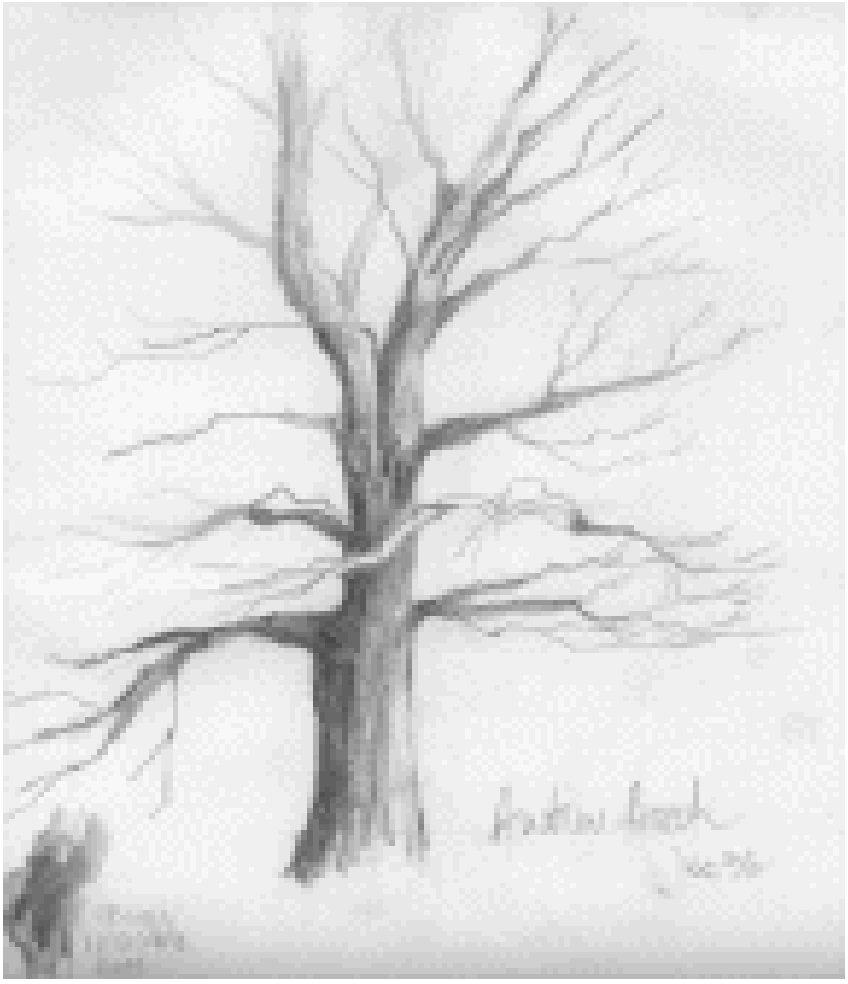
Could Trees Develop a Personality?

Is the status of trees and nonhumans adequately provided for in the legal world? Can they seek to build a case for personhood and how can current legal thought adapt to this paradigm shift. Is the growing awareness of sentient higher animals bridging the gap and bringing the guise of personhood closer to forests and their trees.



The tree which moves some to tears of joy is in the eyes of others only a green thing that stands in the way. Some see Nature all ridicule and deformity, and some scarce see Nature at all. But to the eyes of the man of imagination, Nature is Imagination itself.

- *William Blake, 1799,* The Letters

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1.1 Introduction

For centuries law has gone by the sentiment of, "*Hominum causa omne jus constitum"* (All law was established for men's sake) and even though jurists aired this view nearly two thousand years ago it still echoes firmly in the present. Today modern treatise contain the identical words with an explanation that, "The law is made for men and allows no fellowship or bonds of obligation between them and lower animals." The law is rooted in the past; it is borrowed from one age to another and survives itself by perpetuating the doctrine of precedent. It is much simpler to refer to and trust in the decisions already established in the legal mindset than to start anew[1]. This does provide a continuity and stability to the law that is always needed, but when borrowing from laws of the past we are transposing the past into modern culture. The law of a modern society often has its rules based in different cultural beginnings and beliefs, and the laws that have arisen from an entirely different cultural universe can have a contradictory affect. These ancient laws may transport with them ancient prejudices and less developed knowledge of our environment, which reflects values that have been outdated for many years.

We view law as something that is ever changing and evolving into new sensibilities to mirror our changing consciousness as a developing society. The past reconciles itself with the present and we adapt ourselves to new reasoning and thought to reflect the current state of things. This is how the law should perpetuate itself but often we find that the law does not travel along that linear advancement. Rather, the law becomes an anachronistic entity that erects barriers and fortifies itself against modern change and custom. Arguably the most stubborn law of recent history has been the unjust treatment of legal personality or thinghood towards non-human life

and entities. This paper will reconsider modern law's ability to assimilate not such a modern idea into the ranks of firmly threaded legal practice.

Throughout legal history there has been a consistent granting of rights to new entities, from blacks, to women, to children. Each has successively been unthinkable within their time, yet now appear so natural within the legal world that it seems ludicrous to believe that such rights would have been against the convention in previous centuries. Blacks have been denied rights of citizenship due to being considered, " as a subordinate and inferior class of beings, who have been subjugated by a dominant race…"[2]. In the 13th century Jews were considered men *ferea naturae*, protected by a quasi-forest law. They were treated as deer or roe, an order apart from other men and all that they acquired or did was for the King and not himself[3].

The foetus was once considered devoid of any rights when negligently killed, as it had not yet come into being and any civil duty or liability seemed inconceivable to jurists. When an object has no rights it appears to be a fit of whimsy to suggest that it should. It is hard to identify with something that has naturally been overlooked due to an inferior status. When a thing accumulates rights and a value unto itself it reduces the human right to hold power over the environment. In this discourse I will be specifically concentrating upon trees and forests and the possibility that they could start to develop a legal personality in their own right. International law in recent decades has seen the creation of more sophisticated environmental instruments that consider the environment in an ever-growing intrinsic light. National courts have witnessed increasing cases brought in the name of higher animals like chimpanzees, dolphins and birds. Cases have also named plaintiffs such as a polluted river, a marsh, a beach and a tree.

I will be discussing the means by which trees could show a basis for personality and the principles and mechanisms of law that will be able to further the argument that trees should have standing. As the branch of non-sentient life most recognised and with which we sympathise, trees shall be at the forefront of change in environmental law. The recent attention upon animal rights could extend the fundamentals of a legal framework to non-sentient life.

1.2 Personality of trees

In order for a tree to attain a personality or legal standing it must be given some amount of public review. To institute legal proceedings, the tree must have a legally recognisable worth and value in itself, and thus must satisfy certain criteria. Firstly, it must be able to institute proceedings and legal actions at its behest. Secondly, the action must be in respect of injury suffered in the form of a legally recognised interest. Thirdly, there must be causation in which the injury must be attributable to a recognised breach of duty. Lastly, the remedial action must be for the benefit of the injuriously affected person and alleviate the injury.

Common law has barriers in place that prevent trees, natural objects or even animals from gaining access to the courts. If a forest has lost vigour, reproductive capacity and the ability to contribute to it's ecosystem due to the recidivistic actions of a polluter, it is powerless. The forest itself cannot bring the case for damages; only the human with property rights over the forest can bring a claim for invasion of property. But bringing an action may cost more than the worth of the forest, the property owner may be economically dependent upon the polluter, or the forest owner maybe contributing to the pollution. This creates an initial barrier for which cost will eliminate the ability of most individuals, or even co-plaintiffs, to bring an action

against a polluter. After the cost, burden of proof that specific damages have been afflicted upon the plaintiff's property has to be established. Thus verifying that unreasonable neglect of the contiguous environment has been committed by the defendant's improper action. There are issues to be resolved such as whether practical abatement exists, whether they are cost effective, the status of joint casualty and whether the pollution is prescribed by the state.

The law also denies natural objects any weight in the decision or interests of the property owner, compromises and balances are struck but only in the favour of the economic interest of the identified humans. The public interest doctrine puts the economic hardship of the trees against the cost of abating the pollution; the trees and the life that they support do not come into the equation. Even the personal grievances of an individual or property owner must yield to the greater public interest and the forest is lost in the midst of two prevailing human interests.

Finally the law does not make any provision for whom is the beneficiary and to what extent they may benefit from the paid damages. Even if the damages were based on making the forest whole again or bringing it back to a state before the pollution occurred, no money would benefit the forest, not even for reparation but would be paid to the plaintiff. The costs for paying reparation damages to the property owner may be substantially less than that of upgrading the technology to mitigate the pollution. This may motivate the plaintiff to sell out the forest, a settlement that does not solve the greater problem and makes no peace for the forest.[4].

1.3 Guardians of the forests

Considering the points discussed above it is obvious that a forest should not be subjugated by an owner suing for property damage to his trees. Rather a forest should

be suing for damage to its integrity, consequently gaining reparation through the owner or interested party as a guardian *ad litem*. In the past thirty years the possibility of forests and natural objects obtaining standing in their own right has been showing signs of emerging or least moving in the right direction.

Forests share one common attribute with many holders of rights; they cannot speak for themselves in the same way that corporations, states, infants and incompetents cannot speak. A lawyer is appointed to represent them in legal affairs and to stand for their best interests. Stone suggests that much like a bankrupt corporation or a human incompetent that natural objects should be granted a guardian or trustee to represent their interests.[5] A "friend of the forest" could petition the court to be granted the status of guardian; an established environmental group with expertise in the matter would take on the guardianship. A local centralised environmental group would have more of an interest in the matter of guardianship and would be able to prove direct and impacting injury to their members or the local area.

The guardian as a qualified friend would be able to clarify and affirm the condition of the forest in the eyes of the court, as through inspection, regular monitoring they could gain a deeper knowledge of the specific forest and the possible impacts of the proposed action[6]. They could therein identify any redressability and raise that right in court in the forest's name; this would then forego the need to establish any 'injury in fact' to members of the organisation or group. The investigated proof alone would provide that the forest would suffer or has suffered adversely and that redress could be brought to benefit the forest's status in itself without any direct impact to humans. The investment and time that the organisation would have to expend in the guardianship of the forest would ensure to the courts satisfaction of the plaintiffs expertise and genuine concern for the forest.

The guardian would take such forms as internationally recognised environmental organisations like Greenpeace, the Sierra Club, Friends of the Earth and Environmental Defence Fund. All are reputable bodies with expertise in both the scientific and legal sense governed by the mandate of protecting the environment. They would represent the interests of the trees or other forms of the living environment but still this would not solve the question of how to represent the interests of something that is interestless. It can be argued that the interests of a tree, forest or ecosystem are less arbitrary than the interests of represented humans.

In charge of an infant or an incompetent, the lawyer will apply the "best interests" theorem, where pre-stated conditions are legally mandated and will therefore create a bar from which its best interests can be violated.[7] The best manner for this to proceed is through civil recovery action. In the United States the federal and state government can sue polluters as trustees for the environment to recover and apply the costs for restoration. As when an oil tanker devastated a mangrove swamp off the coast of Puerto Rico the operators had to pay the liberally estimated costs of 'making the swamp whole'.[8]

Similarly, in the Berne Convention and the EC Habitats Directive, if a site is disturbed, even through overriding public interest, the interfering party has to compensate the site by making it whole by extension or rebuilding of the habitat on another site[9]. In the Grunwald Forest case concerning the construction of a road that would intersect Luxembourg's most prolific Beech forest, recovery of its integrity was initiated through consultation with Greenpeace resulting in the creation of rides, securing of the forest boundaries and extensive planting on an adjoining site[10]. These cases are only limited to States, which are party to the Convention or Directive and to the habitats that are of 'Community Importance'.

These binding articles create a property right. Berne, the Habitats Directive, Cites and the US Endangered Species Act protect critical habitats from invasion and therefore gives the species concerned a property right. It would not be wise if the species were afforded strict property rights without a balance of interests, as our ability to trade and compromise maintains the inertia towards the greater community needs. In the allocation of the costs to the environment common law sides with the preference for restoration costs as the measure for recovery, but the recovery of a forest is much more complex than that of just the timber value and tourism[11]. Also integral to a forest is aesthetic beauty, the accumulation of biomass and the complex relationships it maintains, habitats and cover for many animals. Further there is the amenity for local populations, the CO^2 sequestered over the primary growth period and the historic narrative. None of these factors that define a whole forest can be accounted for in normal common law restoration measures.

The guardian or friend concept has firmly cemented itself as a way to seek judicial redress for the environment and its occupants. In New York a woman sued as "next friend or guardian" for all livestock that then and thereafter awaited slaughter. She challenged an exemption to the Humane Slaughter Act as "inhumane" and "unconstitutional", it favoured a Jewish ritual that prescribed that the cattle must be conscious when knifed, shackled or hoisted[12].

The foundation of a guardian action would best be served through a cumulative class action that would bind all interested parties; this would also reduce the number of individual actions being deemed inconsequential or frivolous. Through the homocentric beginnings the action could then empathise the not presently cognisable injuries of the environment. This would take the form of suffering animals in the forest habitat, loss of soil productivity, injury to trees and degradation of a

wilderness area. Although it is obvious that humans feel these losses through the growing proliferation of environmental organisations and welfare groups it is not economically measurable. It has been espoused that these interests could be measured through the guise of property invasion. The polluter would then be confronted with not only the net social costs of pirating the property of homocentric concerns but also with the costs of the environment per se[13].

The best way to calculate the costs of the environment per se would be by applying the 'making it whole' idea, for which restoration of the forest to the status quo would be the cost to the defendant. A social price tag that seems too unreasonable to preserve a common forest species and its rare ground flora may seem too high in comparison to the economic benefits of a power plant. We then have to strike a balance between restoration costs and fair market values. We can achieve this through a similar method as the Berne Convention and EC Habitats Directive by making the power plant bear the costs of making the environment whole somewhere else. Still we run up against the question of how to fairly report the market costs of such compromise, and the solution would be similar to how we have dealt with human pain and suffering. We cannot ascertain these figures as objective economical facts but we do it through crude estimates to reach accords that will further and improve the values of society[14]. The courts have not been reluctant to award damages for the destruction of other inanimate objects like manuscripts and heirlooms. In one instance the owner of an old book written by his ancestor was awarded damages of all detriment including sentimental loss proximately caused by such destruction[15].

In making these normative judgements, decision makers should take into account the evolution of the value that we have placed upon the environment and that through experience we realise that we have destroyed significantly more valuable

resources. The burdens of proof should not be placed upon the present human values and knowledge but should allow room for the growth of our abilities to bio-prospect and to unlock the secrets of our environment.

1.4 Guardians through future generations

"Man has a solemn responsibility to protect and improve the environment for present and future generations," this was the Declaration of the UN Conference on the Human Environment[16]. Such sentiments have been aired in countless legal texts, the concerns for future generations and our responsibilities to them has been transmitted numerous times and is now often a standard article in environmental treaties and Conventions. A guardian to future generations would represent posterity interests and would argue their case at various international fora. The guardian would plead for the future generations firmly establishing a voice for the voiceless and bringing attention to the implications of our present actions[17]. Unlike disadvantaged groups that need representation in environmental discussions such as women, youth and indigenous peoples, future generations have been overlooked[18].

The most noticeable case for the representation of future generations is the Minor Oposa case that took place in the Philippines in regard to the revocation of timber licenses and the rights of unborn children to a healthy environment. In this case the petitioners, all minors, who were duly represented by their parents, and the Philippine Ecological Network was also impleaded as an additional plaintiff[19]. The crux of the case is based upon the right of Filipinos to a balanced and healthful ecology, which is associated with two concepts: that of "inter-generational responsibility" and "inter-generational justice". More specifically it touches on whether petitioners have cause of action to:

> "Prevent the misappropriation or impairment of Philippine rainforests and arrest the unabated haemorrhage of the country's vital life-support systems and continued rape of Mother Earth.[20]"

A guardian's role should be one of precaution so that future generations are not deprived of planetary goods and resources needed for an acceptable human existence[21]. In the Minor Oposa case it demonstrates that these considerations have not been taken into account in regard to their national rainforests as in 1968, 16 million hectares of rainforests constituting 53% of the country's land mass was present. At the time of the case it was revealed that only 850,000 hectares of old growth forest was left, barely covering 2.8% of the county's land mass. This demonstrated the irreparable damage to the minor's generation and the generations yet unborn[22].

We have a moral obligation not to leave our progeny the moral equivalent of a used up garbage heap[23] and that when charged as a guardian the employment of not only sound science but also general moralistic wisdom, which translates, as a 'healthful life' is necessary. The Guardian could take a stand against actions that would cause 'irreparable or irreversible harm'. For example a change in an ecosystem that future generation would deeply regret and ought not be permitted, as it would jeopardise future generations rightful inheritance[24].

We can recognise instances when the Guardian should intervene on future generations' behalf due to the threat of irreversible harm, which comes from the notion of option value. This is a social choice that displays the value of possible decisions. The first choice is impossible to rectify or too costly to undo like the clear cutting of virgin rainforest. The second is a reasonable anticipation of future trends,

knowledge, likely benefits and costs of the outcomes[25]. In the biological hotspot of a rainforest the present values of farmland and timber may outweigh those of medicinal, industrial, recreational and tourism values.

The forest does possess the possibility of bearing value in the future that would outstrip farmland conversion or harvesting. The option value is expressed if the forest is chosen for preservation so that our knowledge and development can exploit that future value. Our responsibilities of promoting the option value of biological hotspots give us an obligation not only to conserve the physical assets but also the knowledge of natural and cultural systems[26]. This will enable the further clarification of the forests worth, therefore increasing the concept of loss, irreparable harm and benefit for both human and intrinsic environmental interests under the powers of a guardian.

It was ruled that the petitioners of the Minor Oposa case could file for a class action on behalf of themselves, for others of their generation, and succeeding generations. Their personality to sue on behalf of succeeding generations was based on the concept of inter-generational responsibility insofar as the right to a balanced and healthful ecology is concerned[27]. The concept of guardianship could act as a mediator for international disputes or through bilateral or multilateral agreements, the guardian would act to intervene on behalf of the future generations. As in the manner of the World Heritage Convention when natural or cultural heritage is at risk, the Convention will pursue redress[28]. The Convention provides for the, "transmission to future generations"[29] of cultural and natural heritage. This, a recognised binding international duty has affected cases protecting endangered forests from destruction. In the Tasmania Dam case, a rainforest was saved from being flooded for construction of a hydroelectric Dam due to the international obligations transposed by

the Convention[30]. This is how a guardian should act, but not only for those sites that have been deemed to be of "outstanding natural beauty" from an exclusive homocentric perspective, but also the sites of less aesthetic worth.

A guardian could act as a special element to procedural hearings to make specific findings, represent and enjoin the activities that could damage global patrimony. In the Gabcikovo- Ngymaros case Hungry terminated a bilateral treaty with Czechoslovakia to build a joint canal system. One of their claims included that, "reforestation and preservation of animal species were not only of 'national value' but their preservation for future generations is a moral obligation"[31]. If these arguments are to be reiterated and held up as guiding legal thought then it would appear that inter-generational equity is gaining customary status but lacks any normative fashion to integrate itself into the corpus of international law. Although, each state in its capacity as *parens patriae* holds the ultimate responsibility to the minors and unborn generations to conserve the forests and resources so that they can transmit the right to a healthful life.

1.5 Liberalised standing

Apart from the guardianship approach, which has not completely anchored itself as an avenue for environmental rights, there has been a movement from the 1960's that promised to broaden the constraints of traditional standing, thereby affording the environment increased legal review through environmental groups that challenge governmental action. In the Scenic Hudson Preservation Conference v. FPC, the granting of a licence to construct a hydroelectric project on the Hudson River at Storm Mountain was opposed by conservation interests on the grounds that the transmission wires would be unsightly, fish would be destroyed and nature trails

would be inundated[32]. Despite the claim that the Scenic Hudson had no standing because it had not made a traditional claim of "any personal economic injury resulting from the Commissions actions"[33], the petition was heard on the standing point that the Federal Power Act gave a right of instituting review to any party "aggrieved by any order issued by the Commission"[34]. The "aggrieved by" language was not limited to traditional personal economic injury but read broad enough to include "those who activities and conduct have exhibited a special interest in the aesthetic, conservational, and recreational aspects of power development…"[35] It clearly shows a development for liberalised standing for environmental groups and that non-traditional injury has due consideration in the courts.

In the Sierra Club v. Morton, the organisation challenged a Walt Disney development in the Sequoia National Park. It was held that there was an absence of allegation as their activities or pastimes were not affected by the proposed project. The Sierra Club, which claimed special interest in conservation of natural game refuges and forests, lacked standing[36]. The club failed to prove injury in fact and the organisations mere interest in a problem is not sufficient to render the organisation, "adversely affected or aggrieved" within the specific Act, as judicial review is provided for a person that has suffered a legal wrong due to agency action[37]. The Sierra Club alleged that the project would adversely change the area's aesthetics and ecology, but the organisation asserted no individualised harm and therefore lacked the standing to maintain the action[38].

The Sierra Club's established expertise and a plea for future generations was not sufficient to create an interest due to the indiscriminate impact that the development would have upon the population. However, sympathy was found in the dissenting opinion of Mr Justice Douglas, who favoured that when an inanimate

object is about to be despoiled, defaced or invaded it should be represented by public outrage in the courts and 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”[39]. Despite the sympathies that existed on the bench standing through public interest failed, as an organisation cannot vindicate its own values, ideals or philosophies upon a subject of law. In this situation the concept of liberalised standing is foiled, as it relies on the interpretation of specific Acts and the actions of certain agencies that are answerable to that Act. Only within these Acts does the liberalised standing have a chance to take effect in particular statutory language such as, “aggrieved by”.

Unlike the constraints of language and Acts, the guardianship concept would give the inanimate environment an effective voice even if public lands and authorities were not involved. Liberalised standing would not have to be expanded or fought by the courts to remain in a traditional and static form. It would also mitigate the possibility of the courts being cracked wide open by ‘the right’, to challenge through a whimsical grievance[40]. Class action suits may ameliorate some of these problems but the courts may be better served by a guardian *de jure* that would be susceptible to discretionary intervention if needed. If standing is to reliberalise itself there is a need for recognition that the alarm and anguish caused by the stripping of a forest or any other such ecosystem qualifies as a matter in which the public has a personal stake.

Inanimate environmental objects are often at the core of each country’s beauty and run through the land as an artery proliferating life, but when a species is gone, it is gone forever, and nature’s genetic chain, billions of years in the making, is broken for all time[41]. Aldo Leopold wrote that, “The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals or

collectively: the land."[42] This sentiment underlines the process of the courts and their inevitable growth and evolution. The courts are founded and based upon the ethics that drive our community and is forever increasing its boundaries to include new knowledge and wisdom. Therefore through the growth, expansion and understanding of the changing ethic, the definitions of our community will be changed and the citizens of our community will possess increasingly diverse forms. The question of standing here is one for which the boundaries are being resisted and the questions of the integrity of stalwart doctrines are being sidestepped.

Although the liberalisation of citizen suits on behalf of the environment showed movement in the past and appeared to be expanding, a step back in the expansion of liberalised standing was suffered with the 1992 decision of the U.S Supreme Courts on the Lujan v. Defenders of Wildlife case[43]. The environmental group challenged the action of the Department of Interior's failure to issue guidelines insuring that U.S funded actions did not imperil endangered species outside of the country. The group claimed standing on the point that the decimation of the Asian species would harm one of their members who had future plans to embark on a Sri Lankan wildlife expedition. The DOI's argument was that the group did not actually suffer any cognisable injury and therefore lacked the standing to question regulations that would affect animals on another continent[44].

The Lujan case was held in favour of the DOI, where the majority of justices agreed and thus sent the message that they were not afraid to limit or even arrest the means to seek liberalised standing. The court labelled several theories of standing as, 'novel', even though they appeared to be consistent with some rulings of earlier cases such as Kreps (the South African Seal case) and American Cetacean Society (Japan Whaling case)[45]. There are two approaches to establishing standing; the "animal

nexus", whereby anyone who has an interest in studying or seeing an endangered animal has standing and the 'vocational nexus', in which anyone with a professional interest in the animals can sue. Both approaches were mocked by Justice Scalia[46]. Who espoused that the purported injuries of the plaintiff were so remote and conjectural that they were of no constitutional controversy[47].

The respondents also proposed an "ecosystem nexus", which proposes that any person who uses any part of the contiguous ecosystem and is adversely affected by a funded activity has standing even if it is located a great distance away[48]. This was reproached as being inconsistent with the opinion in the National Wildlife Federation[49], which held that a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly in the vicinity. In contrast to Justice Scalia's opinion, Justice Stevens would allow standing on the apparent "animal nexus" theory to all plaintiffs whose interest in the animals is "genuine". In his opinion, animals do not have to be visited, as they would be analogous to family[50].

The Justices asked what would constitute a "genuine interest" and how it would differ from a "non-genuine interest". If the interest were continuous or significant therefore demonstrating an adverse affect upon the plaintiff through psychological detriment combined with emotional and monetary investment, then a "genuine interest" would be established through that of a personal stake. Even if this were the case, the plaintiffs still fail to prove their grounds through redressability, as if the funding were to be suspended or eliminated it would not necessarily do less harm to the animals[51].

In the Japan Whaling case it affirms that, "the judiciary's constitutional responsibility to interpret statutes cannot be shirked simply because a decision may

have significant political overtones"[52]. Is it not then reasonable to consider that the justices should not impede themselves in interpreting such statutes just because of the political undertones that they may create within the countries own borders? It is not unreasonable, but not all are convinced. This particular line of thought has come to be regarded as a "Linnaean leap", but a leap in the courts it would not be, just a leap in the nomenclature of standing. This particular case has erected intimidating blockades for those seeking to find a qualified plaintiff or to pursue a case on behalf of an animal or environmental object. The elaborations on 'nexus' have been stemmed and await an epicotyl growth to reliberalise it again.

A Michigan environmental conservation group were granted an injunction to mining activities under the State Environment Protection Act [53]. Standing was granted under traditional precepts and ignored the wider issues that Judge Weaver was so eager to explore. "The analysis of standing fails to recognise the will of the people expressed in the constitution that the conservation and development of the natural resources of the state are hereby declared to be of paramount public concern"[53].

When traditional precepts of standing are brought alongside not-so traditional teachings, then the question of standing, which is sometimes more prevalent in the long run, is ignored and the standing and case is kept safe from contorting into a debate about the powers. When such events occur the subject that should be the true thrust and centre of the case is never touched upon. To do so would open another facet not only of the case, but also to the law of standing, not to mention the ruling judicial powers. The Hawaiian Crow (Alala) case[54] is example of such events, in which the chance to set a precedent is swept aside by the dominant arm of the traditional and the firmly rooted.

1.6 Standing for environmental beings in their own right

The Alala is a bird that is protected by the Endangered Species Act (ESA) and is unique to the Hawaiian Islands. The plaintiffs, the "Hawaiian Crow" itself, the Hawaiian Audubon society and National Audubon society adopted a recovery plan designed to prevent the species' extinction. The Alala was only dismissed upon the request of the defendants but the court denied motions for sanctions upon the case on the proviso that the plaintiffs submitted a more definite statement. The ESA authorises that "any person" can bring enforcement suits, and the term person is defined as, "an individual, corporation, partnership, trust, association, or any other private entity.[55]"

The statute does not define "entity", but quoted from Black's Law Dictionary an entity when boiled down is something that "possesses a separate existence for tax purposes"[56]. If read in common language an entity is, "something having real or distinct existence, especially when considered independent of other things."[57] The citation on which the Alala's action was based speaks only of incompetents and infants, not birds. Even though the plaintiffs conceded that the courts had not expressly addressed the meaning of "a person" under the ESA, they cited numerous cases under the ESA in which animals appeared as named parties and were not challenged in regard to standing or propriety. The court found in the language of the ESA that the Alala was not authorised to sue. The court stated that the plaintiffs did not mention the Alala for improper purposes and that a competent attorney would not have concluded that naming the Alala was contrary to existing law[58].

In the Palilla case[59], a Hawaiian Honeycreeper sought the protection of the court from harm caused by feral goats and sheep; the bird's populations were reported

to be at a dangerously low level, resulting in the filing of an injunctive relief. The bird was named as a plaintiff along with the Sierra Club, National Audubon Society, Hawaiian Audubon Society and Alan Ziegler who were suing as next of friends on their own behalf. It was held that the defendants were violating the Endangered Species Act by maintaining the feral Goats and Sheep within the critical habitat of the Pililla. The Ninth Circuit produced the statement that the Palilla; "also has legal status and wings it way into the federal court as a plaintiff in its own right"[60].

Later in the "Alala" case the language of the Palilla case was said to be of mere dictum and that the defendants never challenged the bird's standing so that the Ninth Circuit had no reason to address the matter. According to Lujan the language is just an acknowledgement by the Ninth Circuit that the bird has been named as a party and that the presence of more conventional plaintiffs supported the bird's associated standing[61]. In the Palilla case it was deposed that the mamane trees provided food shelter and nest sites for the Palilla and that the Naio forest is of critical importance to the Palilla. Under the guidance of the ESA can the powers not be extended to the rare Naio forest also? Where the bird is protected the forest could also have been be named as an interested party to the proceedings. As the, "Palilla and other Hawaiian birds are unable to adapt to drastic changes in its environment because it has become intimately tied to the mamane-naio forest through evolution[62]."

The fact that the Palilla cannot survive without the forest and that they are integrally tied up in one another's survival proves that they cannot exist apart without fracturing the rare ecosystem. Could it not then be said that in violating the rights of the Palilla and vice a versa, one is violating the rights of the forest. They exist in a fragile balance and to infringe upon either would infringe upon the interests of those charged with their protection.

In 1994 a more authoritative stamp upon a non-persons standing was taken in the Marbled Murrelet case[63]. A citizen suit to sue under the ESA was taken out by the Environmental Protection Information Centre (EPIC) and the Marbled Murrelet to seek to enjoin the implementation of a timber-harvesting plan. It was established in support of a permanent injunctive relief that the harvest plan would "harm" the Murrelet, and thereby cause "take" of that species in violation of the ESA. The logging activities would result in destruction and degradation of occupied habitat such that the Murrelets would be killed or injured by logging operations or significantly impaired in their behavioural, breeding, nesting patterns as well as exposing them to heightened risk of avian predation[64].

The stands of old growth forest do not regenerate for at least two hundred years and due to the precarious state of the Murrelet population, the destruction of any significant portion of their habitat would result in their extinction. Not to mention the destruction of rare old growth coniferous forests. It is supported that all old growth coastal coniferous forest must be protected to prevent any further modification as anymore destruction would retard the recovery of the Murrelet[65]. Although forests only appear to be of secondary importance to the species that is in fact threatened by increasing association it is building its own personality of importance as a rare habitat that cannot be replaced or compensated for under any circumstances.

The court stated that as a threatened species and thus protected under the ESA, "the Marbled Murrelet has standing to sue in its own right.[66]" The Court of Appeals took no issue in affirming the Marbled Murrelet as a plaintiff and the EPIC, which was granted standing through 'injury in fact' to its members. However, future cases that may decide the capacity for a species to bring a suit in its own name may follow

the Hawaiian Crow (Alala) case in place of the Marbled Murrelet. Thus a species standing alone in court devoid of human representation is still vulnerable to immediate dismissal.

There have been other cases brought in the interest and in the name of non-humans, under the most prevalent auspices of the ESA, in which failures to protect the animals habitat contravened requirements of the Act. The Northern Spotted Owl[67], the Mt Graham Red Squirrel[68], and the Florida Key Deer[69] were all brought in the name of the animal affected, but the issue of the species' ability to stand as a plaintiff was never tested, as all had adequate representation and standing in the form of the other plaintiffs. All of these cases were tied to forest habitats, each critical to the survival of the species and rare within themselves but they only found personality or legal significance through the animal species and its protection under the ESA.

In Germany in 1988, a suit was instituted in the name of Harbour Seals that were dying off in prolific numbers due to the flow of toxic metals into their environment. The administrative law court in Hamburg dismissed it with the pithiest of opinions[70]. In 1995 a case was filed in the name of rare migratory Bean Geese, pressing the government to declare the geese's choice of wetlands as a sanctuary. The complaint was marked with a goose's webbed footprint, but along with the case this too was rejected[71]. All of this demonstrates the difficulty for non-humans to access the courts in their own name or to any unique right that protects a fundamental right to life or existence.

1.7 Interest & friends of the environment

There are certain routes by which persons can gain judicial review or initiate an action on behalf of the environment, one of which relates to those who possess an

interest or a special interest in the condition of the said environment. The question that arises is whether a duty is owed to plaintiffs that profess an infringement upon their stated rights. In Dagi v. The Broken Hill Propriety Company case[72] actions were brought against the defendants by persons who claimed that they had been injuriously affected by the discharge of copper mine by-products into a river in Papua New Guinea. The claims included causes of action in trespass, nuisance and negligence and maintained that the defendant's actions affected the plaintiff's rights as owners or possessors of the waters of the river and the land adjacent to it[73].

The plaintiffs alleged contractual claims that the state of Papua New Guinea held on trust for the plaintiffs certain rights pursuant to agreements and statutes, and were thus beneficiaries of that trust. An interesting concept in theory, but it was struck down, as in common law a court will refuse to entertain a claim that essentially concerns rights, whether possessory or proprietary, to or over foreign land in the sense that those rights are gravamen of that claim[74]. The trespass and nuisance claims were held as not justiciable. In relation to the negligence claim they were found to be unjusticiable when based on that the plaintiffs 'possessory and proprietary rights' to the land and water. When the claim was reformulated, the negligence claim arrived on the foundation of the plaintiffs 'loss of amenity or enjoyment of the land' was found to be justiciable.

The "trust principle" on which the plaintiffs relied to question the acts of the government of Papua New Guinea and the alleged agreements were negated by the Act of State doctrine and an inappropriate intrusion into sovereign law[75]. The claims that survived the jurisdictional attack were said to be, "not unarguable that the law…imposes a duty of care in favour of persons who might use water downstream as food source or for livelihood, on the concept of dependence[76]." In this

interpretation the concept of dependence takes the forefront in supporting the case but does not assert whether it includes enjoyment of the river as a dependence, which would arguably be linked to use of the river in its untainted state.

The "trust principle" that was utilised by the plaintiffs took no affect due to the inability for it to affect a foreign court and that it could not be assimilated into domestic law. If the domestic rights of a forest were being challenged upon the basis of the "trust principle", then the government could grant relief and compensation to the owner or occupants who used the adjacent land. The "trust principle" could grant standing to sue under such breaches as negligence, nuisance or even the trespass of pollutants. The human beneficiaries of this compensation and relief should be held to place it into a trust for the recovery of the forest or afflicted environmental object. The object should be made the beneficiary of the monetary rewards from the injunctive settlement. This would ensure that the money would properly contribute towards a sincere recovery of its pre-afflicted status[77]. The trust fund would then be administered by the object's guardian and distributed to all litigants of the case but with a mandate to provide equitable redress to the affected object.

In 1993 Greenpeace was concerned about levels of radioactive discharge from the Sellafield site. They applied for judicial review by way of *certiorari* to quash the respondents' decision to vary the existing authorisations; thereby creating an injunction that would result in halting the proposed testing of the new plant[78]. The court rejected the two grounds that Greenpeace had submitted and decided to approach the case through discretion. The court considered it appropriate to; "take into account the nature of Greenpeace and the extent of its interest in the issue raised, the remedy Greenpeace seeks to achieve and the nature of the relief sought."[79] British Nuclear Fuels' (BNFL) acknowledgement of the national and international standing

of Greenpeace supported the court's recognition that it's prime objective is protection of the environment. This lead to a bona fide interest in the activities carried out by the BNFL at Sellafield. This can enforce decisions of courts that support standing for which the grounds are rejected on the basis of strong intrinsic merits, which favours a more lenient view of the plaintiff's deficiency in standing[80].

Another reason for the court to grant sufficient interest to Greenpeace is one of pure administration and economy of the courts themselves. If Greenpeace were denied standing, those that it represented might not have an effective way to bring the issue before the court. Individuals that may bring the application would not command the expertise, which is at Greenpeace's disposal. A less informed challenge may stretch and drain the court's resources therefore denying the court the assistance it requires to do justice between the parties[81]. A question is often posed in the legal world that if standing rules are designed to ensure the plaintiff has a personal interest in the litigation, is it ever justifiable to allow third parties to represent the interests of another?[82]

The most advantageous course for the courts is to allow organisations experienced in environmental matters and able to mount a carefully focused, relevant and well-argued challenge, to spare the scarce resources of the courts and expedite the hearing to an early result[83]. This may very well quell the fears of American courts that in the wake of a surge of liberalised standing they would unable to prevent a flood of litigation. It would seem that binding a competent third party would economise the courts significantly[84].

So much depends in a given case on the nature of the relief sought, for what is a sufficient interest in one case may be less than sufficient in another[85]. The relief sought in the case above, the *certiorari*, was less stringent in the courts view and still

left the discretion of further questions in their hands. It was in this light that the court declared that, "I reject the argument that Greenpeace is a "mere" or meddlesome busybody. I regard the applicant as eminently respectable and responsible and its genuine interest in the issues raised is sufficient to be granted *locus standi*."[86] According to Crane a third strand of the law of standing is acknowledging the role of the legislatures in defining the scope of judicial function by laying down rules of standing. In these rules of standing an open list of categories would provide both flexibility and guidance in an area dominated by vague and conclusory phrases[87]. These should include categories of guardians, liberalised standing and the ability of a non-person to bring an action in its own name.

One case in which a non-person was deemed as a "juristic entity" and able to sue in it's own right was the Bumper Development Corp Ltd case[88]. The named plaintiffs included the Union of India, the state of Tamil Nadu, a person suing on behalf of an Indian temple, the temple itself and a stone idol belonging to the temple. The idol classed as a family member of the temple, was stolen and sold on. Eventually it was found in London under the possession of the Bumper Development Corporation and was finally seized by the Metropolitan Police. It was considered whether the temple and the idol were one and the same object and if so then the claimant's title to the idol would be superior to that of Bumper's[89]. The judge held that the fourth claimant, the temple, suing by it's fit person, custodian or next of friend, the third claimant, had proved a title to the idol superior to that of Bumper's.

In English law there exists a stringent restriction of legal personality even to corporations and other personified groups of individuals, it insists there must be animate content in the legal person. This leads to a formidable conceptual difficulty in recognising a party that is entitled to sue in the courts, in something which to many

is little more than a pile of stones or disparate non-sentient organisms. Salmond commented that, "the corpus of, or object selected for personification, is not a group of persons or series of persons but an institution…the law may attribute personality not to any persons connected with the institution but to the institution itself."[90] If a religious body or an institution for environmental protection that included certain forests under its auspices possessed legal personality under the law of the host country, would empower them to sue for protection and recovery of its contents.

It would be a strong thing for the English courts to refuse the institution access simply due to the disparity of our recognition of a legal person. Therefore, if a forest or sections of a forest that came under the auspices of this institution were compromised, recovery of lost integrity would not be out of the question.

'Comity of nations' is the determining factor whether access is given or refused; only if there was an offence to public policy would access be refused[91]. Courts cannot close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the common weal[92]. It would appear that granting personality to an institution that represented either the spiritual, societal or environmental beliefs of a nation would not contravene any fundamental principle of justice. It would in fact strengthen such foundations of good morals and traditions of common weal.

In the Bumper case, the constitution of the temple empowered the third claimant to take all necessary steps in the proceedings on its behalf much like a guardian of a minor or patient. As an acceptable party it was deemed unnecessary to decide whether the idol itself was a juristic entity in the eyes of English law[93]. To find a legal entity that is bound to forests one may have to look to the past rather than the future, as in medieval England there existed forest franchises, which were 'legal

entities'. These franchises even upheld some crude idea of protecting the forests' ecological integrity through the presence of venery beasts residing within, whose presence defined it as a forest and protected it from being harvested[94]. However the guise of personality may bestow itself upon those that lack the mask of legal identity. Whether through gradual moral considerations or the increasing recognition of a guardian, the tendrils of a foundation will remain moribund if not for harder evidence, science and a change in legal conscience to bridge the gap between human and non-human entities.

1.8 Are Higher Animals Bridging the Legal Gap

Rene Descartes denied all thought to animals and in that he denied them consciousness. Animals in his view were "thoughtless brutes," *automata*, machines. Despite outward signs that tell the contrary, according to Descartes they are not aware of anything neither, sights nor sounds, smells nor taste, heat nor cold; they experience neither, hunger nor thirst, fear nor rage, pleasure nor pain. They are but a clock, and nature acts in them according to the disposition of their organs[95]. Not all believe that animals possess a consciousness, the father of modern philosophy denies them all but life and minor sensation but it is their awareness and consciousness that is hoped to be the pivotal linchpin in securing legal rights for animals.

The notion that things or animals lack specific volition and self-determination is often an underlying argument in an animal's lack of true awareness. The animal's will remains unrecognised by law because it stems from instinct, which is the antithesis of volition. Animals, especially the higher animals such as, apes, chimpanzee's, bonobos, cetaceans, elephants and parrots all possess a will whether it is based in autonomy, volition or self determination. Things lack these qualities,

persons do not and persons have a will that affords them basic liberty rights, basic rights that should be granted to animals with such qualities[96]. Kant understood the ability of animals to act in regards to desires just as children did, but Kant was dismissive of their position in their legal firmament as they lacked the ability to act as rational agents in accordance of some universal law[97]. Despite the general acceptance of animals as conscious beings, the law recognises the school of thought that was echoed centuries ago when modern science and behavioural studies were still in their infancy.

Most legal authorities are dubiously circumventing the pursuit of personhood and the qualities that attribute an animal's right to this entitlement. Recent tests of nonhuman personhood include the "Silver Springs Monkey Cases", in which a group of research monkeys had been subject to shockingly abusive conditions[98]. Several animal welfare groups filed a complaint alleging various violations of animal cruelty laws, and the plaintiffs claimed that they spoke as next of friends of seventeen macaque monkeys, as well as for their own and class interests[99].

Standing was dismissed as it was ruled that the defendants had failed to demonstrate that they had personally suffered any actual or threatened injury as a result of the putatively illegal conduct, along with the fact that the Animal Cruelty Act did not authorise private suits[100]. The question of actual rights for the primates in their own name through the guise of the "best of friend" theory was negated in light of the disposition. In 1988, on appeal for a temporary restraining order for the euthanisation of three of the monkeys, the counsel drew back to the periphery of the animal rights argument, stating that the fact that the monkeys would be left without an advocate in the courts imperilled their mission of protecting the rights of the Silver Springs monkeys[101].

Many people have complained that the Animal Welfare Acts have been indifferently or even unlawfully enforced, not least via regulations that do far less than the statute requires[102]. This raises the question of whether statutory law is not largely expressive and symbolic, more a statement of good intentions, less ineffectual in the world than it is on paper[103]. This complicates the requirements and compliance with the laws that govern the welfare of the environment and begs the question; how can the environment and animals protect themselves?

In the early 1990's, two cases came to the forefront of the legal question in the form of two marine mammals. Rainbow was an 11-year-old bottlenose dolphin and was being transferred to a naval centre from the New England Aquarium to be trained for naval warfare. The environmental group CEASE claimed that among its 4000 members many were patrons of the Aquarium and that they would suffer from not being able to observe Rainbow further. The case was settled with the Navy and Aquarium calling off the transfer by stipulation and therefore no opinion was ever voiced about the Rainbow matter[104]. The same circumstances of transfer without permits arose in 1993 regarding a dolphin named Kama. Could he be, legally, a "person" suffering legal injury, as the federal law would appear to require for him to appear in court in his own right[105]?

Parallels were drawn from the Endangered Species Act on the Palilla case, which held favourable language but was nullified by the Alala case on the fact that when the species claim had been contested it was dismissed. Kama was considered to be an individual with a domicile but lacked the ability to sue, as there was no clear statement within the state statute that a dolphin could sue[106]. Arguably a dolphin could then be made into a legal person under the expressly amended statutory language of Congress but the court would need this to be explicit for such a claim as

Kama's to be endorsed[107]. If such cases dismiss the right of beings such as Kama to uphold their interests, then on what grounds can the courts be persuaded to acquiesce in light of the present system? It is suggested that humans only have an indirect duty to animals, as fully functional humans are *moral agents* belonging to an exclusive moral community and therefore we have no direct duties towards them. This would place them outside the scope of the moral boundaries of the human individuals as *moral patients*[108]. If there is no reciprocity involved then the community is limited only to humans but we do include the paradigm *moral patients* into the community. We extend the rights of the moral community to children and the mentally enfeebled on the basis that they do not know right from wrong.

We do owe a direct duty to *moral patients* as we share a common harm that can afflict humans and nonhumans in similar ways. To deny either nutritional sustenance or inflict gratuitous suffering or bring about either's untimely death is to harm one just as it is surely to harm the other[109]. This commonality of harm affirms a direct duty to *moral patients* and to evade such a duty is to evade the requirements of formal justice or impartiality. If similar cases were to be treated dissimilarly this would undermine the making of an ideal moral judgement upon which all law shares it's foundations. Moral duties at some point have to make the transition to legal duties, for which we have an intuitive feel but as in the struggle for animal rights we cannot quite define them[110].

Richard Dworkin said that legal rights act as "trump cards" that individuals can play against appeals to society; armed with a right, the individual essentially becomes a small-scale sovereign. "Rights are side constraints or limits or vetoes…And a right that does not stick in the spokes of someone's wheel is no right at all"[111]. In defining these legal rights we can rely on principles that reflect the momentum of societies'

collective beliefs and thoughts. This is the role in which Common Law provides a flexible springboard for animal rights, policies represent the community's present sense of right and justice, and the extension of personhood protects fundamental immunities that block present abuses of power[112]. Principles respect and perpetuate the Common Law's impulse to "work itself pure" allowing society to promote it's fundamental principles through a court of law[113].

These immunities, the most basic rights of an individual that assert what cannot be legally done, set an achievable goal for animal rights to gather form one step at a time through Common Law. In the ALDF v. Glickman case,[114] the plaintiffs avoided the pitfalls of trying to change the standing doctrine yet fought the present standing issues on a detailed well-structured case that held reachable merits. The case challenged the inhumane treatment of twenty-two primates that were isolated from one another, depriving them of inherent psychological needs. The plaintiff, Mr Jurnove, asserted that on his repeated visits to the game park where the primates were housed, their unlawful and inhumane treatment caused injury to his aesthetic interest in observing the animals living under humane conditions[115]. It was due to his repeated visits to the park that established that, Mr Jurnove had "far more" than an abstract interest in law enforcement for its own sake. Thus the court concluded that standing could be granted "to a plaintiff's interest in the quality and condition of an environmental area that he used."[116]

The oddity here is that the notion of aesthetic injury is referred to in judgements although the plaintiff's concern and injury is based upon an ethical or moral character, and these concerns are the true basis for such suits[117]. The Glickman judgement affirms our duty not to harm animals on a physical and psychological level, as we recognise parity in both humans and animals that extends the cloak of the

moral community to that of animal harm. Our reflective intuitions unifies many beliefs about our direct moral duties to *moral agents,* including the *prima facie* direct duty that it is wrong to kill them or deprive them of their liberty. As demonstrated above, our moral community naturally stretches to include nonhuman *moral patients.* To limit the scope of this no harm principle and to deny the underlying reasoning can only be a symptom of moral arbitrariness[118].

The moral consideration of 'separate but equal' in the legal world stems from the notion that, equality demands that likes be treated alike, and therefore depends upon how an animal compares to another with rights. An animal should be afforded basic liberty or bodily rights, on the grounds of equality as they are like someone who possesses liberty rights. Liberty rights gives one a bodily integrity and entitles one to be treated in a certain way due to how they are constructed, especially in regard to one's mental abilities. Bodily integrity is considered an absolute, which is sacrosanct to anyone possessing these rights and a breach of this right is considered the gravest injustice[119].

Wise proposes that we can use a scale of practical autonomy to persuade judges that animals should be given basic rights, as autonomy is what they deem sufficient to grant basic liberty rights. In this way, legal fictions can be made transparent for granting false autonomy where none exists. The legal fiction disguises entities such as ships, trusts, and corporations that lack consciousness but are attributed personhood[120]. Due to this fact Jeremy Bentham characterised them as a "*syphilis*"…that carries into every part of the system the principle of rottenness[121]. These legal fictions contradict the bedrock value of personhood and reveal the very discrepancies that brush over animal's autonomy.

The less complex autonomies of animals than that of humans can be categorised by the degree which their behaviour resembles ours and their taxonomic proximity to us. The greater these factors the more certain we can be that an animal possesses desires, intentions, and a sense of self-resembling ours. Although this is an approximate scale resting upon assumptions of a general link between mental complexity and practical autonomy it creates a window for those animals that clearly possess practical autonomy to obtain basic liberty rights[122]. These animals are probably self-aware and possess some of the elements of a theory of mind (knowing that what others know can differ from what they know). Species as the bonobos, chimpanzees, apes, orang-utans and dolphins that understand symbols, use language like communication systems and may deceive, pretend, imitate or solve complex problems would be included within this group of highly mentally complex animals[123].

The proportional rights that Wise proposes may not directly concern forests or trees, but if qualifying nonhumans were given basic liberty or dignity rights, then proportional rights may trickle down to less mentally complex forms of life. The right of equality by definition would not extend far from humans, but the right of respect could be applied to integral forms of life so they will not suffer irreparable harm.

The most prominent case yet that addresses the respect and harm principle as fundamental elements, is the case of Sucia, the Brazilian chimpanzee, in which a petition requested *habeas corpus* in her favour. The petitioners from the Environmental Department and other private entities alleged that Sucia was confined to a cage that had severe infiltration problems in its physical structure and thus prevented the chimpanzee from moving around[124]. After her companion died earlier in the year Sucia started to show signs of depression and unusual behaviour, the writ

sought to release her from the zoo in Salvador to a sanctuary. This was the first time that a nonhuman had been admitted to court under the consideration that a Chimpanzee may be a person. The petitioners alleged that, "in a free society, committed to ensuring freedom and equality, laws evolve according to people's thinking and behaviour, and when public attitudes change, so does the law, and believed that the judiciary can be a powerful social change agent."[125]

Unfortunately, Sucia died in her cage the day before the judgement of the court was to be given but the court admitted the debate when it could have so easily been dismissed. The hearing of this case recognises the respect principle for animals of Sucia's stature that solidifies their inherent value such that they become subjects, not objects of the court and of life. The status of a subject of life acknowledges that they possess a psychophysical identity that evolves over time, which is independent of their utility. In this regard they are holders of basic moral rights independent of anyone's voluntary act, such as institutional arrangements[126]. As chimpanzees can be equated with human beings for the purposes of *habeas corpus* through Sucia on the basis that our species only diverged 5-6 million years ago, Sucia and her peers are no longer mere respectables of their value but have a value in their own right. It is therefore a matter of strict justice that each moral entity within one community is given their dues and that is the same respectful treatment due any other[127].

Any act that fails to show respectful treatment of their value is therefore unjust and demotes them once again to the value and status of resources, and in that they are replaceable without any wrong being done. If cases such as Suica's are to arise again and be seriously considered then the path of principle will have to prevail, for which judges must openly borrow from religion, ethics, economics, science and politics in order to properly represent the consciousness of the time. They must also employ

two of the most critical legal principles, that of liberty and equality when they encounter the seminal question of who is entitled to legal personhood[128].

1.9 The plight of the emerging non-person

Non-persons often suffer injustices, such as treatment as an expendable resource due to their legal status as property, despite all of our moral protestations and evolving conscience. Francione describes this as a "moral schizophrenia", which; underlines the profound disparity between our beliefs in regard to the moral status of animals and natural life and how we actually treat them[129]. How can we justify this contrary behaviour? We riddle and inflict living nature with the ills that beset human society, exposing them to extreme pain, stress, obliteration and suffocation of ecosystems. Yet we promote and try in earnest to preserve the awe inspiring environment that nurtures our society, but human property interest will always prevail over moral consideration when conflict arises[130]. It is the shackles of absolute property that need to be loosened.

Multiple schools of thought rear their heads in times of seminal quandary and transitional shift of rights definition; like a serpent shedding it's old skin it is often a slow and tireless course of pain staking movement. This visceral process opens raw wounds and creates flakes of uncertainty, all of which exposes the fissures of new, stronger and more integral skin beneath. The definition of persons is showing ever-widening fissures but is still shrouded in the inherent peelings of uncertainty and caution. The first step in shedding the old, dry skin of personhood is to bridge the legal gap by recognising the higher animals that possess a complex level of extended consciousness or a language enriched, autobiographical sense of self[131]. If we

acknowledge their moral right not to suffer, we acknowledge their personhood but their status as property has prevented this from being realised.

In attributing this non-property status to higher animals it does not necessarily preclude our choosing human interests over animal interests in situations of genuine conflict. It does however require that we accept that we have a moral obligation to stop the suffering of animals in any uses that assume that they are merely resources and thereby prohibit the ownership of such animals. David Favre, premises an animal property paradigm where living objects will receive equitable self-ownership[132], which would take the form of a trust relationship.

The guardian would act as a parent-shield, and would hold the legal title while the animals would hold their own equitable title. This type of entitlement action can be brought on the animal's behalf and will secure the flow of financial remedy to support their interests[133]. If a criminal act against an animal takes place, or a violation of some bodily right is inflicted, then the animal's self-ownership status would initiate itself and would not hold the animal subject to the dominion of another human. Alternatively if an animal is released into their natural habitat, along with regaining self-control and determination they will regain self-ownership[134]. The animal would then possess a property status that would differentiate it from other objects of property and with this new status the allocation of new legal rights, such as bodily integrity could be comfortably accorded.

This allocation of self-ownership could be achieved through the private action of an owner that voluntarily transfers equitable title to the animal, and thereby the owner creates a new legal status for the animal. There is also the possibility that the legislature may enact legislation that would have the effect of causing mandatory transfer of equitable ownership to a class or species of animals. The legislature may

decide that scientific evidence of primate nature supports the proposition that every primate owner should respect their nature and require the establishment of equitable self-ownership[135]. The equitable ownership would focus on the fundamental needs of the animal or living object, in the form of life supporting and specie-orientated necessity. If these are ignored, then the courts could intervene.

As entities with legally recognised interests, self-owned animals may have sufficient status as juristic persons so as to enable them to hold equitable interests in other property. For example those animals that have been released out into the wild and have regained their self-ownership will have an interest in the habitat that they occupy[136]. These habitats would be varying forest ecosystem, which would sustain all their fundamental needs. As juristic persons they would then possess a right to a healthy environment and as natural inhabitants of the habitat would hold a property stake on the use and state forest, and therefore would claim a natural, instinctive preference for the forest to remain intact and sustain its integral functions as a habitat.

It is inevitable that a certain amount of specieism will dictate the legal world's approach to law making of the natural world, as the great chain of being, which has been engrained upon us since birth, underscores each person's perception and attitude[137]. A decisive line has to be drawn if the law is to advance and extend its judicial hand to the natural world as persons; for that to happen a distinction between species or class of animals will have to occur. The legal rights that I propose for forests and trees would not be the same as those for higher animals, just as the rights of higher animals would differ from the entire rights that a human entity holds. The rights would be proportional and demonstrate a partial parity according to the complexity of the beings.

In essence there would exist a trinity of rights for life for which the top strata would be that of functional humans with all rights of a legal human person. The second strata would be that of the higher animals freed from the stigma of property and given rights of bodily integrity, respect and not to suffer; they would be legal persons in their own right without any "quasi" terminology to undermine their status. A quasi-person status holds the danger of cementing animal slavery into the law without hope of abolition. The third strata would hold lower forms of animal life and forests, which would not shed their status as property or be entitled to bodily integrity or the no-suffering principle but would be entitled to respect.

Any strict prohibitions on forest activities would rapidly erode, as their status as valuable resources would make their conflict with prevailing humans desires more apparent[138]. It is due to this fact that their rights would be diluted in comparison to more complex beings. The forests would be given rights of respect that would promote ecological integrity and the right to ecosystem intactness to perform its function as a biological entity. The immunities that a forest could enjoy would be that of protection from irreparable harm and the more encultured, fragile or rare the forest, the greater protection may be granted. Plantations and secondary forests may be easily made whole in another location if human conflict arises.

The ecological integrity would establish itself on a on a bedrock of standards and thresholds that would suggest the maximum incursion that the environment could endure without it's integrity being compromised[139]. These standards would apply to habitats and meta-ecosystems within the forest and would set a safety threshold for when it's natural biological functions were being affected by detrimental operations. The standards would be based upon observation and experience of the forest's natural biological progression, regeneration, biomass, signs of abnormal stress and

impediments of its biological norm and species interactions. Through this, the needs of a forest can be known and the deprivation of those needs could be easily identified. Due to the demarcated recognition of a forests life supporting needs and interests we can freely allocate advantages and compensation to the forest through the behest of a guardian.

Orientating an ideal state of welfare will be pivotal in the progression towards legal rights for trees. As when a court can recognise possible irreparable harm it will be able to exercise a due diligence to uphold the integrity a forest, limiting unnecessary harms and admitting the complaint through the appropriate guardian.

A fundamental element to which the argument for the rights of forests and trees will have to consistently return is that of precaution. This will continue to be a central principle upon which forests can base an argument for a more resolute concern over it's status. It is essential that policy makers and courts acknowledge our ignorance and limitations, show determination to learn what we can do, and be alert to the evolving knowledge that will better allow us to safeguard our forest resources[140].

The forests represent millions of years of evolution and hold species and resources that we have not even begun to discover. It is this uncertainty that underpins the importance of exercising "environmental safety" in regard to our forests as they are not only the lungs of the planet and biodiversity hotspots. They are a source of information older than all of us and potentially hold resources of greater value than can be obtained from any utility presently. Our present anticipation of our uncertainty regarding the potential and irreversible harm that we may now cause may save not only money, utility resources and beautiful ecosystems, but may also help to save lives and proliferate future generations.

The onus of "environmental safety" should demand that the burden of proof shifts to the act that affects the forest, proving that it is *not harmful* to the forest's integrity, rather than the contrary, for which the plaintiff must prove that the act is *harmful*. Normally the side with the burden of proof rarely prevails[141]. The forests ability to rise to a higher echelon of consideration will not be easy as inequities survive in our modes and thoughts, and the habitual discriminations, such as 'a forest or a tree is a mere resource', are always the hardest to eradicate[142].

2.1 Conclusion- can a tree have a personality?

To achieve global justice requires the inclusion of many peoples and groups who were not previously included as fully equal subjects of the law. Through the natural momentum of change and constantly evolving state of the law the objectified have been recognised as equals. If we are to achieve a true justice, it follows that we must look beyond our own species, to all that surrounds us, other sentient beings and complex life forms with whose lives our own are inextricably and complexly intertwined[143].

The idea that we grant trees standing in the courts, if only partially through guardians and liberalised citizen suits, may for some appear as a deracination of our traditional court system that is slowly relinquishing the judiciary power from centralised human interests. I see it as more of a decentralisation of the judiciary powers, in which the social conscience is represented more adequately through the extension of our definitions of a community and would therefore create a more intricate and complete form of human interests. Although guardians already exist as an actual legal function for the purposes of infants, incompetents and foetuses', this protection has not been extended to non-humans even though the higher animals can

be equated with such recipients of the law. It has been demonstrated that a legal guardian for the environment would greatly economise the courts' time as well as contributing to a more complete corpus of environmental precedent and standards that would mitigate the under-current of uncertainty that afflicts the courts presently. Guardianship has been granted to a forest upon the basis of "inter-generational equity" but only indirectly through the focus future generations.

Even with common law's cathartic intent to rid itself of unjust impurities the ardour of time affects the adoption of new concepts, and without the assistance of the legislature it renders the debated concept static in a limbo-moribund state. During such processes, various environmental groups have endorsed themselves with specific mandated interests and unequivocal expertise in environmental protection, which only bolsters their reputation and reinforces the argument for the guardian concept.

Liberalised standing allows challenged action on behalf of the environment but only if an individual can assert a personal stake. Courts are often dismissive of inventive attempts to establish standing through what seems increasingly a purely academic exercise. Advancements have been noted from traditional claims to those that are more in line with current thought, like that of aesthetic injury, which more often than not can preclude a moral injury. The aesthetic injury has proved to be an invaluable legal tool in the protection of nonhuman entities and their habitats but for the injury to impact on a more focused level the boundaries of the aesthetic injuries need to be explored further.

In granting standing to nonhuman plaintiffs in their own name, the court has only done so when there has been a statutory obligation backing the plaintiff in question. More than often there is support from more traditional plaintiffs that negates the need to address the issue of standing. Without any statutory language to

support the nonhuman as a person, no matter how strong the case, the claim is always vulnerable to a swift dismissal. In saying this, nonhumans have achieved the status of *locus standi* when such language has been violated, but in the absence of legislation nonhumans will not be granted standing in its own name.

There remains numerous ways to attempt to obtain recognition for the nonhuman in the courts, whether it is through precedent or reference, the process entails a lot of effort in exchange for very little if any result at all. If the forests and trees are to attain any independent recognition from which they can exercise self-preservation through affirmed representation, then animal rights will have to prevail in tipping the balance between the past's mindset and the modern paradigm of a legal person. Important court debates like that of granting *habeas corpus* to Sucia will generate the first waves of personhood that will precipitate their effects into other courts and beyond. The abolition of animal property will create a new legal status that will not only save the due process but will expedite the matter of partial personhood for lower life forms. The adoption of proportional rights that draw distinct lines to aid the legal structure in conferring the rights of bodily integrity to higher animals and ecological integrity to forests will not be based on uncertain judgements, but that of corresponding scientific evidence.

We as humans possess an evolved sense of self and the law establishes itself as a personified collective of society's evolved sense of self. Thus the law should symbolise the basic intuitive, moral obligations that we owe all life on Earth: not to cause suffering or irreparable harm and to show respect for all living entities.

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[5] Id article, pp 13.
[6] Id article, pp 18.
[7] Christopher. D. Stone. "Trees at Twenty Five". Should Trees have Standing? pp 168 (1996).
[8] Commonwealth of Puerto Rico v SS Zoe Colocotroni, 456. F. Supp. 1327 (1978).
[9] Council Directive 92/43/EEC, on the conservation of natural habitats and wild flora and fauna (1992). See Article 6 (4).
[10] Road Construction in Grunwald forest (Luxembourg). T-PVS (98) 47 Report from Secretariat, with Government and NGO reports.
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[15] Willard v. Valley Gas Fuel Co. 171 Cal. 9 151 Pac. 286 (1915).
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[35] See supra note 29, pp 616.
[36] Sierra Club v. Morton 405 US 727 (1972).
[37] Id article, pp 728.
[38] Id article, pp 730.
[39] Id article. Dissenting opinion of Mr Justice Douglas, pp 741.
[40] See supra note 4, pp 17.
[41] See supra note 38, pp 745.
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[47] Cass R. Sunstein, What's Standing After Lujan? Of Citizen's Suits, "Injuries", and Article III, 91 Mich. L. Rev. 163.
[48] See supra note 45, pp565.
[49] Lujan v. National Wildlife Federation, 497 U.S 871 (1990).
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[51] Id, pp 556.
[52] Japan Whaling Ass'n v. American Cetacean Society, 478 U.S 221 (1986).
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[58] See supra note 57, pp 553.
[59] Palilla v. Hawaiian Department of Land and Natural Resources, 471 F. Supp. 985 (1979).
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[85] See supra note 84, pp 148.
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[109] Id article, pp 189.
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