmental Defense Fund, and Natural Resources Defense Counsel.¹⁷² In seeking to represent environmental interests, however, national establishments have often failed to provide sufficient showing of injury in the aftermath of *Sierra Club*.¹⁷³ Perhaps the quest for appropriate legal representation of environmental interests can be answered by asking whose interests are being represented. Focusing on natural objects' interests in existing has led to currently unsolvable legal issues and seemingly irreconcilable philosophical disputes. But there are also human interests at stake. Whose? Everyone's.

IV. WHY LOCAL COURT-APPOINTED COUNSEL BEST SERVES ENVIRONMENTALISM

A. *What Deodand Got Right*

It would seem that modern environmentalism has brought us almost full circle to medieval deodand practice in our efforts to color Western law with recognition of our responsibility to preserve the natural world. While the practical implications of some of the more extreme of these proposals (granting legal personhood to trees) may rightly give us pause; perhaps there is a reason we find ourselves returning to courts to iron out our

168. Stone, *supra* note 91, at 472; Knight v. U.S. Land Ass'n, 142 U.S. 161, 181 (1891).

169. Endangered Species Act, 16 U.S.C. § 1540(g) (2012); Clean Air Act, 42 U.S.C. § 7604; Clean Water Act, 33 U.S.C. § 1365 (2012).

170. See *Defs. of Wildlife*, 504 U.S. at 555–56 (giving an example of a case failing to show sufficient injury for standing requirements); *Nat'l Wildlife Fed'n*, 497 U.S. at 872.

171. Stone, *supra* note 91, at 465.

172. *Id.* at 466 (“The potential ‘friends’ that such a statutory scheme would require will hardly be lacking.”).

173. See, e.g., *Defs. of Wildlife*, 504 U.S. at 555–56 (denying standing to individual members of national organizations).

relationship with the environment. What does deodand practice tell us about how humanity sought to resolve conflicts with non-human objects in our surroundings historically? It was the responsibility of the community to ensure order and justice in the local environment through legal processes.¹⁷⁴

Not only were trial practices and penalties for non-human offenders mandated by the law, but communal funds paid for court-appointed counsel to represent the interests of the human complainants and the non-human defendants.¹⁷⁵ Non-human offenders in the environment were not to be punished without proper presentations of evidence, fair trials, and substantiated convictions.¹⁷⁶ Humans were not permitted to bypass legal processes for resolving conflicts with the natural world,¹⁷⁷ and defense attorneys performed their duty to represent their non-human clients earnestly.¹⁷⁸ However oddly these practices played out, it is certain that they were an attempt to ensure that conflicts between humans and the natural world were addressed justly, procedurally, and according to the requirements of the law that applied to the entire community. These legal traditions were based on a hierarchical understanding of the natural world,¹⁷⁹ which viewed humans as rationally supreme caretakers responsible for providing sustainable protection to the interests of the entire community.¹⁸⁰

It is not coincidence that today the actions brought by local communities of affected areas accomplish more through litigation than the

174. Pervukhin, *supra* note 22, at 253; Stone, *supra* note 91, at 475. This sense of responsibility even in the midst of advocating for rights for natural objects: “Indeed, one way—the homocentric way—to view what I am proposing so far, is to view the guardian of the natural object as the guardian of unborn generations, as well as of the otherwise unrepresented, but distantly injured, contemporary humans.” *Id.*

175. Girgen, *supra* note 5, at 99 (noting that “[i]n spite of their nontraditional defendants, both the ecclesiastical and secular courts took these proceedings very seriously and strictly adhered to the legal customs and formal procedural rules that had been established for human criminal defendants” and that “[t]he community, at its own expense, provided the accused animals with defense counsel, and these lawyers raised complex legal arguments on behalf of the animal defendants”).

176. *Id.* at 101 (describing how a complaint alleging harm must be brought, a judge must send someone to investigate the damage allegedly caused by the defendants, a procurator must be appointed to represent the defendants, and a full trial must be held before any judgments could be pronounced).

177. EVANS, *supra* note 3, at 147.

178. Girgen, *supra* note 5, at 101 (noting that defense counsel “could avoid all arguments by the use of dilatory tactics” or “claim that the court had no jurisdiction over the animals” and “try to vindicate their clients’ actions”).

179. Wise, *supra* note 1, at 488; Finkelstein, *supra* note 44, at 83; *see* Cohen, *supra* note 45, at 37 (arguing that animal trials “defined man’s relationship with the animal kingdom by virtue of his judicial rights over it” and “reaffirmed society’s self-image as universally just” while providing “the setting for a communal ritual of self and environment purification from inimical forces”).

180. Cohen, *supra* note 45, at 15.

actions brought by individual private parties or national organizations.¹⁸¹ Both county prosecutors and groups of community members have successfully met standing requirements when suing for environmental harm. Procedurally, this reflects the preference for a geographical nexus to the natural resource in question so often stressed in judicial opinions discussing standing since the 1970s and present in ecclesiastical deodand proceedings.¹⁸²

When human interests propose to alter the local ecosystem in an irreversible way, a case should be made for the interests of communities affected by the loss of biodiversity or degradation of natural resources. Many federal regulations already require proponents of industrial expansions to conduct studies on estimated ecological impacts.¹⁸³ The results of these studies should be carefully considered and debated before decisions to jeopardize or destroy wildlife habitats are made. In many cases, once the ecological impacts are understood, it is likely that interested parties will petition courts to grant standing to sue for the imminent harm. Germany has embraced this outcome with its *Verbandsklagerecht* laws, which grant standing to organizations who seek to promote nature conservation for non-pecuniary purposes.¹⁸⁴ But, it should not be left up to volunteer counsel or national organizations to represent the interests of the community in preserving the natural environment in these situations. Instead, courts should appoint local counsel to represent the human interests at stake in the loss of or abuse to the natural resource in question.

181. Compare *Students Challenging Regulatory Agency Procedures*, 412 U.S. at 670 (granting standing to a group of individuals who made regular use of the locally affected area), and *Douglas Cty.*, 48 F.3d at 1495, with *Sierra Club*, 405 U.S. at 727 (denying standing to a national organization suing over a specific plot of land), and *Cetacean Cmty.*, 386 F.3d at 1179 (granting standing to a group of individuals who made regular use of the local affected area and to a county prosecutor who proved land within the county's borders would be affected, but not to a national organization suing over a specific plot of land or to a private party seeking to represent the entire cetacean community).

182. *Sw. Ctr. for Biological Diversity*, 967 F. Supp. At 1171; *Lucero*, 102 F.3d at 449–51 (10th Cir. 1996) (referencing the importance of geographical nexus); *Cedar Point Oil Co.*, 73 F.3d at 555; *Didrickson*, 982 F.2d at 1340–41; see also Cohen, *supra* note 45, at 13 (noting that ecclesiastical proceedings and secular trials “had a clearly discernible geographic epicentre”).

183. See, e.g., National Environmental Policy Act, 42 U.S.C. § 4321 (2012) (requiring companies seeking to build certain types of industrial and commercial operations, particularly manufacturing structures, to conduct extensive surveys and evaluations of probable and possible effects on the surrounding natural habitats and the potential degradation in environmental quality for specific ecosystems and species, particularly if a protected area or endangered species is jeopardized).

184. Magnotti, *supra* note 104, at 492 (describing how the German Federal Nature Conservation Act allows for an organization that has not been subjected to any violation of its rights and that wishes to “promote for non-pecuniary purposes and not merely for a limited period of time, the causes of nature conservation” to file for a legal remedy).

This idea is not unprecedented in legal thought¹⁸⁵ or in state legislation. The California Water Code allows the state attorney general to petition a court to impose civil liability on citizens who violate the code's provisions concerning pollution and unauthorized discharge into communal water systems.¹⁸⁶ Similarly, some states have begun to facilitate the idea of localized environmental litigation by creating trust funds for the benefit of non-human legal representation.¹⁸⁷ Legal efforts like these, recognizing community responsibility to ensure environmental protection, remain our best hope for restoring a correct understanding of the role of humanity in protecting the natural world and sustaining a thriving ecology.

B. Sustainable Legal Protection for the Environmental Community

Because we are currently experiencing an increase in environmental litigation, it is crucial that we understand our role as protectors and careful managers of the natural world and that this understanding manifests in our legal systems. The goal of modern environmentalism should be to enhance the most effective and sustainable legal representation for ecological injuries. Despite the trend of current environmental conversation, it is in the best interest of environmental plaintiffs to focus on human interests at stake in the loss of biodiversity in our ecosystems rather than seek individual redress for the interests of non-human parties.¹⁸⁸ For example, scientists who study climate change have argued that increasing individual awareness of human impacts on nature is the only viable option for ensuring clean-air sustainability and reducing atmospheric pollution.¹⁸⁹ Divorcing human and

185. See Burke, *supra* note 24, at 29–30 (arguing that deodand practice has not expired in the United States because the Attorney General or States Attorney has essentially replaced the function of the sovereign in prosecuting accidental deaths).

186. CAL. WATER CODE § 13385(b)(2) (Deering 2016).

187. REV. CODE WASH. § 11.118.005 (2001).

188. Carlson, *supra* note 102, at 976 (arguing that “a human-centered approach to environmental standing at least offers the potential to reach beyond old environmental constituencies and to see the human complexity in environmental policy” and that “[r]esource-centered litigation makes no room for such perspectives”).

189. Michael P. Vandenbergh, *From Smokestacks to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515, 517–18 (2004) (“If asked to envision a polluter, most of us would describe a tall stack from a large industrial facility billowing smoke or a pipe releasing foaming liquid into a stream. The environmental laws and academic commentary of the last thirty years reflect this common conception. With few exceptions the environmental laws enacted since the 1970s have directed command and control requirements at large industrial sources of pollution. . . . We are polluters. Each of us. . . . Industrial sources continue to be major sources of pollution, and other important pollution sources exist, but individuals are now the largest remaining source of many pollutants.”) Debates over effective measures to combat climate change have, until recently, centered on restrictions for large corporations and apparent mass polluters. In the last several years, however, an increasing awareness of the imprint of the individual human on the planet has shifted the nature of concern. *Id.*

environmental interests likely will do more to harm than to help lasting protection of natural resources.

The interests at stake belong not only to the current members of the community who avail themselves of the esthetic, ecological, educational, historical, recreational, and scientific value of natural resources but also to future inhabitants who one day would do the same. In the summer of 2015, Pope Francis released his encyclical letter, *Laudato Si'*, which focused exclusively on the moral imperative of environmentalism.¹⁹⁰ Pope Francis describes the responsibility to ensure functional human interaction with the natural world as one common to all people as members of the human race.¹⁹¹ Thousands of years have passed since the earliest societies instituted laws regulating the relationship of humanity and our surroundings, and still we are searching for the best processes to maintain order and justice in our ecological communities. Perhaps it is currently even more essential that we understand our role and responsibility in guaranteeing legal protection to the environment because lately we have found ourselves to be masters of the natural world, quite capable of its subjugation and destruction, and not so often victims of it.

CONCLUSION

Far from being a novel concept, wildlife and biodiversity have long been considered an indicator of society's attentiveness to environmental stability¹⁹² and have been afforded legal processes and protections for thousands of years.¹⁹³ By recognizing the value of non-human members of the environment and the connectedness of human interests to natural resources, we assume our responsibility to care for the natural world and afford the collective community a place under the law. By allowing court-appointed counsel to represent the value and importance of the non-human environment to humanity, we are essentially litigating for our own posterity

190. Pope Francis, *Laudato Si'*, VATICAN ENCYCLICAL LETTER ¶ 1–2 (2015).

191. *Id.* ¶ 13–14 (“The urgent challenge to protect our common home includes a concern to bring the whole human family together to seek a sustainable and integral development, for we know that things can change. . . . We need a conversation which includes everyone, since the environmental challenge we are undergoing, and its human roots, concern and affect us all.”).

192. MICHAEL J. MANFREDO, WHO CARES ABOUT WILDLIFE?: SOCIAL SCIENCE CONCEPTS FOR EXPLORING HUMAN-WILDLIFE RELATIONSHIPS AND CONSERVATION ISSUES 2 (2008) (“People worldwide have different reasons for caring about wildlife: Wildlife are a source of attraction and fear, they have utilitarian value and symbolic meaning, they have religious or spiritual significance, and they are a barometer measuring people’s concern for environmental sustainability.”).

193. Wise, *supra* note 1, at 478–85.

and fostering healthy, societal relationships for the future.¹⁹⁴ And in the process, we cannot help but extend legal protection and generate concern for the other non-human members of our environmental communities, as has been the habit and goal of the law in countless cultures over the centuries. Because the law does and should seek to provide sustainable protection for the well-being of our communities, rats and trees need lawyers too.

194. See Cohen, *supra* note 45, at 35 (describing uses of justice as “excellent mirrors of the mentality of an age” and stating that “they delineate man’s concept of necessary and desirable societal relationships” and “reveal man’s view of his place within the universal scheme”).