

# Legal Human Humility: Contending with the Representation of Trees and Other "Nature" Beings

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Alyse Bertenthal, [Standing Up for Trees: Rethinking Representation in a Multispecies Context](#), 32 **L. & Literature** 355 (2020).

Despite the dominance of COVID-19 in our media feeds this past year, we still do not hear much about the anthropogenic origins of zoonotic diseases or the anthropocentrism that frames anthropogenic activity. We hear even less about the corresponding need to *combat* anthropocentrism, the monumental roadblocks legal systems erect in this regard, and how legal systems can and should adopt anti-anthropocentric perspectives in order to make inroads against an array of inequality-producing social phenomena. Going against this grain, and exacting much-needed pressure against Western legal orders' exclusionary anthropocentric worldview of "nature" as property, is Alyse Bertenthal's *Standing Up for Trees: Rethinking Representation in a Multispecies Context*.

In this elegantly-written article—that reads more like a cogent literary meditation than standard law review writing itself—Bertenthal casts a critical lens on the anthropocentrism of Western legal cultures and, in particular, the legal devaluation of trees in the American landscape (figuratively and literally). But she also challenges us further by asking us to interrogate the human-made legal constructs that are meant to rectify the subordinate position of "nonhuman nature" (P. 356)—such as the extension of legal personhood—for their residual anthropocentric exclusions.

With Christopher Stone's trailblazing 1972 article [Do Trees Have Standing?](#) as a point of departure for her analysis, Bertenthal provides two signal contributions in moving us toward a multispecies understanding of who law is for and the power asymmetries it should address. First, she provides a fascinating historical overview of the specific ways trees have populated American case law, including the last time the United States Supreme Court rendered an opinion about the value of a tree (almost a century ago in 1928).

Second, she goes beyond standing debates about whether trees should move from legal object to legal subject to ask a newer set of questions: how can the perspectives or voices of trees (and, by extension, other nonhumans) enter spaces of law without succumbing to its anthropocentric vortex? How can law hear "tree voice" in a way that avoids human contamination and containment, however benevolently intended? Can we fashion a different relationship with trees and other "nature" beings so that these nonhumans do not need to "rely upon human forms in order to be heard in distinctly human forums?" (P. 356.) Can we eschew the "centrality of humans as the standard and representative for nonhuman nature" (P. 356)?

Bertenthal innovatively uses literature to spotlight these questions and illuminate some answers, suggesting that the impoverished stories law tells us about trees and what they are worth can profit from the better stories available in literary imaginings of trees "where trees can and do exist as more than human property or prize." (P. 357.) Bertenthal opens her recourse to literature for "good stories" about trees with a section entitled "Tree Space." She first recalls how literature has primed us to think of trees as old and encouraged us to mark their longevity, as well as covet their unhurried and gentle pace. This is a conceptualization some have called "tree time" that stands "as an implicit critique and

natural contrast to human time.” (P. 357.)

Bertenthal then suggests that law, in contrast to literature, harnesses the endurance of trees not to romanticize or dignify them, but to establish private ownership. She takes us through a brief but instructive historical account of how trees are used to delineate the physical dimensions of real property. She discusses the metes and bounds systems and other 19<sup>th</sup> century legal initiatives that treat trees, as Bertenthal pithily puts it, “as markers of space, not time.” (P. 359.) Bertenthal also refers to the voluminous case law focused on neighbour disputes over who owns trees in more contemporary times. While owners may care enough about trees to sue their neighbours, these cases, Bertenthal argues, are much more about social relations gone awry than any challenge to trees’ status as property (P. 361.) This type of socio-legal excavation about nonhuman animals—let alone trees—is rare in legal scholarship.

The latter parts of the paper are where Bertenthal explores a corrective for the “property-obsessed narrative of trees,” something she is quick to stress must be different from conservationist goals that implore us to protect trees for future human generations. She instructively asks the question most of us don’t: “When trees speak in their own voice, will they really be so concerned with us, and with what happens to us?” (P. 362.)

She acknowledges that there are cases where state courts have been able to bring into view trees’ “intrinsic value.” Bertenthal discusses another dispute between neighbours where one party resisted terminating the tree’s life due to the personal value the tree held for him, a value that the court was able to legitimate in its damage award.<sup>1</sup> Bertenthal appropriately reads such cases as expanding law’s surface understandings of trees but not the foundational legal ordering that classifies trees as property under which trees are valuable insofar as humans value them. The intrinsic value cases are compared to *The Giving Tree* by well-known children’s author Shel Silverstein in which a tree ostensibly gifts to a little boy whatever he needs as he ages, including the tree’s life.

For a non-anthropocentric appraisal of tree value, Bertenthal turns first to the Lorax, a character from the eponymously-named book of another famous children’s book author, Dr. Seuss. A dominant understanding of the tale reads the Lorax as an environmental guardian of trees, caring empathically for them and giving voice to their needs.<sup>2</sup> Although the trees in *The Lorax* are no longer valued simply for how they benefit humans, Bertenthal suggests that a continuing problem with the guardianship model as a corrective for law’s propertization of trees is the power asymmetry it embeds, however well-intentioned. Bertenthal finds a recent interpretation of the Lorax character as actually forming part of the trees’ ecological system a more hopeful rendering of the representation she is advocating for. Her vision is a form of legal representation where tree (and other nonhuman) voices can be less mediated by humans who wish to speak for them but do not share their vulnerability. Bertenthal also calls for a form of legal representation that acknowledges that trees do not speak with a singular voice and that a lot will be lost in translation and will remain unknown to humans even when we care deeply and wish to protect trees.

It is in a courtroom scene in Richard Powers’ tree-centered novel, *Overstory*, that Bertenthal finds a model for how the law can listen to and learn about trees in a different register. In *Overstory*, a botanist is asked to be an expert witness to convince a judge to rule against a logging company. She tells the judge about who trees are through what trees and forests can do, basically convincing him as to their need to be protected from death. But she also shares that, as a human, even one who is an “expert” in trees, she can only know so much and that there is much more that trees and forests have to impart if humans are to be able to understand them.

Bertenthal offers up the botanist’s testimony in this novel as an example of how humans who care

about the lives and flourishing of trees (and presumably other nonhumans) can speak more ethically *about* rather than *for* trees. This is because the testimony envisions legal representation as partial translation, a translation in which we acknowledge the limits of being human. Bertenthal reads the botanist as not speaking for the trees, but for herself. Her advocacy and contribution in that moment is to allow the love and empathy that she has for trees help the legal decision-maker see “tree being,” rather than merely seeing trees as property. The botanist’s advocacy thus illuminates the injustice in our normal relations with trees.

I recommend Bertenthal’s piece not so much for her specific prescriptions about representing trees or other nonhumans, but for the overall non-anthropocentric imprint her fluidly-crafted argument leaves on its reader. One might come away unswayed that the guardianship model or the act of *speaking for* is as flawed as Bertenthal argues. But one will not come away unaffected by the literary analysis or the need to think more deeply about the flaws of legal anthropocentrism and the violence it enacts on trees and other beings devalued as “nature” and subordinated as “property.” Bertenthal reminds us that questions about legal standing for other species will require that we “stand up for” (but not speak for) them and will also invariably require us to “stand aside.” (P. 369.) The article presses the point that we must write a different and better legal narrative or story for other species, one where humans are no longer the central characters.

Property Law instructors seeking to infuse their teachings with more critical content should teach Bertenthal’s article. We know that teaching critical content in law school about inequality and injustice, particularly to those anxious to learn the law and not critique it, can be challenging. This is so even when we do *not* ask students to reconsider who has formal legal subjectivity in law and who doesn’t. Imagine what happens when we do ask this question.

In my first six years of teaching, I taught Property Law to 1Ls. I always raised the normative question about what/who is property. Most years, I included a module introducing students to animal law scholarship promoting legal personhood for animals. These classes were daunting, eliciting the denial and overall defensiveness that often ensues when adults are asked to confront the subjectivity of the living, sentient subjects many of us eat or whose milk or eggs we appropriate.<sup>3</sup> One year, prefacing a module about the physical dimensions of land ownership, I also raised the question about whether trees should be property, thinking this would go over better. I put Christopher Stone’s classic article, *Should Trees Have Standing?* in the readings and read Shel Silverstein’s iconic children’s book, *The Giving Tree*, to the class, both of which are sources Bertenthal mentions. Whether my adult students felt infantilized by the latter or didn’t love the classic children’s book as much as I did (for what I perceived as its *objection* to a sacrificial life for a tree), I am not sure. But this intervention also fell flat.

If I were to teach Property again, I would include Bertenthal’s article to do the heavy critical lifting. Her analysis is peppered with literary references to possible childhood favourites that students can relate to, and it also has an inviting, literary quality itself. Without compromising its hard-hitting message against law’s anthropocentric exclusions, it has the potential to bring along even the most ardent proponents of human exceptionalism to consider the claims of nonhumans and the urgent need for law to respond to multispecies realities and complexities.

1. [Kallis v. Sones](#), 208 Cal.App.4<sup>th</sup> 1274 (2012).
2. It is worth noting that Dr. Seuss’ works have been criticized for their exclusionary tropes, and Dr. Seuss Enterprises has recently announced that 6 books will cease to be published due to racist imagery. *The Lorax* is not in this list and, as Bertenthal notes, has received acclaim as a pro-environmental text.
3. [Why We Love and Exploit Animals: Bridging Insights from Academia and Advocacy](#)

(Kristof Dhont & Gordon Hodson eds., 2020).

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